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THE ENGLISH REPORTS
ROLLS COURT

Oct. 30. 1905.
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LAW DEPARTMENT.

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VOLUME LV

ROLLS COURT

VIII

CONTAINING

BEAVAN, VOLUMES 32 TO 36

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LIST OF LORD CHANCELLORS, MASTERS OF THE ROLLS,
LORD JUSTICES OF APPEAL, VICE-CHANCELLORS,
AND LAW OFFICERS, DURING THE PERIOD COVERED
BY THE PRESENT VOLUME—1863-1866.

LORD CHANCELLORS.

1861. LORD WESTBURY.
1865. LORD CRANWORTH.

MASTER OF THE ROLLS.

1851. Sir JOHN ROMILLY, created LORD ROMILLY Jan. 3, 1866.

LORD JUSTICES OF APPEAL.

1851. Sir JAMES L. KNIGHT BRUCE.
1853.

Sir GEORGE J. TURNER.

VICE-CHANCELLORS.

1851. Sir RICHARD TORIN
KINDERSLEY.

1852.
1853.

Sir JOHN STUART.

Sir WILLIAM PAGE WOOD.

ATTORNEYS-GENERAL.

1861. Sir WILLIAM ATHERTON.
1863. Sir ROUNDELL PALMER.
1866. Sir HUGH M'CALMONT CAIRNS.

SOLICITORS-GENERAL.

1861. Sir ROUNDELL PALMER.
1863. Sir ROBERT PORRETT COLLIER.
1866. Sir WILLIAM BOVILL.

The Authorised Reports of CASES in CHANCERY
ARGUED and DETERMINED in the ROLLS
COURT during the time of the Right Honorable
Sir JOHN ROMILLY, Knight, Master of the
Rolls. 1862, 1863. By CHARLES BEAVAN,
Esqr., M.A., Barrister-at-Law. Vol. XXXII. 1864.

[1] LAVER *v.* FIELDER. Dec. 18, 1862.

[S. C. 32 L. J. Ch. 365 ; 7 L. T. 602 ; 9 Jur. (N. S.) 190 ; 11 W. R. 245 ;
1 N. R. 188. See *In re Allen*, 1880, 49 L. J. Ch. 556.]

Upon the treaty for a marriage, the father of the lady wrote to the husband, "I still adhere to my last proposition, viz., to allow Elizabeth £100 a year, . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of." Held, 1st, that this was a contract binding on the father ; 2d, that it was not so vague as to prevent its being enforced ; 3d, that it did not include freehold property ; 4th, that the daughter was entitled to an equal share with the other children of the personal estate which the testator died possessed of, after deducting the widow's one-third share and the debts and expenses ; 5th, that parol evidence was inadmissible to shew what was intended by the words "her share ;" 6th, that the suit ought not to be by the daughter alone, but that her husband ought to be a Plaintiff.

The object of this suit was to enforce a written promise, made by a father on the marriage of his daughter, under the following circumstances :—

In 1844 the testator Mr. Fielder had two children, viz., Elizabeth, a daughter by his first marriage, and John Henry, who was then only four years of age.

In December 1844 Henry Laver made proposals of marriage to Elizabeth Fielder, and he wrote to her father, stating the particulars of his property, and asking him to make a suitable settlement. Negotiations afterwards took place between them and their solicitors as [2] to the money arrangements to be made, but, in consequence of disagreements, Mr. Fielder wrote an angry letter, and all further negotiations for the marriage were thereupon broken off.

Some time afterwards the treaty for the marriage was renewed, and Mr. Laver sent, through Elizabeth Fielder, a letter to her father asking his consent to the marriage. Mr. Fielder thereupon wrote to Mr. Laver the following letter :—

"1st April 1845.—Dear Sir,—My daughter has given me a letter from you, in which you say you are willing to marry her, if I will give my consent. I certainly, in my last to you, did state that which was my feeling upon the subject then, for I could not conceive that any man who had a regard, such as you had professed for her, could have so suddenly altered his determination, as you had done twice. I therefore concluded, and I think very naturally, that your only motive was to see how much money I thought proper to give her, and as I had no particular wish to see her married to any man that I had the least idea would not make her a good husband,

was the cause of my writing as I did. However, as you have now a wish to renew the acquaintance, so far as I am concerned, I will still adhere to my last proposition, viz., to allow Elizabeth £100 per annum, and if you like the situation, one of my houses to reside in, and that at my decease she shall be entitled to her share in whatever property I may die possessed of. As to all other matters, I shall leave it entirely to you and her, she being now as I consider of sufficient age to judge for herself. I shall be most happy to see you and to be on as friendly terms as we ever were, and which I sincerely hope no further misunderstanding will sever."

[3] The marriage took place in July 1845, with the full consent of Mr. Fielder, but no settlement was ever executed.

The testator died in 1859, leaving his son, his daughter, and his widow surviving. By his will and codicil, dated respectively in 1847 and 1854, he had made an equal disposition of his real and personal estate in favour of his widow, son, and daughter, and provision for his grandchildren. In the event of his son's dying under twenty-one, his share was given over to his sister.

In November 1859 Mrs. Fielder the executrix instituted a suit against Mr. and Mrs. Laver for the administration of the testator's estate, and a decree was made in February 1860, but no certificate had yet been made.

The testator's son, John Henry Fielder, attained twenty-one in October 1861.

Mr. and Mrs. Laver alleged that they had learned for the first time in April 1862 that the letter of the testator of the 1st of April 1845 amounted to a binding contract.

The bill was filed in May 1862 by Mrs. Laver, by her next friend, against Mrs. Fielder, John Henry Fielder, and Mr. Laver. It prayed a declaration that Mr. Fielder "was bound so to leave or dispose of his property, that the Plaintiff should, after his death, have a share of all his property, both real and personal, equal with what he should leave to his son and any other children or child that he might have; and that all necessary directions might be given for setting [4] apart for the Plaintiff such share of the said testator's residuary real and personal estate."

Mr. Selwyn and Mr. Piggott, for the Plaintiff, and Mr. Davey, for the husband. The letter constitutes a valid contract, binding on Mr. Fielder and his estate. That has been established by a series of modern authorities.

Loxley v. Heath (27 Beav. 523, and 1 De G. F. & J. 489); *Bold v. Hutchinson* (20 Beav. 250, and 5 De G. M. & G. 558); *De Beil v. Thomson* (3 Beav. 469, and 12 Clark & Fin. 45); *Hutton v. Rossiter* (7 De G. M. & G. 9); *Barkworth v. Young* (4 Drew. 1); *Goldicutt v. Townsend* (28 Beav. 445).

Secondly, as to the construction of the words "at my decease she shall be entitled to her share in whatever property I may die possessed of." This means an equal share of his property. [THE MASTER OF THE ROLLS. It cannot mean that the widow was to be left destitute.] It is a contract that no preference should be made as between his children, in regard to whatever property he died possessed of; but that each should be entitled equally. The word "property" includes the freehold estates of the testator, which produced £180 a year.

They proposed to give in evidence a conversation between Mr. Laver and Mr. Fielder in 1848, in which the former asked the latter if he had made his will, and in answer to which inquiry Mr. Fielder expressed himself as follows:—"My property, as I have before told you, will be divided, one-third to go to my wife, one-third to my daughter, and one-third to my son, and at the death of [5] my wife her one-third will be divided between my daughter and son."

This evidence was objected to as inadmissible, the object of it being to control the written instrument.

Mr. Southgate and Mr. F. H. Colt, for the Defendants. This suit is improperly framed, being one by the wife alone to enforce a contract between the testator and her husband. The husband ought to be joined as Co-plaintiff and the bill amended for that purpose. Parol evidence is inadmissible in this case; the Plaintiff must stand or fall upon the written document, and nothing which took place afterwards could affect its construction,

The letter of 1845 is too vague and uncertain in its terms to be capable of being

enforced; *Kay v. Crook* (3 Smale & Gif. 407). It is a mere general vague notice of his intentions. What is "her share?" She was entitled, as of right, to none. Again, there are no words of equality, nor any statement of the class with whom she is to share. In all the decided cases the class has been ascertained, as "shall share with my other children." The word "property" is ambiguous, and the expression "possessed" shews that it did not extend to freeholds. If it included real estate, then, as the daughter takes no share in real estate, the difficulty would be increased as to the words "her share."

There was no contract to die intestate, and the testator had a clear right to deal with his property as he pleased during his life, and it was not intended that he should be deprived of all power of disposition by his [6] will. This is a case within the mischief intended to be prevented by the Statute of Frauds. (29 Car. 2, c. 3, s. 4.)

Lastly, the Plaintiff is bound by her *laches* and acquiescence. She has taken the chance of her brother dying under twenty-one, and, until that event happened, elected to abide by the will. With that view, she submitted to a decree for the administration of the testator's estate, and to carry the will into execution.

Mr. Piggott, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion in this case that the Plaintiff is entitled to a decree.

I think it is impossible for me to allow the parol evidence to vary the effect of the letter. The testator, in his letter, after a few preliminary observations, says, "I will still adhere to my last proposition." If that stood alone, parol evidence might properly have been given to explain what that "last proposition" meant. But the testator has himself gone on to explain what he intended by his "last proposition"—for he puts a *videlicet* after it, and says, "Viz., to allow Elizabeth £100 per annum, and, if you like the situation, one of my houses to reside in; and that at my decease she shall be entitled to her share in whatever property I may die possessed of." I am of opinion that I cannot allow parol evidence to be introduced for the purpose of varying those words. The testator expressly states what he intends, in words which it is necessary for me to construe. If I agreed with the argument, that the words are too ambiguous to admit of any definite or distinct meaning, I should make no decree at all. But [7] if not, those are the words upon which I am to decide. In my opinion that excludes the parol evidence; because, assuming it to be true and that this evidence shews that his "last proposition" was different, still, when the testator in his letter states what his "last proposition" is, his contract is confined to that statement, and cannot be carried beyond it.

The next point which I have to consider is the construction of the words used. What do they mean? The words are these:—"At my decease she shall be entitled to her share in whatever property I may die possessed of." The first question is, whether those words are too ambiguous or too vague for the Court to put any definite and distinct meaning upon them? I was referred to the case of *Kay v. Crook* (3 Smale & Gif. 407), which was that of a father having promised to recognize his son in his will; and the Court there held that that promise was much too vague to entitle the son to anything. I concur in that view of the case. "Recognizing" the son evidently amounted to nothing more than a mere statement that he was his son. If the rule of the civil law prevailed, that a man could not disinherit his son without shewing that he had him present to his mind at the time, and from whence arose the practice of leaving the son a shilling, or, as it is commonly said, "cutting him off with a shilling," it is clear that that is a recognition of the son in the will; yet such could not be the meaning of the father in this case, and beyond that no line could be drawn.

I do not mean to say what would have been the effect if the words here used had been "entitled to a share of the property." The words used are, "entitled to *her* [8] share of the property." But what is a daughter's share of property? Suppose a person were asked this question:—What is the share your children have in your property? The answer which would suggest itself to my mind, as a lawyer would be, "the share which by law they have in your property." But what, then, is her share in your property? Her share in your property is an equal share with her brothers and sisters in two-thirds of the personal estate. The share of the widow is one-third, and the daughter's share is an equal share with all her brothers and sisters in the two-

thirds which remain. What, then, is it that the testator here meant to give his daughter? Here was a gentleman about to marry that daughter, who said to the testator, "What will you give her?" He replies, "She shall have her share in my property." The gentleman goes to his lawyer, and asks him what is a daughter's share in the property; upon which he is told it is an equal share with her brothers and sisters in two-thirds of the father's personal estate. A promise is to be taken most strongly against the person who promises, for the same reason as a grant is against the grantor. The testator might naturally have expected that he would have more children than he then had; and I think that the words of the promise leave open the consideration for other children to be born, in order that they might also have their shares. This daughter, then, would only have taken whatever was her proportion of the two-thirds, which furnishes a distinct and definite meaning to the words.

It was, however, justly observed, that the words are—"her share in *whatever property*," which would include real estate; and therefore it was suggested, on the one hand, that the Plaintiff or the Plaintiff's wife, would take one-third of the real estate; and on the other that, [9] if the real estate were intended and she took no share in it at all, it made the whole void for uncertainty. But I do not think it is necessary to adopt that view. I think a difficulty might have arisen if there had been nothing but real estate; because then the daughter would, by law, have had no share at all; and yet, as it would have been necessary to give some meaning to the words used, it might have been held that they were too vague to express what share the testator intended her to take. But where there is property in which she can, by law, take a share, I think the words "her share" may well have a distinct and definite meaning attached to them. She will only take her share in that portion of the property which she can by law take; and her share will, therefore, be satisfied out of the personal estate.

I think the testator meant to say—"Whatever that personal estate may be at the time of my death, she shall have her share of it. In case I buy more land, she will lose something; but in case I sell land and turn it into personal property, she will gain something; but whatever the personal estate may consist of, she is to have her share of it." I think he used the words "her share" as synonymous with "her legal share"—"her lawful share"—"her rightful share"—"the share which the law gives her"—"the share which according to law and to the statutes passed for that purpose, the Legislature and the law of the country have thought it right and reasonable she should have in her father's estate." That is, I think, a distinct and plain meaning, and that which is intended by the words "her share."

I do not agree with the argument that the words "her share" mean "an equal share with other brothers and sisters," if extended to a share given by the testator, and not confined to such as she would be entitled to in [10] the case of intestacy. In that respect, I follow the reasoning of Mr. Colt, that there must then be some reference to the class which is to take, and it should have been said, "a share with her brothers and sisters," or a "share with the rest of the other children." In that case, as it was very properly stated, the words "her share" would have meant an equal share. In this case, however, the testator having said nothing of that kind; but having merely said, "Her share in whatever property I may die possessed of," that share is, in my opinion, such as I have defined it to be.

It was suggested that the testator had himself subsequently put a construction upon this promise. Even if that evidence were admissible, I am not clear that he has. I am not at all clear that he had not the whole matter present to his mind when he wrote the letter of April 1845. He may probably have thought he was not bound by it. In fact the Plaintiff's husband states, he did not know but that he was precluded by the testator's will. The testator may have thought that he had made a mere empty promise, and that he had a right to change his intention by his will. But I cannot allow any supposition of what the testator might have thought to vary what I consider to be the fair and true construction of the promise into which he has clearly entered.

This is how the rights of the parties would have stood if the Plaintiff had filed his bill the moment after the death of the testator, or the moment that they discovered their rights. I have now to consider the arguments used with respect to the *laches* and acquiescence and election of the Plaintiff.

Now, with respect to *laches*, undoubtedly a con-[11]-siderable time has elapsed, upwards of three years ; but having regard to the view which the Court takes of cases of this sort, I think that that is not such a lapse of time as ought to bar the Plaintiff from obtaining relief in this suit. In the first place, this is to be considered :—that it is always a painful thing to file a bill of this description. It is necessarily a bill against persons to whom you are attached, members of your own family ; it is not exactly the same as if the Defendants were mere strangers.

It is impossible, I think, to lay stress upon the letter of the 29th May 1862. It was said that Mr. Laver, by that letter to his brother-in-law, written to him shortly after he came of age, purposely delayed the suit, running the chance of whether, by the death of the son previously to twenty-one, he might not acquire the whole of the property, and, if not, that he might then institute this suit. In answer to that argument, the evidence that the Plaintiff did not know of his rights by law is very material, and the evidence of Mr. Kearsey upon that part of the case is conclusive. The law will not allow that ignorance of it shall excuse any man from his acts, whether of a criminal or a civil nature—a rule inseparable from the due administration of the law. But ignorance of the law will thus far protect a man : it will shew that he did not act from the particular motive which might be attributed to him, if he had been fully cognizant of his rights. That, therefore, is, in my opinion, very valuable evidence to shew that the motive to which I have referred was not the real motive actuating the Plaintiff. I feel satisfied that if any person knew what was actually passing through the mind of the Plaintiff at the time, it would be found that he was merely writing a few civil words, and that, when the son came of age, he wished to break his inten-[12]-tions to him in a manner which was the least disagreeable. I am satisfied, upon a general view of the case, that the letter of the Plaintiff did not amount to an assertion of the particular intention of running the chance of the son's dying under twenty-one.

The only other thing which I have now to consider is the effect of the decree made in 1860. I think it does not affect this question. That was a decree for the administration of this testator's estate, directing the accounts to be taken ; the certificate has not been issued, and a claim is now made on the estate. A claim can be made on the estate, either by application in the cause itself, or by means of a substantive proceeding. If it can be made in the cause itself, then it is a mere matter of course to allow it to be made at any time prior to the certificate being approved ; and indeed, subsequently to that period, before a division of the fund, providing the claimant make an application to the Court for that purpose, and pay the costs which he has occasioned by not applying sooner. But if the claim cannot be made in the suit, and a substantive proceeding be necessary for that purpose, it does not vary or alter the case.

It is of great importance that all persons should understand that when a man makes a solemn engagement upon an important occasion, such as the marriage of his daughter, he is bound by the promise he then makes. If he induce a person to act upon a particular promise, with a particular view, which affects the interests in life of his own children and of the persons who become united to them, this Court will not permit him afterwards to forego his own words, and say that he was not bound by what he then promised. It is upon these principles that the Court has acted in all such [13] cases ; it exercises its jurisdiction for the enforcement of the truth, and makes a man's acts square with his words, by compelling him to perform what he has undertaken. That being so, I think that the relief which I must give the Plaintiffs is this :—Declare that they are entitled to one-third of the personal estate of the testator in this suit, after the payment of the debts and testamentary and funeral expenses and costs of the administration suit. Then the Plaintiff may go in in the other suit to prove for that third, and for the costs of this suit ; and the Defendants can have their costs out of the estate in that suit.

The bill must be amended, as suggested by Mr. Southgate, but the order I have made as to costs will not include those of the amendment of the bill, or of Mr. Laver in his original character of a Defendant to the bill. The proposed amendment of the bill was a very proper one ; in fact, I think I could not have made the decree without it.

[14] CLARK v. LEACH. Dec. 3, 4, 1862.

[Affirmed, 1 De G. J. & S. 409; 46 E. R. 163; 32 L. J. Ch. 290; 8 L. T. 40; 9 Jur. (N. S.) 610; 11 W. R. 351.]

Where partners, after the expiration of the term agreed upon by the articles of co-partnership, continue to carry on the business at will, without change, this partnership is regulated by the articles, so far as they are applicable to the new state of circumstances, but such of the articles as are inconsistent with a partnership at will have no application.

By articles for a partnership for seven years, a partner, upon certain default of his co-partner, had power to dissolve, and thereupon the defaulting partner was to be considered as quitting the business for the benefit of the partner giving the notice, who was to have the option of taking the property and effects of the partnership at a valuation. Held, that this clause did not apply to a partnership continued at will after the expiration of the seven years.

By articles of partnership, dated the 17th of July 1839, and made between the Plaintiff Mr. Clark and the Defendant Mr. Leach, they covenanted to be partners as merchants, &c., for the term of seven years from the 1st of July 1839. The articles provided for an equality between them, as to profits, losses, capital, monthly drawings, &c., and provided for the mode of keeping and settling the accounts. It then provided "that the partners shall, at all times, during the continuance of the said partnership, diligently and faithfully employ themselves, respectively, in the conduct and management of the said business and the concerns of the said partnership, and devote the whole of their time and attention, during the usual hours of business, to the same."

The articles then provided that neither of the partners should transact business, &c., &c., with any person, after he should be requested by the other not to do the same, nor compound debts, nor accept bills out of the ordinary course, or be bail, &c., &c., and then followed this proviso:—

"Provided always, that if, contrary to the several agreements hereinbefore contained, either of the said partners shall neglect or refuse to attend the business of the said partnership, or if either of the said partners shall wilfully neglect or refuse to keep proper and just [15] accounts, or shall transact business," &c., &c., "with any person after he shall be requested not to do the same," &c., &c. [then follows a specification of the other acts previously forbidden] "then and in any of the said cases, the other of the said partners, if he shall think fit, shall be at liberty to dissolve the said partnership, by giving to the partner who shall offend in any of the particulars aforesaid a notice in writing declaring the said partnership to be dissolved and determined. And the said partnership shall, from the time of giving or leaving such notice, or from any other time to be therein specified for the purpose, absolutely cease and determine accordingly," &c., &c., "*And the said partner to whom the said notice shall be given shall be considered as quitting the said business for the benefit of the partner who shall give the said notice.*"

The articles afterwards provided that in such case the partner giving the notice should have the option of purchasing the share of the other, of and in the property, credits and effects of the partnership at a valuation, the price to be paid by certain instalments, and if he should decline, they were to be converted and divided; and if such partner should decline to purchase the share upon the terms aforesaid, then the partnership accounts and affairs should be adjusted and wound up in the same manner as is hereinbefore provided, in the event of the death of either of the said partners and the surviving partner declining to purchase the share of the deceased partner.

The seven years expired on the 1st of July 1846, but the partners continued their business as before, without any alteration of the terms, until the 30th of June 1862, when the Plaintiff, alleging that the Defendant had wholly neglected to attend to the business, gave him a [16] written notice, which, omitting the immaterial parts, was in the following terms:—

"In consequence of your continued neglect to attend to the business of our partnership, I hereby give you notice that I declare the said partnership to be dissolved and determined as from and after this date. Having regard to your continued neglect of our partnership business, I am constrained to avail myself of the provisions given by our articles. By the articles, I am entitled to take over and become the purchaser of your share in the property, credits and effects of the partnership, to be ascertained by arbitration, and this I am desirous and prepared to do in the mode provided by the articles."

The Defendant disputed the Plaintiff's right to give such notice, but said he was content to acquiesce in an immediate dissolution, on the usual terms of the assets being realised and divided.

The Plaintiff continued to carry on the business in the name of Leach & Clark, and Defendant set up business in the neighbourhood on his own account, using the name of R. Leach & Co., late Leach & Clark. On the 4th of August 1862 the Defendant caused printed cards and circulars to be addressed and sent to the customers and connections of the late firm. The cards were—"R. Leach & Co. (late Leach & Clark)." And the circulars were in these terms:—

"Gentlemen,—I beg to inform you that the partnership which subsisted between myself and Mr. John Clark, under the firm of Leach & Clark, has been dissolved, and that I shall, from this date, carry on business under the firm of R. Leach & Co.

[17] "Soliciting a continuance of your much esteemed favors, and referring you to the signature of my new firm.—I am, gentlemen, yours respectfully,

"ROBERT LEACH."

A correspondence ensued, and, ultimately, the Defendant's solicitors wrote to the Plaintiff's solicitors as follows:—

"6th August 1862.—Dear Sirs,—We find from our client this morning, that Mr. Clark invariably uses the name of the late firm in all his business transactions and at his place of business. In our judgment, he has no exclusive right of so doing, and therefore our client will continue to follow the example which yours has set. If your client be willing to abandon the name of the old firm, so will ours.

"CLARKE & MORICE."

The Plaintiff did not accede to this proposal, but filed a bill, praying a declaration that the partnership was dissolved as from the 30th of June 1862; that the affairs of the partnership might be liquidated on the terms insisted on by the Plaintiff; that the Defendant might be restrained from resuming or carrying on the business of a merchant, &c., under the style or firm of Leach & Clark, and from further using the name of that style or firm, and from issuing or sending, to any person or persons, any further copies of the said card or circular of the 4th day of August 1862, or any other card or circular signifying or importing that the business carried on by the Defendant is a continuation of the business carried on by the late firm of Leach & Clark, and from soliciting any customer of the said late firm to become a customer of the Defendant, or to cease [18] from employing the Plaintiff in the business formerly carried on by their late firm of Leach & Clark.

Mr. Selwyn and Mr. Druce, for the Plaintiff. After the expiration of the seven years, the partnership continued on the same terms as before, and the partners were, therefore, subject to the consequences of a neglect to attend to the business. The Defendant being in default, and the notice having been duly given, the Plaintiff's right has arisen, and the Defendant must now be considered as having relinquished the business for the "benefit" of the Plaintiff, and the partnership must be wound up on that footing.

Secondly. The Plaintiff is entitled to an injunction to restrain the Defendant from acting in violation of the articles and in derogation of his grant or cession of the partnership business to the Plaintiff. He has no right to use the name of the old firm, or to issue circulars "soliciting a continuance" of the custom, and to attempt to take away "the benefit" of that business, which belongs, by contract, to the Plaintiff. In *Burrows v. Foster* (MS., Lords Justices, 13th May 1862), it was agreed that the

Plaintiff "should have the benefit and advantages of the business and connections of the said co-partnership firms," and an order for an injunction was penned by Lord Justice Turner, which restrained the Defendants from soliciting the business of the old customers and connections.

[THE MASTER OF THE ROLLS. Has not the Defendant a right to say that he lately belonged to a certain firm, and cannot he advertize that fact? The difficulty is, if he cannot be prevented carrying on the same business, is he not at liberty to solicit the public at large, and to do so by telling, as is the truth, that he belonged to a late firm?]

[19] The Defendant may carry on business where he likes, even next door, but not so as to interfere with the Plaintiff's rights; he can do no act in contravention of his distinct contract. The partnership articles contemplate a continuance of the business, of which the Plaintiff is to have the "benefit," and the Defendant can do no act, true or false, which will deprive the Plaintiff of that which he has contracted for. He cannot represent that his is a continuation of the old partnership, or solicit, as he is in the habit of doing, "a continuance" of the favors of the customers of the old firm; *Hove v. M'Kernan* (30 Beav. 547); *Churton v. Douglas* (John. 179); *Parsons v. Hayward* (31 Beav. 199); *Hayward v. Parsons* (31 Law J. (Chanc.) 666).

Mr. Baggallay and Mr. Knox Wigram, for the Defendants. After the expiration of the seven years, the clause in question was no longer binding, any more than the clause providing for the continuance of the partnership for seven years. Such a clause was quite inapplicable to a partnership at will, determinable *instantly*. Besides, the Plaintiff was not in a position to give the notice; the evidence does not shew any such wilful neglect, on the part of the Defendant, as justified it, and the Plaintiff was precluded from taking advantage of the proviso by his own flagrant breaches of the articles.

But supposing the Plaintiff entitled to the benefit of the proviso, still he has no right to the injunction asked. There is nothing in the articles which prevents the Defendant carrying on the same business wherever he pleases; but to entitle the Plaintiff to the injunction he cannot stop short of saying that the Defendant shall [20] not carry on the same business at all or at any place. The nature of the "benefit" contemplated by the articles was the place of business, the possession of the "property, credits and effects," that is, of the stock, books, &c. These would naturally attract to him the old customers, especially those indebted to the concern.

Burrows v. Foster differs from this case, for, in that case, there had been a liquidation of a partnership, and a sale to a stranger of the business.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS. My strong impression is, that this is not a case for an injunction, and that, on the true construction of the articles, this clause is only to continue in force and be available while the partnership for seven years was in force, and that when the partnership became a partnership at will, this clause was no longer applicable to that altered state of things.

Dec. 4. THE MASTER OF THE ROLLS [Sir John Romilly]. The further consideration I have given to this case confirms the impression I received yesterday from the argument in Court.

By the articles of agreement a partnership was entered into for seven years, and after the expiration of that period it continued as before. It is admitted that the articles were binding on the parties after the seven years had expired, so far as they were applicable to that new state of things. There is no question and no [21] dispute on that point, but the only question is, how far those provisions are applicable to that altered state of things. Here is a provision which, in certain events, gives to a partner a right to give notice to dissolve. When, after seven years had expired, they continued to carry on the partnership, this is clear:—that a new term of seven years did not arise, and that the clause, creating a partnership for seven years, was not applicable to the new state of things, and therefore that it did not affect the partners.

There are many things to which the provisions of the articles do apply, as, for instance, the division of the profits and loss, the drawing out money, the manner in which the books are to be kept and the accounts settled. These were applicable to

the altered state of the partnership when it became a partnership at will, for they were strictly applicable to the new state of things.

The question here is whether the power of giving notice with its consequences is one of the former or latter class of provisions. Now it is incidental to the character of a partnership at will that either partner may, at any moment, give notice to dissolve, and therefore no special provision is necessary for that purpose. It is therefore obvious that if there had been a provision that six months' notice should be given to dissolve, as soon as it had become a partnership at will, this would have been quite inconsistent with the legal incidents of a partnership at will, and inapplicable to the then existing state of things.

Under the articles, one partner was bound to the other to carry on the partnership business for seven years. One might have totally neglected the business from the [22] beginning: was the other to be bound to work for the seven years for the benefit of the negligent partner? No; it was intended that the active partner might give notice of dissolution and carry on the business for his own benefit. It was not necessary that this article should continue after the seven years, because neither of the partners was then bound to continue or compellable to work for the benefit of the other, for he might give notice of dissolution at any moment.

To hold otherwise, it would also involve this inconsistency:—If after the seven years the negligent partner gave notice of dissolution, the partnership would have to be wound up as in any ordinary case, that is, as the partners might agree, or by a sale and division. But if the active partner give the notice, then the penal consequences are to follow, and it is to be wound up in the peculiar form mentioned in this proviso. It is scarcely possible that this can have been the intention of the parties.

It is obvious that this state of things might occur:—One partner might be extremely active for six years and after that cease to attend; could the other in the last two or three months give the notice and thus obtain the whole of the business for an indefinite period of time? It is clear that this proviso had reference only to the past, for it is difficult to suppose that some default at the end of that time was to give the active partner a right to the business as long as he should live, and which right, but for the neglect of five days, would be lost.

I am of opinion that this is not the proper construction of these articles, and that, according to their true construction, this provision is not applicable to a partnership at will, that it was binding only during the [23] term of seven years, and had for its object the power to compel the attendance of the partners during that time, in order that, if one partner refuse to attend to the business, the other shall be at liberty to carry it on for his own benefit and advantage.

A question was argued as to the meaning of the word "benefit," and how far the active partner is to have the advantage of that "benefit." The case of *Burrows v. Foster* (*ante*, p. 18) was cited to shew what was the meaning of the word "benefit," but it does not apply to this case. It explains the meaning of the word "benefit," and that it has such a meaning that, when one gives up a business for the benefit of another, he will be restrained, by the order of the Court, from sending circulars to or otherwise soliciting the customers of the partnership, and from obtaining their custom to the detriment of the partner to whom the business has been given up. I adopt that definition of the word "benefit." The expression here is, "The partner to whom notice shall be given shall be considered as quitting the business for the benefit of the partner who shall give the said notice," consequently, if this clause had reference to the state of things during the term, the Plaintiff would be entitled to the benefit of the decision in *Burrows v. Foster* (*ante*, p. 18). But it does not apply to the case of a partnership at will carried on after the expiration of the term; nor does it assist the Plaintiff, assuming it had so applied, for he must then shew how long the benefit was to enure to the active partner. Suppose the active partner gave notice a few months after the partnership began, he would then be entitled to the "benefit" of the business for the seven years; but why is he entitled to have it beyond? The negligent partner might say, "I intended and engaged to carry on [24] the business in partnership with you for seven years, but after that time I intended carrying on the business alone." If that be the true construction of the proviso, then, assuming

that it applies to a partnership at will, the same construction would follow, and the benefit to be derived from the cession of the business only lasts during the continuance of the partnership; but a partnership at will may be determined at any time.

I am therefore of opinion, on the construction of this partnership agreement, that this provision has no reference to the altered state of things when it became a partnership at will, and also that, on the words of the proviso, it was not intended to give any benefit beyond the term for which that partnership was to last. The consequence is that the Plaintiff was not entitled to give the notice.

Burrows v. Foster was a case where the two firms had been wound up and the business sold for valuable consideration, and after that an attempt was made by the partners to derogate from the sale by setting up business for themselves and taking away the customers of the firm.

I am therefore of opinion, in this case, that, unless the parties can agree in the mode of winding up the partnership, it must be wound up in the ordinary mode.

The Plaintiff must pay the costs up to and including the hearing and of the motion for the injunction. I am of opinion that it was his contention which occasioned the suit.

NOTE.—Affirmed by Lord Westbury, L.C., 30th January 1863. [1 De G. J. & S. 409.]

[25] PHILLIPS v. BEAL (No. 1). July 11, 1862.

[Followed, *Cockayne v. Harrison*, 1872, L. R. 13 Eq. 434.]

A wine merchant, possessed of a large stock of wine, by his will gave all his household goods, &c., and everything he died possessed of, to his wife for life, and he bequeathed the whole of his effects that might be remaining after her death to his daughter. Held, that the wife took absolutely the wine which the testator had for his private use, but a life interest only in the rest.

W. B. Hill, the testator, by his will dated in 1846, bequeathed as follows:—

"I give, devise and bequeath all my household goods, furniture, plate, linen, china, glass, together with all bills, bonds, notes of hand, mortgages and everything that I may die possessed of, unto my dear wife Mary Anne Hill for her life," &c., &c., &c. "And from and immediately after the death of my said dear wife, I then give, devise and bequeath the whole of my effects that may be then remaining unto and to the use of Elizabeth Offrida Hill Skinner" (his daughter).

The testator was a wine merchant and had a considerable quantity of wine, much of which was in the cellars of his house, the rest in other places. Under the will the widow claimed the wine absolutely.

Mr. Selwyn and Mr. Marett, for the widow, contended that the wine, being one of those things which *ipso usu consumuntur*, must pass to her absolutely; and that any doubt was cleared up by the passage in the will, in which the testator contemplated consumption by speaking of what "might be then remaining."

Mr. Follett and Mr. C. Hall, for the daughter, contended that the wine was given with the furniture, &c., to the wife for life, with remainder to the daughter. Moreover, that this was not the common case, as the wine belonged to the testator as his stock-in-trade.

Mr. Fooks and Mr. Rowcliffe, for other parties.

[26] THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the widow is entitled to all the wine in the house, but not to that used for the purpose of trade. Wine is one of the things which *ipso usu consumuntur*, and if the testator was keeping the wine for his own consumption, and not for the purpose of sale, it belongs to the widow. This must be ascertained.

NOTE.—*Foley v. Burnell*, 1 Bro. C. C. 275; *Porter v. Tournay*, 3 Ves. 311; *Randall v. Russell*, 3 Mer. 194; *Andrew v. Andrew*, 1 Coll. 690; *Twining v. Powell*, 2 Coll. 262.

[26] PHILLIPS v. BEAL (No. 2). July 11, 1863.

After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the Statute of Limitations out of its operation.

This was a summons to vary the certificate. The testator was indebted on two promissory notes for £400 each, dated the 23d of March 1846, and interest had been paid on them to March 1851.

The testator died on the 31st of May 1851, and on the 8th of May 1857 the bill in this cause was filed for the administration of his estate, and the decree was made on the 10th of February 1858. After the decree, and on the 30th of March 1858, the executrix gave to the holder of the notes a written acknowledgment that the bills still remained owing and unpaid, with interest from the 23d of March 1851; and the question was, whether the acknowledgment was effectual as against the other persons interested in the testator's estate, to take the case out of the Statute of Limitations.

Mr. Fooks, for Sarah Salter, the holder of the notes. The institution of a suit does not suspend the discretion [27] of an executor, and he may pay a debt proved to be justly due though barred by the statute; *Stahlschmidt v. Lett* (1 Smale & Gif. 415). So an executor may retain his debt, though barred by the Statute of Limitations during the lifetime of the testator; *Hill v. Walker* (4 Kay & J. 166). The acknowledgment is equivalent to a promise to pay, or to do that which he was morally bound to do and legally justified in doing.

Mr. Follett and Mr. C. Hall, *contrà*, were not heard, but they referred to *Fuller v. Redman* (26 Beav. 614).

Mr. Rowcliffe, for the husband of the Plaintiff.

THE MASTER OF THE ROLLS [Sir John Romilly]. It is clear I cannot do it. It is settled by *Shewen v. Vanderhorst* (1 Russ. & My. 347; 2 Russ. & My. 75), that after decree, an executor cannot exercise any discretion at all, and that he is bound to take the objection of the Statute of Limitations, and that any creditor or other person interested may insist on having that defence set up. After decree an executor can do no act to vary the rights of the parties.

The right of retainer stands on a different footing. The executor, having the right of retaining his debt before the suit was instituted, it has been held that is not forfeited by the institution of a suit.

[28] LEAK v. MACDOWALL. Dec. 4, 1862.

[For subsequent proceedings, see 33 Beav. 238.]

The several receipts by joint-tenants of a portion of a trust fund does not destroy the joint-tenancy as to the remainder of the fund.

A testator gave the residue of his real and personal estate to his nephews and nieces living at his death. But if any should be then dead, their offspring were to be considered to stand in the place of their parents and to take "the same benefit." Held, that though the nephews and nieces took as tenants in common, their offspring took as joint-tenants.

The testator devised his real and personal estate to trustees in trust to convert and, after making certain bequests, "the remainder of his property real and personal of whatever description (after the deductions before recited) he gave and bequeathed, in equal proportions, share and share alike, to his different nephews and nieces, the sons and daughters of his late brothers and sisters, William Merritt, Ann Leak, Mary Dannatt and Frances Holmes, or to such of them as might be living at the time of his death. But if any of them should then be dead, and have left offspring, the said

offspring were to be considered to stand in the place of their parents, and to take the same benefit from the said bequest."

The testator died in 1845, subsequently to the month of April, in which he made a codicil.

Mary Swift, one of the nieces and a daughter of William Merritt, died in March 1845, in the life of the testator, and her children became entitled to her share, by substitution.

The trustees made several small payments on account of unequal amounts to the children of Mary Smith. One of them having died, the question arose, first, whether the offspring of the nephews and nieces took in joint-tenancy, and secondly, whether it had been severed by their receipts on account of their shares.

[29] Mr. Kay argued, first, that the words of severance did not apply to the substituted gift to the offspring. *Bridge v. Yates* (12 Sim. 645); *Penny v. Clarke* (1 De G. F. & J. 425).

Secondly. That the small sums received on account did not sever the joint-tenancy as to the residue. *In re Barton* (10 Hare, 12).

Mr. W. W. Cooper, *contrâ*. The joint-tenancy was severed by the receipt of a part of the fund, it destroyed the nature of the interest in the whole fund, by altering the rights of the parties to it. "The severance of the joint-tenancy is a mere matter of evidence, it is not necessary to shew a specific act of division of each part of the property, if there has been a general dealing sufficient to manifest the intention to divide the whole. The acts done, as to parts, may be evidence as to the rest, as to which no act has been done. Their division of all other parts of the estate is evidence of their intention to divide this whenever they could lay hold of it;" *Crook v. De Vandes* (11 Ves. 333); *Williams v. Hensman* (1 John & Hem. 546). The receipts have been unequal, and it is therefore impossible to treat the remainder as held in joint-tenancy.

Secondly. The children were not, originally, joint-tenants, for the offspring are to take "the same benefit" as their parents, and must therefore, like them, take in the same way, that is "in equal portions, share and share alike," or as tenants in common.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this is a joint-tenancy; I see nothing like severance. If a nephew is dead at the death [30] of the testator his offspring is "to be considered to stand in the place of their parents," and take the same benefit, that is, they shall take their parent's share, but they take it as joint-tenants.

A separate dealing by joint-tenants of the property may sever the joint-tenancy and create a tenancy in common. But I do not think this inference is to be drawn merely from the circumstance that a trustee, having realised part of the estate, has paid the money received, in certain proportions, to the parties in severalty. As to the money not received, they still remain joint-tenants.

If a testator were to devise twenty houses to a trustee, in trust to sell and pay the proceeds to ten persons as joint-tenants, though one house were sold and the purchase-money divided, that would not shew that the other nineteen houses were to be held by the owners as tenants in common, and that when sold, the produce was to be divided equally between the surviving owners and the representatives of those who had died. Until some act is done to sever, the interest remains as it previously was, an interest in joint-tenancy. The burthen of proof lies on those who contend that a joint-tenancy has been severed.

[31] JONES v. SOUTHALL (No. 2). Nov. 21, Dec. 9, 1862.

[S. C. 32 L. J. Ch. 130; 8 L. T. 103; 9 Jur. (N. S.) 93; 11 W. R. 247; 1 N. R. 152.]

A. B. bequeathed her residue to such person as C. D. should, by deed or will, appoint, and in default to his next of kin. C. D. died in the life of A. B. Held, that his will could not operate as an execution of the power under the 1 Viet. c. 26, s. 27, and that his next of kin were entitled to A. B.'s residue.

By her will, the testatrix directed the trustees of a settlement executed by her to hold

"all and singular the trust moneys comprised therein, and the securities on which the same should be invested" on trust to pay legacies, &c. Held, that the bequest of such of the trust moneys as had been called in, received and reinvested by the testatrix in her life, was adeemed.

A testatrix, after stating that she was desirous of leaving certain legacies, requested her supposed husband to pay certain legacies out of his own estate. He predeceased her. Held, that the legacies were demonstrative and payable out of the testatrix's estate.

On the 27th June 1842 Cath. Wood, in contemplation of marrying Benjamin Crane, the widower of her deceased sister, executed a settlement, by which, in consideration of the marriage, she assigned to the trustees, Mr. Grape and Mr. Southall, a mortgage of £1200 on the Broadwas turnpike road, a mortgage of £400 on a certain reversionary interest, a bond debt of £200. She declared that these and a mortgage debt of £938, 9s. 2d. on Sapling Mill, a mortgage to her of £700, also £2000 £3, 10s. per cents., which had been transferred into the names of trustees, should be held upon trust for her until the solemnization of the said intended marriage, and from and after the solemnization thereof, upon trust during the joint lives of the said Benjamin Crane and Catherine Wood for her separate use without power of anticipation, and after the decease of either of them, upon trust for the survivor for his or her life, and after the decease of the survivor, upon trust for the children of the said intended marriage, and in case of none, upon trust, in case Catherine Wood should survive Benjamin Crane (which happened), then from and after his death and such failure of children as aforesaid, *in trust for Catherine Wood, her executors, administrators and assigns*, but if the said Catherine Wood should die in the lifetime of Benjamin [32] Crane, then from and after his death and such failure of children as aforesaid, in trust for such person and as Catherine Wood, by any deed or writing or by her last will, should, notwithstanding coverture, appoint, and in default of such appointment, in trust for such person or persons as, at the decease of Catherine Wood, would have been entitled to her personal estate under the Statutes of Distribution, in case she had died unmarried and intestate and without issue.

The ceremony of marriage was performed, and the parties to it cohabited during their joint lives as husband and wife. But, as no lawful marriage could be contracted between these persons, the trusts never arose.

On the 4th of October 1842 Cath. Wood, calling herself Crane, made her will, on the construction of which the present questions arose. The will, after reciting the marriage settlement, the power of appointment therein contained in the event of her husband surviving her, and she should leave no child, proceeded thus:—

"Now I do hereby ratify and confirm the said settlement, and in pursuance and exercise of the power thereby reserved to me and of all other powers enabling me in this behalf," &c., "appoint that the trustees or trustee for the time being of the said settlement *do and shall stand possessed of and interested in all and singular the trust moneys comprised in such settlement, and the securities on which the same shall be invested*, from and after the decease of the said Benjamin Crane and such failure of issue as in the said settlement mentioned, in trust for such of the several persons hereinafter named as shall be living at the time of the decease of the said Benjamin Crane, and in the parts, shares and proportions hereinafter also mentioned, to whom I give and bequeath the same accordingly (that is to say)." She [33] then gave a number of pecuniary legacies, and proceeded:—"And as to the residue of the trust moneys and personal estate comprised in *the said settlement*, from and after payment of the said legacies (which I direct to be paid at the end of six months after the decease of the said Benjamin Crane) and the expense of proving this my will, I do hereby give and bequeath one moiety thereof to such person or persons as my said dear husband Benjamin Crane shall by deed or will direct or appoint, *and in default of appointment to his next of kin*, and the other moiety thereof to my sisters" Jemina Wood and Ann Jones in equal shares.

"And whereas, on my marriage with my said dear husband Benjamin Crane, he became entitled in right of such marriage to certain personal estate belonging to me, which was not comprised in the before-mentioned settlement, and I am desirous of

leaving certain legacies payable immediately on my decease, I do therefore hereby request my said dear husband to pay, out of such personal estate, notwithstanding the same is now become his own property, the following legacies," viz., to the poor of the parish of Knightwick £10, to the poor of the chapelry of Doddenham the like sum of £10, to my servant Rebecca Roberts £10, to Martha Chambers £50, and to Thomas Finch £10, such three last-mentioned legacies to be paid within six months from my decease.

On the 5th of June 1844 Benjamin Crane made a will, by which he gave all his real and personal estate to the testatrix Catherine Crane, subject to the payment of his debts and an annuity of £20 to the Defendant Sarah Pardoe. He died on the 27th of December 1846, without having had any issue. The testatrix survived [34] him; she made no alteration in her will, and died on the 2d of January 1857.

At the hearing of this cause in 1861 (30 Beav. 187), the Court was of opinion that the will of the testatrix, which had been proved in the Probate Court, was a valid disposition of the settled property, and inquiries were directed as to the position of her property.

The Chief Clerk certified that, shortly after the death of Benjamin Crane, the settlement, with a deed of even date assigning the mortgage debt of £700 to the trustees of the settlement, were given up by them to the testatrix, and that she afterwards destroyed them.

That in 1855 a sum of £600, being one-half of the £1200 due on the mortgage of the turnpike tolls, was paid to the testatrix, and was, on the 13th of July 1855, lent by her to Mr. George Peake on his bond and a mortgage dated the 24th of August 1855, and made between G. Peake of the one part and the testatrix of the other part, and that it remained so invested at her death. That the second half of the £1200 due on the mortgage of the turnpike tolls had been allowed to remain on that security. That at the date of the settlement, the testatrix was transferee of this mortgage of tolls, but that neither the transfer to her, or from her to the trustees, had ever been registered as required by the 3 Geo. 4, c. 126, s. 81.

That in 1846, during the life of Benjamin Crane, the sum of £400, secured by mortgage, was paid off and invested by the trustees of the settlement, in their own names, in the purchase of £411, 16s. 10d. £3 per cent. [35] Reduced annuities, and that, about the same time, £411, 16s. 10d. consols were transferred into her name.

That the £200, due on bond, had been paid to her by the debtor in April 1847, with the consent of the trustees.

That the £938, 9s. 2d., due on the mortgage of Sapey Mill, remained on that security at the death of the testatrix, but that in 1847, and again in 1851, she had endeavoured to sell the premises by auction, without the intervention of the trustees.

That the £2000 consols had been transferred by the trustees at the request of the testatrix, into her name, in which they stood at the time of her death.

Mr. Selwyn and Mr. T. A. Roberts, for the Plaintiff, the sole next of kin of the testatrix. First, this was a mere voluntary settlement, and the property comprised in it was not effectually vested in the trustees; as for instance, the turnpike bond; 3 Geo. 4, c. 126, s. 16; *Jones v. Jones* (5 Exch. Rep. 16); it was incomplete and ineffectual, and this Court will not interfere, in favor of volunteers, to perfect it; *Bridge v. Bridge* (16 Beav. 315); *Jefferys v. Jefferys* (Craig & Ph. 138).

Secondly. The gift of the trust moneys comprised in the settlement was adeemed by the destruction of the settlement; *Pigot's case* (11 Rep. 26 b.); *Hemfree v. Bromley* (6 East, 309); *Whelpdale's case* (5 Rep. 119 a.); Stephen's Commentaries (vol. 1, p. 505 (5th. edit.)); and also by the testatrix resuming possession of the property and altering the investments. It is not sufficient to be [36] able to trace specific moneys into other investments, money cannot be so ear-marked or traced. It is necessary that the specific gift must remain in specie; Williams on Executors (vol. 2, p. 1132); *Badrick v. Stevens* (3 Bro. C. C. 431); *Rider v. Wager* (2 Peere Wms. 328); *Barker v. Rayner* (5 Madd. 208); *Gardner v. Hatton* (6 Sim. 93); *Pattison v. Pattison* (1 Myl. & K. 12).

Thirdly. The will of Benjamin Crane operated as an execution of all powers, 1 Vict. c. 26, s. 27, and, amongst them, the power given by the will of Catherine Crane; but if it did not so operate, the gift in default of appointment to the next of

kin of Benjamin Crane cannot take effect; there could be no default, if there was no power to execute; *Baker v. Hambury* (3 Russ. 340); Sugd. on Powers (p. 321 (7th edit.)).

Fourthly. The small legacies, which the testatrix requests her husband to pay out of the unsettled property, fail altogether. They are payable out of a particular fund possessed by Mr. Crane, and not out of the testatrix's property, and they are mentioned in terms of a recommendation to him, and not as bequests out of her own property.

Mr. Lloyd and Mr. A. Smith, for the next of kin of Benjamin Crane. First, the validity of this settlement has been established; but whether valid or not, or whether destroyed or not, it has the effect of pointing out the property referred to by the testatrix in her will, and besides she expressly ratifies the settlement. Secondly, this is not strictly a specific legacy, it is a gift not only of the moneys in the settlement, but of "the securities [37] on which the same shall be invested," and it is, therefore, only necessary to trace the money into an investment. But, as to the rest, there is no ademption where the change has been for convenience and security, and not for the purpose of ademption; *Clough v. Clough* (3 Myl. & K. 296); *Clark v. Browne* (2 Smale & G. 524); *Ashburner v. Macquire* (2 Bro. C. C. 108); *Dingwell v. Askew* (1 Cox, 427); *Fryer v. Morris* (9 Ves. 360); *Le Grice v. Finch* (3 Mer. 50).

Thirdly, the power in Catherine's will, which never arose in Mr. Crane's lifetime, cannot be construed to be executed by his will; it was a power to a dead person. The statute 1 Vict. c. 26, s. 27, says, that a bequest of personal estate shall include any personal estate which the testator "may have power to appoint in any manner he may think proper, and shall operate as an execution of such power." How could this be an execution of a power purported to be given him by a will which first operated fifteen years afterwards? No power ever existed, and a power may lapse like a legacy, and here it cannot be said to have been executed. But that does not prevent the gift over from taking effect; the gift over in default operates either if the power is not executed or does not arise. The very event contemplated has arisen; he has not appointed; *Jones v. Westcoomb* (Prec. Ch. 316); *Mackinnon v. Sewell* (2 Myl. & K. 214); *Warren v. Rudall* (4 Kay & J. 603); *Murray v. Jones* (2 Ves. & B. 313); *Hardwick v. Thurston* (4 Russ. 380); *Edwards v. Saloway* (2 Phill. 625).

Fourthly. The legacies which the testatrix directed her husband to pay are demonstrative legacies.

[38] Mr. Baggallay and Mr. Freeman, for the trustees, supported the legacies.

Mr. Swan, for a legatee.

Mr. Selwyn, in reply.

Dec. 9. THE MASTER OF THE ROLLS [Sir John Romilly]. The first question is to whom did the moiety of the residue go, it is bequeathed to such persons as Benjamin Crane shall "by deed or will direct, and in default of such appointment his next of kin."

The Plaintiff contends that the moiety of the residue of the testatrix's estate passed, under the combined effects of the will of the testatrix and of Benjamin Crane, to the testatrix herself, and was therefore undisposed of and went to the Plaintiff, who was her sister and sole next of kin.

The Defendants contend that the power of appointment was never exercised by Benjamin Crane, and that the moiety goes, as in default of appointment, to the next of kin of the husband.

The first question I have to consider is, whether the will of Benjamin Crane operated as an execution of the power contained in this will of the testatrix? I am of opinion that it did not, and that because, in my opinion, no power created by the will of the testatrix had any existence until the death of the testatrix had given validity to the instrument itself. Indeed this is the first time that I ever remember it to have been argued that a man could execute a power of which he [39] was intended to be the donee named in the will of a person who survived him. Under the old law it is obvious that his will, having no reference either to the power or to the fund subject to it, could not have operated as an execution of any power; and under the 27th section of the new Wills Act (1 Vict. c. 26), it is equally obvious that

it would have no such operation. That section, which makes a general disposition by will operate as an execution of a power, treats such a disposition as evidence of intention to execute such power, and therefore makes such a disposition an execution of the power, unless a contrary intention appears on the face of the will. But it is obvious that no intention can be presumed respecting the execution of a power of the existence of which the testator is ignorant. In other words, the testator can, by his will, execute only such powers as are in existence when his will takes effect. He was not the donee of any power at his death, the time at which his will begins to speak, and unless he had survived the testatrix, he never could have become the donee of a power created by her will, which has no operation except from the day of her death.

The next question is, does the gift over in default of appointment take effect? and I am of opinion that it does. This is simply the case of a gift to a certain class of persons, provided a certain event does not happen. The class to whom the gift is made is the next of kin of Benjamin Crane, the event on which it is to take effect is, the non-execution of a power by him. That event has occurred, he has not executed the power. It is true that he has not executed the power, simply because he could not; but this does not, in my opinion, alter the case. His capacity or incapacity to influence the occurrence of the event on which the gift over is to [40] take effect is wholly immaterial. If the gift had been "to the next of kin of Benjamin Crane in the event of his predeceasing A. B.," the fact of death previous to that of A. B. would have given effect to the legacy, although the occurrence of the event depended, not on the will of Benjamin Crane, but on the will of God. Here, if he had survived the testatrix, he would have executed the power; he died before her, and therefore he did not execute the power, and as he has not done so, the gift takes effect in favor of his next of kin; this also appears to me to be the plain meaning of the testatrix's will, which might be thus expressed:—"I wish one-half of the residue to go as Benjamin Crane shall direct, if he does not or cannot give any direction on this subject, then I wish his next of kin to have that half."

The next question which arises relates to whether there has been any ademption of the sum mentioned in the settlement. The testatrix, by her will, directs that Grape and Southall (the trustees of the settlement) shall stand possessed of "all the trust moneys comprised in such settlement, and the securities on which the same shall be invested," after the decease of Benjamin Crane, in trust for the persons mentioned in her will. The first question is, whether these are all adeemed, by reason of the trustees having delivered up the settlement to the testatrix and her having destroyed it. On the first of these, I entertain no doubt that such delivery and destruction did not produce any effect. The settlement never had any validity, as it was founded on consideration of a marriage which did not take effect, and the destruction of it did nothing. In my opinion the words of the will are simply a manner of describing the specific funds, by the division of which certain legacies are to be paid.

[41] The next question is, whether the dealing with the funds by the testatrix, subsequently to the date of her will, has adeemed any, and which, of them? I will take them *seriatim*.

The first is £1200 and interest secured by a mortgage of the tolls of Broadwas turnpike road. In 1855 £600, part of this, was paid off and lent by the testatrix to the Rev. George Peake, and was secured by his bond and mortgage. The remaining £600 continued due on the security of the tolls at the death of the testatrix. I think that this fund is adeemed, to the extent of the £600 paid to the testatrix.

It is contended that, under the words "and the securities on which the same shall be invested," the legatees are entitled to follow out and trace the funds into the fresh securities into which they may have been invested by the testatrix from time to time, and thus preclude any question of ademption. I do not mean to say that if the settlement had been valid and effectual, and if, in pursuance of the powers contained in it, the trustees had invested the settlement funds in fresh securities from time to time, considerable weight might not have attached to that argument, or that the words of the will might not, in that case, have been construed to mean, "the funds in settlement whatever they were," and if it were the true construction of the will, that only the funds subject to the settlement, and none other, should be applied

in paying the legacies, then, as the settlement had no operation, it might support the argument that the bequest had no operation at all, inasmuch as there were no funds in settlement; but if I am right in my opinion that this is not the just construction of the will, and that these words in the will simply import a description of the funds specifically appro-[42]-priated to the payment of certain legacies, then the reference to the securities on which they shall be invested merely applies to the existing security, by way of more completely identifying the fund, and does not operate as a bequest of future securities to be thereafter taken or future advances of any portion of these funds if they should be called in or paid off. In other words, I think that the words of the will are merely referential to another document as containing the description of the funds, and that they must be read exactly as if the testatrix, instead of using the words in the will, had enumerated the various funds which were mentioned in the document referred to, and which the certificate of the Chief Clerk has enumerated. The first fund therefore is, in my opinion, adeemed to the extent of one-half.

The second is a sum of £400 and interest, secured by mortgage of a reversionary interest by Richard Burnaby. This also was paid off, and invested by the trustees of the settlement in the purchase of £411, 16s. 10d. £3 per cents. This fund also was, in my opinion, adeemed for the reason I have already stated.

The third fund was a sum of £200, secured by a bond, which was paid off to the testatrix and received by her and not reinvested. This also, therefore, was adeemed.

The fourth fund was £938, 9s. 2d., secured on the mortgage of a mill called Sapey Mill, and £700 secured on lands called Barley, both belonging to a person of the name of John Bowbeny; both these sums now remain due on the original securities, and both therefore are available for the payment of the legacies to which they are specifically appropriated.

[43] The fifth and last fund is a sum of £2000 £3, 10s. per cent. Reduced annuities. There was no dealing with the fund other than that, after the death of Benjamin Crane, it was by the trustees transferred into the name of the testatrix, in whose name it now remains. This, in my opinion, is no redemption, and this sum is specifically applicable to the payment of the debt.

The only remaining question which arises on this will relates to five legacies which are given thus:—"And whereas on," &c. [See *ante*, p. 33.] I think that all the legacies are payable. The argument against them is, that the will simply contains a direction or request to Benjamin Crane to pay these legacies, and that being such, they are not legacies of hers but a request to him to give legacies, which has no operation. I think that the words of the will do not support that argument. They constitute, I think, five legacies given by her, with a request that they should be paid by Benjamin Crane out of a particular fund. They are in the nature of demonstrative legacies, that is, general legacies directed to be paid out of a particular fund. Observe the words "Whereas Benjamin Crane is entitled to some personal estate, and whereas I am desirous of leaving certain legacies payable on my decease: I therefore request him to pay the following legacies, viz.," then follows an enumeration of five legacies. Omit the introductory words and there could be no question but that the five legacies were legacies given by the testatrix, all that she does is, that before giving them she mentions a source from whence they are to be paid. If Benjamin Crane had survived her, that might have raised a question of election, but it could not have disappointed the legatees. Assume that the fund which she appropriates for the payment of these legacies fail, the legacies are not also to fail. Suppose she had said, "I [44] give the following legacies to A. B., &c., and I request that these legacies be paid to my executor out of a sum of stock standing in my name," using the words "out of," not by giving a part of the stock itself for payment of the legatees; then the effect would have been that they would have been general legacies to be paid out of a specified fund, but if that fund failed the legacies must be paid out of the general personal estate. Here I think the words, "I am desirous of leaving certain legacies," followed by the statement of them, the last three of which are to be paid six months after her decease, point at this:—that these were general legacies given by the testatrix, and that the previous words shew that these legacies were coupled with a request to her husband to pay them out of a fund which she supposed belonged to

him, and which request, whether complied with or not, does not affect the validity of the bequest.

I have now, I believe, disposed of all the questions submitted to me on this certificate, and the order on further consideration may be made accordingly.

[45] HOGG v. JONES. Dec. 18, 1862; Jan. 14, 1863.

[S. C. 32 L. J. Ch. 361; 8 L. T. 816; 9 Jur. (N. S.) 507; 1 N. R. 222. Distinguished, *In re Cresswell*, 1883, 24 Ch. D. 102. See *In re Cornwallis*, 1886, 32 Ch. D. 394.]

A testator devised his freeholds to the first and other sons of A. (who was living and unmarried) successively in tail, with remainder to B. for life, with remainder to B.'s first and other sons successively in tail, &c. And he bequeathed his plate to B. for life, and after her decease, he gave the same "in the nature of an heirloom to the person, who, for the time being, should be in the actual possession and enjoyment of his freehold estates under the limitations of his will." In the lifetime of A., B. and her eldest son executed a disentailing deed. A. survived both B. and her eldest son, and he died without having been married. At A.'s death C. was the issue in tail of B., but was not in possession of the freehold. Held, that there had been no failure of the gift of the plate, and that C., and not the representatives of B., were entitled to it.

The testator, the Reverend William Maxwell, by his will, dated in 1818, devised his freehold estates to trustees and their heirs, to the use and intent that his son, John Maxwell (a lunatic) should receive an annuity of £1000 a year, and the residue of the rents were to accumulate. And subject thereto, the trustees were to stand seised of all his freehold estate to the use of the first and other sons of his son John Maxwell in tail, and in default, to the use of the testator's daughter Anne Lyte for life, with remainder to trustees to preserve, with remainder to the first son of Anne Lyte in tail male, with remainder to her daughters, &c., &c.

And he declared that he had devised his estates to trustees, in order that the legal estate might be vested in them to support contingent remainders, "it being his intent and meaning that no person should, under the limitations and trusts aforesaid, become entitled to the same lands in possession, or to the rents and profits thereof, during such time as any antecedent limitations remained in contingency and capable of taking effect (that is to say), whilst there was any possibility, in the eye of the law, of any other persons or person coming *in esse*, or who, if then *in esse*, would take a prior estate in the same lands, hereditaments and premises, under the trusts and limitations thereinbefore expressed or contained."

[46] He bequeathed his personal estate to trustees upon the following trust:—As to my plate, I give the use and enjoyment thereof to my said wife during her natural life only, and after her decease, I give the same, in the nature of an heirloom, to the person who, for the time being, shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will. And the testator directed and declared that if any species of his personal property should remain after the several dispositions which he had thereinbefore made, or if there should be anything which might have escaped his attention, and which he might not have thereinbefore sufficiently disposed of, the same should go and belong to his said wife Jane Maxwell, her executors, administrators and assigns, as his residuary legatee and legatees thereby appointed, absolutely for ever.

The testator died in 1818.

Anne Lyte had an eldest son, Henry William Maxwell Lyte, the first tenant in tail *in esse*, and other children, subject, of course, to the possibility of his uncle, John Maxwell, recovering his sanity and leaving issue male, which would have deprived him of his right to the real estate.

On the 29th of December 1844 Anne Lyte, the tenant for life in remainder, on failure of the issue male of her brother (the son of the testator), together with her son Henry W. M. Lyte, the tenant in tail in remainder after the determination of

the estate for life of his mother, joined together and executed a disentailing deed, and, as far as they were able, destroyed the limitations contained in the will of the testator relating to [47] real estate dependent on the death of the son John Maxwell without issue.

Anne Lyte died in January 1856. Henry W. M. Lyte, her eldest son, survived her and died in June following (1856). He left the Defendant, Edward Maxwell Lyte, his eldest son and heir in tail, and by his will he devised and bequeathed his real and personal estate to some of the Defendants upon certain trusts, so that Edward M. Lyte was not in "actual possession or enjoyment" of the testator's freeholds.

John Maxwell, the son, died in 1861 without ever having been married, and the question then arose as to whom the plate belonged? It was claimed, first, by the legal personal representatives of Henry W. M. Lyte as the first tenant in tail; secondly, by Edward M. Lyte as the first existing equitable tenant in tail under the testator's will, if such entail had not been barred; and thirdly, by the executors of the widow as undisposed of and as part of the testator's residue.

Mr. Selwyn and Mr. W. T. Bovill, for the Plaintiffs, the trustees of the testator's will, stated that the questions were, first, as to the effect of the disentailing deed, whether there was any and what protector, and as to the effect and extent of the deed. Secondly, to whom the plate left as heirloom now belonged?

Mr. Baggallay and Mr. Lewis, for the representatives of Henry W. M. Lyte, claimed the heirloom as part of the estate. They argued that they vested in him absolutely as heirlooms, he being the first tenant in tail; *Lord Scarsdale v. Curzon* (1 John. & H. 40).

[48] Mr. Lloyd and Mr. Jenkinson, for trustees of a settlement.

Mr. Macnaghten, for the representative of the testator's widow. The plate is undisposed of; for the person who is entitled is he who is "in the actual possession and enjoyment under the will." No person has ever or ever can fill that character, for the estate is now held independently of the will and under the limitations of the disentailing deed. Henry was never in possession and Edward can never be in possession under the will. Henry Lyte destroyed all the limitations in the will subsequent to the life interest of his mother, and this prevented him and all others from ever filling that character which alone would entitle them to the plate. The gift is not in the nature of an executory trust and it cannot be modified. He cited *Lord Scarsdale v. Curzon* (*Ibid.*); *Vaughan v. Burslem* (3 Bro. C. C. 101); *Ellis v. Maxwell* (3 Beav. 587, and 12 Beav. 104).

Mr. Druce, for Edward Lyte. First. The disentailing deed might be set aside by the issue in tail. Secondly. Edward Lyte is entitled to the plate as *persona designata*. It is given to him individually and absolutely, not under a limitation to go in conformity with the real estate, but to the persons in actual possession and enjoyment under the will. The imperfect barring of the entail does not affect the right to the chattels, nor can any subsequent dealing with the estate alter the character of the person pointed out by the testator's will. Actual corporeal enjoyment could not be what the testator intended, for then the plate would belong to any stranger who might purchase the estate. The disentailing deed [49] affected the realty alone, and could not alter the rights to, or the devolution of, the personalty; *Re Tates' Trust* (unreported. Vice-Chancellor Wood, June 1862); *Potts v. Potts* (3 Jones & L. 353, and 1 H. of L. Cas. 671).

Mr. Osborne and Mr. G. L. Russell, for other trustees, cited *Gosling v. Gosling* (John. 265).

Mr. Baggallay, in reply. The object was that the plate should go along with the estate, and the word "heirlooms" imported succession. H. W. M. Lyte's right is quite irrespective of the disentailing deed; *Foley v. Burnell* (1 Bro. C. C. 274).

Jan. 14, 1863. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on which I reserved my judgment is the determination of the person to whom certain chattels belong under the words of the will of Dr. Maxwell and the events which have since occurred.

The testator gave the plate "to the person who, for the time being, should be in the actual possession and enjoyment of his (the testator's) freehold estates under the limitations of his will."

Now, under the prior limitations of his freeholds, no one could be "in the actual possession and enjoyment of the testator's freehold estate" during the life of the testator's son John Maxwell, who was a person of unsound mind, and who died on 29th of November 1861.

[50] The claimants to the plate are three, first, the representatives of H. W. M. Lyte, who executed the disentailing deed; secondly, E. M. Lyte his son, who would be now entitled to the actual possession and enjoyment of the estate of the original testator, in case no such disentailing deed as I have mentioned had been executed; and thirdly, the representatives of the widow of the original testator.

For the first claimants, the representatives of H. W. Lyte, it is contended that under the word "heirlooms" these chattels vested absolutely in the person who was the first tenant in tail, and that thereupon they become a portion of his property and passed as such to his representatives.

For the second, the Defendant E. W. Lyte, it is contended that the effect of the will is, to vest the chattels in the person who in the event would, if no disentailing deed had been executed, have been the first person in the actual possession and enjoyment of the rents of the real estate; that such legatee is a designated person, and that the circumstance, that the disentailing deed has been interposed and prevented the enjoyment of the estate, cannot affect the devolution of the chattels, which cannot be the subject of any such deed.

For the third, the representatives of the widow, it is contended that the words of the will are precise, that the chattels are given, after the decease of the widow, to a person "*who shall be in the actual possession and enjoyment of the freehold estates under the limitations contained in the will.*" That this imposes on the legatee as a condition precedent, not merely that the legatee shall be a person in the actual possession and enjoyment of the freehold estates, but also that he shall be in such enjoyment [51] by virtue of the limitations contained in the will. That the representatives of H. W. M. Lyte are, it is true, in the actual possession and enjoyment of the estate, but not by virtue of the limitations contained in the will, but under the disentailing deed and will of H. W. M. Lyte, that therefore they do not fulfil the condition any more than a mere stranger to whom they might have sold the estate, and that they, therefore, are excluded from the legacy. That in like manner E. M. Lyte cannot take the legacy, for that he does not fulfil the first part of the condition, viz., that of being in the actual enjoyment and possession of such rents, and that consequently, no one can take these chattels under the words of the bequest. If this be so, then it follows, as a matter of course, that they fall into the residue as undisposed of, and as such must go to the widow, the residuary legatee, and ought now to be delivered to her legal personal representatives.

Of the numerous cases which are usually cited on the subject of these gifts of chattels, which are of frequent occurrence, and which, whenever they occur, usually give rise to suits in equity, I do not think that any one exactly governs this case. *Foley v. Burnell* (1 Bro. C. C. 274) and *Vaughan v. Burslem* (3 Bro. C. C. 101) were principally relied upon for the representatives of W. H. M. Lyte, but, for the reasons I am about to mention, I think that they do not apply. These cases determine that where an estate was limited to one for life, with remainder to his first and other sons in tail male, and in addition chattels were bequeathed to go as heirlooms in conjunction with the real estate, as nearly as the rules of law and equity will permit, the chattels, in that event, vest absolutely in the tenant in tail in remainder as soon [52] as he is born, and it is argued that such is the case here, that W. H. M. Lyte filled that character, and consequently the chattels vested in him.

But there is an obvious distinction between those cases and the present. If those cases apply, it necessarily follows that the chattels vested absolutely in H. W. M. Lyte immediately on his birth, and that if he had died on the following day, still they would have passed to his legal personal representatives. But on this will I think that it is impossible so to hold; it is true that his interest in the freeholds was a vested interest, but still it was an interest liable to be divested; it was an interest dependent on the circumstance of John Maxwell the son of the testator dying without leaving a son. In *Foley v. Burnell* and *Vaughan v. Burslem* the son had an indefeasible interest as tenant in tail. If he lived long enough, no circumstance

could have prevented his becoming absolutely entitled to the possession and enjoyment of the devised real estate; that is not so here. If I were to hold that the chattels vested absolutely in H. W. M. Lyte, this result would follow:—That if a testator, having five or six sons, were to devise the estate to each in succession for his life with remainder, on the death of each, to his first and other sons in tail male, that is, to A. the first son for life, with remainder to his first and other sons in tail male, and for default of such issue to B. the second son for life, with remainder to his first and other sons in tail male, and so on, and if chattels were limited to go with the real estate as heirlooms, then the first grandson of the testator born would take the chattels. The birth of a son to B. or to any one of the younger sons, two or three months before the birth of a son to A., the eldest, would deprive A.'s son of the whole of the interest in the chattels which were limited to go with the estate. This certainly is not decided by [53] *Foley v. Burnell* or *Vaughan v. Burslem*, nor are any words to be found in those decisions, as it appears to me, from which any such conclusion or anything approaching to such a conclusion can be formed. It would also appear to me to be a very strained and technical construction, and one leading to a result which would obviously defeat the intention expressed by the testator.

My opinion is, that all that is decided by these cases, if applied to the limitations and bequest contained in this will, is, that these chattels would have vested in a son of John Maxwell, had any one been born to him at any time before his death, and that they would have vested in such son on his birth, but it does not decide that while that event was doubtful, and while, in the meantime, no one was in the possession or enjoyment of the rents under the limitations contained in Dr. Maxwell's will, these chattels would vest absolutely in anyone.

If this be so, these cases have no application, and as the tenancy in tail in H. W. M. Lyte was defeasible during the whole period of his life, I am of opinion that he took no interest in the chattels bequeathed, and that no one claiming under him can support any claim to them for that purpose.

I now come to consider the case of E. M. Lyte, and first I look at how his claim would have stood if no disentailing deed had been executed. In that case I think it clear that E. M. Lyte would have been entitled to these chattels absolutely. Immediately on the death of John Maxwell the son, E. M. Lyte would, but for this disentailing deed, have become indefeasibly tenant in tail in the actual possession and enjoyment of the real estate. I am at a loss to perceive what sound [54] argument could have been alleged to deprive him of the right to these chattels. It is the plain meaning of the words used by the testator, he would have fulfilled the words of the description of the legatee contained in the will with perfect accuracy, he would have been the first person "in actual possession and enjoyment of the freehold estates under the limitations of the will." If the chattels had been given, or if the Court finds the words of a will to import a gift of them, to the first person who had a vested indefeasible estate of inheritance in the real estate, he was the first person who had such estate, and if the matter then stood between the representatives of H. W. M. Lyte and his son E. M. Lyte, I should have no hesitation in determining the son to be entitled to the plate.

I have next to consider whether the disentailing deed executed by his father and grandmother has deprived him of the right to such chattels. This deed could only operate to create a base fee in the property in remainder in H. W. M. Lyte. If it did, which I assume to be the case, then, if I am right in the construction I have placed on the decisions of *Foley v. Burnell* and *Vaughan v. Burslem*, the only question that can arise is between the residuary legatee and E. M. Lyte as to their respective rights. For the residuary legatee it is contended that the words "actual possession and enjoyment of the freehold estates" import, as a condition precedent, that the legatee should be in the physical perception of the rents and profits arising from the devised estates; but this is not my opinion. I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, E. M. Lyte is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will (regarding them, and them [55] alone, undisturbed by any foreign cause) is entitled to such possession and enjoyment, and which he would have obtained unless these limitations

had been defeated by a foreign circumstance over which neither the testator nor the legatee had any control. It is plain, as was well put by Mr. Druce, that the disentailing deed, which has no operation over chattels, could not in any degree affect the devolution of them; they must go exactly as if such deed had never been executed; but the effect of the contention of the residuary legatee is, to hold that a disentailing deed operated so as to create an intestacy in this disposition of the chattels against the will of the testator.

The consideration of the cases of *Potts v. Potts* (9 Irish Equity Rep. 577, and 1 H. of L. Cas. 671) and of *Lord Scarisdale v. Curzon* (1 John. & H. 40), before the Vice-Chancellor Sir W. P. Wood, confirms me in the view I take; I do not think that the Vice-Chancellor, in that case, intended to draw or establish any distinction between the right to the enjoyment of the estate under the limitations of the will when united to the actual enjoyment of it, and the mere right to such enjoyment when not coupled with the actual possession, where the failure of the actual possession was occasioned by reason of some foreign disturbing causes having destroyed the further operation of the limitations upon the estate devised. Whether such failure be occasioned by a disentailing deed or by natural causes cannot, I think, make any difference. In both cases the right would exist under the limitations of the will taken alone, but in neither case could that right be enforced.

I think that my meaning may be illustrated by suggesting such a case as this:—Suppose that the chattels [56] had been given in the words of this will, and that the real estate, in the actual possession and enjoyment of which the legatee was to be, had been a small messuage on the east coast of England, and that, during the life of John Maxwell, the house and ground had been swept away by some inroad of the sea, so as to render it impossible, after that calamity, for anyone to be in the “actual possession and enjoyment” of it: could it be contended that such an event created an intestacy in the bequest of the testator? I think it would be impossible so to hold. But if this be so, and if, in such an event, E. M. Lyte would have been entitled to these chattels; how does the case differ, because the act which prevents such enjoyment is the act of man instead of being the act of God? The rights under the will remain the same, the meaning expressed by the will is obvious; the testator, in the events which have occurred, has expressed his intention, in plain words, that E. M. Lyte should take the estate and the plate. A disentailing deed, which the testator could not prevent, has enabled two persons, now deceased, to defeat this intention, as far as regards the estate; the intention of the testator, as regards the plate, could not be defeated by them, no deed would affect it; then why is that intention not to take effect?

I am of opinion that no valid reason can be assigned against that proposition and in every way of viewing this case, and I am of opinion that E. M. Lyte is entitled to the plate bequeathed.

[57] *Re THE ROTHERHITHE, &C., INDUSTRIAL SOCIETY.* Nov. 12, 1862.

[S. C. 7 L. T. 305.]

A provident society, registered under the Act of 1852, is to be wound up in the County Court.

This society had been registered under the Provident Societies Act of 1852 (15 & 16 Vict. c. 31), but not under the Act of 1862 (25 & 26 Vict. c. 87). By the 17th section of the latter Act, societies “registered under this Act” are to be wound up in the County Court.

This Court had, inadvertently, made an order to wind up the above society in this Court, under “The Companies Act, 1862” (25 & 26 Vict. c. 89).

But the provisions of the second Act having, in another case, been brought to the attention of the Master of the Rolls in Chambers, he stayed the order.

Mr. Fischer mentioned the matter to the Court, and stated that the Judge of the

County Court considered he had no jurisdiction, the society not being registered under the Provident Societies Act, 25 & 26 Vict. c. 87, s. 2.

THE MASTER OF THE ROLLS [Sir John Romilly]. I still think that this society ought to be wound up in the County Court, and you must either mention the matter to the Lord Chancellor, or register the society under the Provident Societies Act, 1862.

Mr. Fischer elected to adopt the latter course.

[58] GOSLING v. GOSLING. June 4, 11, 1863.

[Reversed, 1 De G. J. & S. 1; 46 E. R. 1, and in House of Lords (sub nom. *Christie v. Gosling*), L. R. 1 H. L. 279. See cases in note, 46 E. R. 1, and *In re Dayrell* [1904], 2 Ch. 502.]

A testator devised real estates to trustees, to the use of A. for life, with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons in tail, &c. And he bequeathed his personal estate to the same trusts, estates, &c., "or as near thereto as the rules of law and equity would admit." Provided nevertheless, that the personal estate should not "vest absolutely in any tenant in tail, unless such person should attain the age of twenty-one years." Held, by the Master of the Rolls, that the gift of the personalty was too remote; but the Lord Chancellor held that the proviso only applied to tenants in tail taking by purchase.

The testator, Bennett Gosling, a banker, made his will in 1844, by which he directed that the right to succeed him as a partner in the bank should be offered first to Ellis Gosling, the second son of his brother Robert Gosling, and in case he should refuse or neglect to accept such offer, that the like offer should be made in succession to the third and every other younger son of Robert Gosling.

And he bequeathed £50,000 to trustees, to be laid out in the purchase of an estate in fee-simple, which he directed to be conveyed to his trustees until some one of them, the said second and younger sons of Robert Gosling, having had the offer made to him, should accept the same, or until the period within which the last of such offers might be accepted should have expired. And from and immediately after either of such events should have happened, then, in case any of them, the said second or other younger sons of Robert Gosling, should accept the said offer, to the use of the son so accepting and his assigns, for and during his life, without impeachment for waste, with remainder to the use of his first and other sons successively in tail male, with remainder over to the other sons of Robert for life, with remainder to their first and other sons in tail. And the testator directed his trustees to receive and invest the rents of the estate, so to be purchased, until the happening of the events above referred to, and to add [59] such accumulated rents to his residuary personal estate. The will proceeded as follows:—

I give and bequeath unto my said trustees "all my real estate and all the residue of my personal estate, upon trust to sell my chambers in Lincoln's Inn, and to get in and convert into money all my said residuary personal estate, and to invest the moneys to arise from my said chambers and residuary personal estate, in their or his names or name, in the Parliamentary stocks or public funds of Great Britain, or at interest on Government or real securities in England, and to stand possessed of all such investments and personal estate, and also to stand seised of all such real estate, to such uses, upon such trusts, and for such estates and interests, and with, under and subject to such powers and provisions as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, or as near thereto as the rules of law and equity will admit. *Provided nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years.*"

The testator made a codicil to his will, by which, after reciting that he had purchased an estate called Busbridge Hall, he revoked the bequest of £50,000 to his

trustees, and, in lieu, devised the Busbridge Hall estate to them, upon the several uses, trusts, &c., mentioned in his will as to the estate to be purchased with the £50,000.

The testator died in May 1855. His only real estate besides Busbridge Hall consisted of the chambers.

Ellis Gosling attained twenty-one in January 1857, [60] and, by a notice in writing, duly accepted the offer contained in the will of the testator, and became tenant for life of the estate and the personalty. He died in July 1861.

The Plaintiff, Ellis Duncombe Gosling, his only son, was born a few weeks after his father's death, and was the first tenant in tail. As such, he, by this bill, claimed an absolute interest in the residuary personal estate, subject to the proviso that the same should not vest in him absolutely unless he should attain twenty-one. The question had been argued before Vice-Chancellor Wood (*Gosling v. Gosling*, 1 John. 265), in 1859, but he considered it premature to decide it.

THE SOLICITOR-GENERAL (Sir R. Palmer) and Mr. Osborne, for the Plaintiff. The Plaintiff is the tenant in tail of the real estate, and the personal estate is given to him in terms of reference, so that the chattels vest in him absolutely as the first tenant in tail; *Vaughan v. Burslem* (3 Bro. C. C. 101); *Lord Scarsdale v. Curzon* (1 John. & Hem. 63, 65).

The bequest of the personalty is perfectly valid. First, the words "vest absolutely" mean a vesting indefeasibly. (*Taylor v. Frobisher*, 5 De G. & Sm. 191.) Secondly, the proviso is in a separate and distinct sentence; the gift is in positive words, and is attempted to be cut down by subsequent negative words; if the latter be void, the original absolute gift remains unaffected. There is a long class of cases which determine that a valid absolute gift remains, so far as it is not effectually cut down by subsequent words. This proviso is either void or valid; if void, it has no effect, but if valid, it merely makes the vested gift defeasible on the death of the Plaintiff during his minority, in which case the [61] *corpus* would go over, but, in the meantime and until the happening of the event which is to defeat his vested interest, all the intermediate income will belong to the Plaintiff and be available for his maintenance. Thirdly, the personalty is given to trustees on trusts which are executory, and the Court will so model the limitations as to make them, so far as possible, effectual. Fourthly, the condition is a condition subsequent, which, if invalid, may be disregarded; *Egerton v. Lord Brownlow* (4 H. of L. Cas. 1). The proviso is only applicable to the sons of a tenant for life, and therefore is not void as tending to a perpetuity; *Gower v. Grosvenor* (5 Madd. 337). But if it be applicable to all tenants in tail, it would simply shew that the proviso is wholly void; *Ware v. Polhill* (11 Ves. 257). We ask a declaration of the Plaintiff's title and an order for maintenance.

Mr. Selwyn and Mr. Rasch, for the trustees of the will.

Mr. Rawlinson, for other Defendants.

Mr. Follett and Mr. C. Hall, for some of the next of kin. The gift of the personal estate after the tenancy for life is absolutely void, it is an attempt to limit personal estate to the first unborn tenant in tail, however remote, who may attain twenty-one. It may be centuries before a tenant in tail attains twenty-one. The age is part of the description of the person to take, and no one can become owner of the personal estate until he has attained twenty-one.

If the words "by purchase" had been inserted, we admit the disposition would be valid, as pointed out distinctly by Mr. Jarman. He says (Jarman on Wills, vol. 1, p. 220 (2d edit.); *Ibid.* vol. 2, p. 492), "Again, where fee-simple lands are limited in strict settlement, and leasehold or other personal property is vested in trustees upon trust to go along with the fee-simple lands, but so as not to vest in any tenant in tail till he shall attain the age of twenty-one years; this trust, so far as it is limited in favor of tenants in tail, is void, since, by the death of successive tenants in tail under age and leaving issue, the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail, *by purchase*, attains the age of twenty-one years."

Limitations must be valid from their inception, no subsequent events can render them valid. This rule of law is accurately laid down by Mr. Justice Cresswell in *Lord Dungannon v. Smith* (12 Clark & Fin. 562). He says, "It is a general rule, too

plainly established to be controverted, that an executory devise to be valid must be so framed, that the estate devised must vest, if at all, within a life or lives in being and twenty-one years after. It is not sufficient that it may vest within that period, it must be good in its creation, and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it so."

The case cited of *Taylor v. Frobisher* (5 De Gex & Sm. 191) has no application; *Re Thatcher's Trust* (26 Beav. 365). No doubt the very object of the clause was, that the personal estate should not vest.

[63] It is said that the proviso is distinct from the gift, and then that it must be rejected. But neither of these is correct: the proviso forms part of the gift and of the description of the person to take, who is the first tenant in tail who attains twenty-one. Nor can it be rejected; suppose it were a gift to A. B., provided he attain twenty-one, how could the Court reject the proviso? It is a gift to a person filling that particular character or to no one, and a gift with a qualification is a limited gift which cannot be altered by the Court. This is not a condition at all, but a gift to one filling a certain character.

It is also clear that this is not an executory trust, there is nothing executory as to the realty, and the trusts of the personalty are fully declared, leaving no further deed or instrument necessary or proper; *Rowland v. Morgan* (2 Phill. 764). They also referred to *Saunders v. Vautier* (Craig & Ph. 240); *Catlin v. Brown* (11 Hare, 372); *Russell v. Buchanan* (7 Sim. 628).

THE SOLICITOR-GENERAL, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. This question arises on the will of Bennett Gosling, who died in May 1855. The scope of the will is this:—The testator directed an estate to be purchased and held in trust, in the events which happened, for Ellis Gosling his nephew for life, with remainder to his first and second sons in tail male, with remainders over. Then the will contained this clause and proviso:—"Provided, nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any [64] part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years."

I have to consider whether the proviso is part of the trust, and indeed I think the decision mainly depends upon the answer to be given to this question. I regret to say that I have come to the conclusion that it forms an integral portion of the trusts declared, and not a separate and distinct proviso or qualification, which can be regarded in the same manner as if it had been omitted here, and had been added by a subsequent codicil.

It was argued, on the part of the Plaintiff, that even if the proviso be read as part of the trust, the whole of these trusts are executory, and that the Court will so mould them as to execute the intentions of the testator, as far as may be possible. But I think that the bequest is not executory, it is simply the declaration of trusts of the personal estate, subject to which it is to be held by the trustees, and if so, and assuming the proviso to be incorporated with and to form part of the trusts declared, and subject to which it is to be held, it is difficult to see how the Court can extract this portion of the trusts from the remainder in order to make the remainder good.

This may be tried by writing out these trusts at length, in which case the personalty is given to be held in trust for the nephew, Ellis Gosling, for life, and after his death for his eldest son, grandson or great-grandson, and so on to the person who shall first attain the age of twenty-one years, then, and not before, it is to become vested in such eldest son, grandson or great-grandson. Such a trust would be bad, unless limited to take [65] effect within twenty-one years of the death of some person living at the death of the testator. And if so the Court could not execute it in favor of the eldest son of the nephew, although he attained twenty-one within the requisite time, no rule being better settled than this:—That a gift originally void cannot be rendered valid by subsequent events.

It is argued, on behalf of the Plaintiff, that the proviso presents this dilemma, either it is good or not good; that if it is good the Court will give effect to it, and

that if it is not good it will have no operation, and the Court will simply disregard it, so that, in either event, the rest of the bequest will take effect.

This argument would be sound, provided the proviso could be separated from the body of the bequest and made perfectly distinct. If, for instance, as I have already suggested, the will had omitted the proviso altogether, and the testator had, by a subsequent codicil, after reciting the devise, stated that he revoked the trusts and substituted new ones, including the qualification to be introduced by this proviso, the Court might possibly have rejected the qualifying proviso which would have the effect of defeating the testator's previous disposition of the personalty and leave the will as it stood originally. But if, as the trusts stand in the will, the proviso forms an integral and essential part of the trusts on which the bequest is made, then the Court is not at liberty to extract and reject the portion it considers to be void, otherwise this argument would apply to every case, including *Leake v. Robinson* (2 Mer. 363). A gift to the class of unborn children at twenty-five is void, but, by this process, the Court might disregard the words "at twenty-five years of age," and give effect to the [66] bequest to the children, simply on the death of the tenant for life. Here, if the will be that the property is to be held in trust for the person who shall fill the double character of being the first tenant in tail of the devised estates and also of having attained the age of twenty-one, the Court cannot restrict the gift, so as to exclude all persons who may become tenants in tail by inheritance of the devised estate, assuming that one of them is also the first to attain the age of twenty-one years, and vest the property in the first tenant in tail who would become entitled if such a proviso had been omitted.

There is no question but that the decision to which I find myself compelled to come will defeat the intention of the testator, and I have striven to reconcile the settled rules of construction with what is the obvious intention of the testator, but I have been unable to do so. I have not found any principle on which I could separate the proviso from the rest of the bequest and treat it as forming no portion of it. The words "provided always" are, in truth, no different from "in such a manner as" or "so as;" they are all connecting words which unite the sentences and make it form part of the previous bequest. The personal estate is given, as far as the rules of law and equity will permit, coupled with this qualification:—that the absolute interest in the personalty is not to vest, absolutely, in the person who is the tenant in tail of the devised estates, unless and until that tenant in tail attains twenty-one years of age. This is what the law does not allow, and the testator has attempted to dispose of his personalty coupled with restrictions which are inadmissible at law, and render it void.

If I could make the bequest executory, the Court [67] would, no doubt, give effect to it as far as it possibly could; but I can see nothing executory in the bequest; the personalty is given to certain persons, to hold in trust, it is not given to them on trust to settle or to convey to persons on trusts to be as near to the trusts of the devised estates as the rules of law and equity will admit.

Neither can I make the case of *Taylor v. Frobisher* (5 De Gex & Sm. 191) apply, for if the proviso form part of the trust, there is no previous vesting of the property in the person who becomes tenant in tail of the devised estates, so as to enable the Court to separate this proviso from the original bequest, and construe it as importing a vesting in possession, or in other words an indefeasible vesting in such legatee.

I think that the true construction is, that the tenant in tail is not to take the personalty until he attains twenty-one, and it is expressly pointed out that this restriction is not confined to one, but that it extends to all the tenants in tail.

It is argued that a distinction may be founded on the circumstance that the disposing words are affirmative, while the words of the proviso are negative. But I think that this does not alter the case, and that the effect of the proviso is, to import into the affirmative disposition of the personalty a condition, which the person who becomes tenant in tail of the devised estates must fulfil before he becomes entitled to the bequest.

If, no doubt, as was suggested in argument, this proviso could be treated as a condition subsequent, [68] then the gift would take effect at once, and the attainment of twenty-one years afterwards would only be essential for the purpose of giving the

first tenant in tail, by purchase, the full enjoyment of the property; and it is obvious that this construction is favored by the circumstance that the will contains no disposition of the income of the personalty in the meantime, such as a trust to invest and accumulate. The case of *Egerton v. Brownlow* (4 H. of L. Cas. 1), was relied on as an authority to support this view of the case; but I think that *Egerton v. Brownlow* does not apply to this particular bequest; neither do I think that the omission of any clause to invest and accumulate the intermediate interest of the personal estate can alter the plain words of the bequest itself, and I think that I should be altering these words and introducing words not used by the testator, and thereby changing the obvious meaning of the passage and bequest, as it stands, if I were so to hold. The attainment of twenty-one years was just as much a condition precedent as the filling the character of tenant in tail of the devised estates; and if I could dispense with the one I might with the other, and thus make a wholly new will for the testator.

This will, in my opinion, requires that the person who is to take the personalty, absolutely, must previously fulfil both conditions. Before this event is accomplished, it may be necessary to wait for many generations. The present Plaintiff may die under the age of twenty-one years leaving a son, who may do the like, and so the personalty may remain in abeyance for a time far exceeding legal limits. The unfortunate result of this has been that, either from the desire of the testator to accomplish what the law does not allow, or [69] by a slip of his legal advisers, his will is disappointed and the bequest of the personalty, after the death of the nephew, is void, and is not disposed of by the will.

NOTE.—The case was heard in November 1863, upon appeal, before Lord Westbury, L. C., who held the gift valid. 1 De Gex, J. & Smith, 1. [L. R. 1 H. L. 279.]

[69] DALLY v. WORHAM. Feb. 17, 1863.

Costs of exceptions allowed, and of those disallowed apportioned and set off.

Seven exceptions were taken to the sufficiency of the Defendant's answer, of which two were allowed and five were overruled. On the question of costs,

THE MASTER OF THE ROLLS said the Plaintiff must pay five-sevenths and the Defendant two-sevenths of the costs and let them be set off.

Mr. Roberts, for the Plaintiff.

Mr. Southgate and Mr. Babington, for the Defendants.

[70] CADDICK v. COOK. Feb. 24, 26, 1863.

[S. C. 32 L. J. Ch. 769; 7 L. T. 844; 9 Jur. (N. S.) 454; 11 W. R. 395.]

A decree for foreclosure or for sale cannot be made in the absence abroad of a party entitled to one-third of the equity of redemption. The objection is not removed by the 15 & 16 Vict. c. 86.

In 1842 Richard Cook mortgaged some property in fee to the Plaintiff Caddick.

In 1853 Richard Cook died, having devised the mortgaged estate to trustees, upon trust to sell and divide the produce between his three children, Emma, Eleanor and Henry, equally. This bill was filed against two of the children (Eleanor and Henry) and against Ankrett, the surviving trustee, and Emma. As to the two latter, the bill stated that some years ago they went to reside in Australia and that they had not since been heard of. They were stated by the bill to be both out of the jurisdiction, and they had neither of them been served with the bill nor had they appeared. The bill prayed a sale and payment of the mortgage or for a foreclosure.

The case having been brought on for hearing,

Mr. E. K. Karslake, for the Plaintiff, asked for a sale of the estate and for the application of the produce in payment of the mortgage.

Mr. Phear, *contra*, for the Defendant, insisted that no decree could be made in the absence of a party interested in one-third of the equity of redemption. That a decree for foreclosure could not be made piecemeal, nor could a sale be directed in the absence of any of the parties interested in the estate, as no good [71] title could be made to a purchaser. He cited *Brown v. Blunt* (2 Russ. & Myl. 83). *Tanfield v. Irvine* (2 Russ. 149) was referred to.

Mr. Karslake, in reply. Even under the old practice, when a necessary party was out of the jurisdiction, the cause might be heard in his absence; *Rogers v. Linton* (Bunb. 200). But now, by the 15 & 16 Vict. c. 86, s. 51, the Court may adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property, and the 42d section relieves a Plaintiff from the necessity of making so many parties as formerly. If, however, the Court should think that the share of the absent party could not be affected, the Plaintiff is willing to take a decree for foreclosure limited to two-thirds of the estate.

Mr. Phear. That would throw the whole of the mortgage on the two-thirds of my clients.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this objection must prevail. I cannot make a decree for foreclosure against a person who is not before the Court, if I could make it as to one-third, I might equally make it against a person entitled to two-thirds. It is obvious also that I cannot foreclose an estate piecemeal.

I do not think that the objection is cured by the 42d section of the 15 & 16 Vict. c. 86, nor by the 9th rule of section 42. I do not think it applies to a case of this [72] description. I will allow this case to stand over generally, with liberty to apply.

Mr. Phear asked for costs.

Feb. 26. THE MASTER OF THE ROLLS. I must give the Defendant the costs of the day.

NOTE.—See *Fell v. Brown* (2 Bro. C. C. 276); *Farmer v. Curtis* (2 Sim. 466).

[72] ALDER v. LAWLESS. Feb. 19, 1863.

Bequest of an annuity to husband and wife "during their natural lives." The wife predeceased the testator. Held, that the husband was entitled to the annuity for his life.

The testator, amongst other bequests, made the following:—"I give and bequeath to James Alder and Britannia his wife, both of Wilmot Square, an annuity of £30 during their natural lives."

Britannia Alder died in May 1890; the testator survived her and died in September 1860.

By this suit James Alder claimed to be entitled to the annuity of £30 for his life. The executors alleged that it was doubtful whether the annuity did not lapse, by reason of the death of Britannia Alder in the testator's lifetime]

Mr. W. Pearson, for the Plaintiff, cited *Neighbour v. Thurlow* (28 Beav. 33).

Mr. Jno. Pearson, for the executors.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think it clear that the Plaintiff is entitled.

[73] BATE v. ROBINS. Jan. 20, 21, Feb. 12, 1863.

As to the proper mode in the absence of any agreement expressed or implied, of taking the partnership accounts of the bankers, as between a surviving partner and the estate of the deceased partner.

A firm of two bankers were accustomed to keep the accounts, both of the customers

and of the partners, at compound interest. One partner died. Held that, in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner and the estate of the deceased partner at compound interest.

An executor, who allows his testator's estate to become insolvent, by keeping an account at a banker's at compound interest, will not be allowed the accumulated interest in passing his accounts.

The question which arose, in this case, was as to the principle on which the accounts of a partnership ought to be taken, as between the late Defendant, Mr. Robins, and the estate of his former partner Mr. Bate.

Thomas Bate, the testator, and the late Defendant, W. Robins, carried on business as bankers, in partnership together, at Stourbridge, on terms of equal profit and loss. The accounts of all the customers at the bank were kept at compound interest on both sides, and the amount standing to each partner with the concern was kept, in like manner, at compound interest.

Thomas Bate died in October 1846, and the Plaintiffs were his legal personal representatives, his widow and son. At the death of Thomas Bate, the amount appearing to his credit in the books of the concern was the sum of £7189, 5s. 3d. This was arrived at by treating all the accounts of the customers with the bank as good debts, although a large class of debts due to the concern were more or less of a doubtful character. These went by the name of "*dead balances*," and the extent to which these might fail to be realized would therefore diminish the amount of the balance due to the estate to Mr. Bate.

After Mr. Bate's death no new account was opened in the bank books, but the balance due to him was con-[74]-tinued, as if all the outstanding debts were good. The accounts of the representatives of Mr. Bate and of the "*dead balances*" were continued as before at £5 per cent. with annual rests, and the losses from the "*dead balances*," as from time to time ascertained, were written off as bad debts, and the share of each partner was then debited with one-half of such loss. This mode of keeping the accounts was adopted by Mr. Ryland (a clerk) without any authority or agreement on the part of the Plaintiffs. It was, however, known to the Plaintiff, C. J. Bate (the son), who continued to be a clerk in the bank after his father's death.

In May 1851 accounts were rendered to the widow, and in June 1851 two meetings took place respecting them [see page 76].

In August 1851 Mr. Robins sold his business to the Birmingham and Midland Banking Company, and the accounts were afterwards continued by that company. Under these circumstances, the questions were, first, whether the mode adopted for keeping the accounts was the proper one, as between Mr. Robins and the estate of Mr. Bate, and, secondly, whether there had been any special agreement or binding acquiescence on the part of the Plaintiffs, which justified that mode of keeping the accounts.

THE SOLICITOR-GENERAL (Sir R. Palmer), Mr. Coleridge and Mr. Hallett, for the Plaintiffs.

Mr. Selwyn, Sir H. Cairns and Mr. C. Hall, for the Defendant.

THE SOLICITOR-GENERAL, in reply.

[75] Feb. 12. THE MASTER OF THE ROLLS [Sir John Romilly]. The first question I have to consider is, what is the right mode of taking the accounts between the partnership and the estate of the deceased partner, in the absence of any agreement, expressed or implied, varying the usual mode of taking such accounts? I am of opinion that, independently of any agreement, the proper mode of taking the accounts is, to ascertain the net balance of the assets over the liabilities of the concern, to divide this in equal portions, and to pay to the representatives of the deceased partner one-half of this amount, together with simple interest at £5 per cent. per annum until payment thereof. If the concern be thereupon wound up and the business sold, this is a simple process leading to no complication or difficulty. If the surviving partner carry on the business, then a new element is to be dealt with, which arises from the manner in which the debts due to the concern are to be treated. The surviving partner who continues the concern may, at his option, adopt,

as good debts, such of the debts due to the concern as he thinks fit, and those he must treat as assets in his hands, the remaining debts must be got in as speedily as can possibly be effected, and the amount derived from that source must be divided between the estate of the deceased partner and the surviving partner who continues to carry on the business.

I omit all mention of goodwill, because no claim is made in that respect in the present case; no value seems to have been attached to it by the representatives of the deceased partner.

If the course of ascertaining the share of the deceased partner, which I have above indicated, be not followed, [76] it must, in order to be binding between the parties, be founded on some agreement entered into between them, either expressed or to be implied from their dealings with each other. In either case, the burthen of proof lies on the person who seeks to enforce and obtain the benefit of such varied mode of taking the accounts.

On examining the evidence, I find no trace of any express agreement, or indeed of any agreement at all. Prior to the month of June 1851, for four years and eight months, there is a complete absence of any agreement which would bind the estate of the testator Thomas Bate, nor indeed is any such agreement alleged by the Defendant. What is alleged and to support which evidence is adduced is this:—That regard being had to the peculiar system on which this business was conducted, the mode in which the accounts were actually kept was, as against the estate of Thomas Bate, the correct mode of keeping such accounts, and that, whether correct or not, the Plaintiffs were cognizant of the fact and acquiesced in their being so kept.

In order to consider this point, some further reference to the accounts and to the conduct of the parties is necessary. The facts, as they appear to me to be established by the evidence, are as follows:—From the death of Mr. Thomas Bate, in October 1846, till 1851, nothing was done towards settling the amount due to his estate. In April 1851 the Plaintiff, Mrs. Bate, applied to the late Defendant Robins for an account of her husband's interest in the firm, and thereupon Mr. Perry, a clerk in the bank, in May 1851, made out four accounts which are proved in the cause. On the 2d and 5th of June 1851 two meetings took place, at the former of such meetings the Plaintiff Charles Bate, Mr. Oughton his uncle, Mr. Corser the solicitor of Mr. [77] Robins, and Mr. Perry were present, and at the second interview, the same gentlemen were present with the exception of Mr. Oughton. In August 1851 Mr. Robins sold the whole concern to the Birmingham and Midland Banking Company.

The Plaintiff, C. J. Bate, was a clerk in the bank at the time of his father's death in 1846, shortly after which he attained his age of twenty-one years; he continued in the service of the late Defendant Robins, in the character of cashier, until the business was disposed of to the Birmingham and Midland Banking Company in 1851, after which he acted in the same capacity for the company until the month of April 1853.

No account was opened in the books of the bank on the death of Thomas Bate in October 1846, or at any subsequent time, between the late firm of Bate & Robins and the continuing business carried on by Robins alone; but the balance of Thomas Bate was taken at what it would have been, in case all the "dead balances" had been good debts, and interest was calculated at £5 per cent. with yearly rests on such balances, and when the account was closed on any one of such "dead balances," and the securities had been realized, and the deficiency written off as a bad debt, then the share of each partner was debited with one-half of the loss appearing on the books, being the sum between the amount so calculated and the sum actually received. As I have already stated, this was not, in my opinion, in the absence of any agreement or binding acquiescence, the correct mode of keeping such accounts. They were, in fact, kept exactly as if Thomas Bate had continued to be a partner in the concern, except that his estate obtained no share of the profits of the continuing business. If the estate of Thomas Bate is bound by [78] this mode of keeping the accounts, it must be by reason of what took place at the meeting in June 1851, to which I have referred, or to the acquiescence of the Plaintiffs in such mode of keeping the accounts.

Upon the careful perusal of the evidence relating to what occurred on the two

meetings in June, and indeed to all the interviews spoken of by Mr. Corser, it appears to me that the mode of keeping the accounts never was the subject of any discussion or agreement; it seems to have been assumed that the mode adopted was the correct mode, and the discussion related to the mode of ascertaining what would be due on that principle, and what was to be done with the various outstanding assets of the old firm, and the mode of realizing several of the "dead balances." It is to be observed that Mr. Robins was not present at any of these meetings, that nothing, except the papers I have mentioned, was put into writing, that nothing was signed, and that the mode of keeping the account was adopted by Mr. Ryland (a deceased clerk), because it was considered by him to be correct, but without any authority or agreement to that effect on the part of the Plaintiffs or either of them. There is, in fact, no trace of any agreement binding either Mr. Robins or the Plaintiff, and the meeting in June 1851 is wholly inconsistent with the assumption that any such agreement existed.

In the absence of any such agreement, the only question that remains is, how far the Plaintiffs were bound by acquiescence in the mode of taking the accounts. It appears by the books, as made up and ascertained in June 1851, and by the documents proved in the cause, which were made out by Mr. Perry and particularly by the document C., that, on the 31st of December 1846, assuming also the "dead balances," [79] which amounted at that time to the sum of £61,000 or thereabouts, to be all bad debts, that on that day the net balance due to the estate of Mr. Thomas Bate would have been about £2000, that is, assuming that the debt set down to Thomas Hill of £1280 was an error, otherwise it would have been about £1400. The balance placed to the credit of Thomas Bate's estate was upwards of £7000, and interest has been allowed on this amount at £5 per cent. per annum with yearly rests. The amounts of the "dead balances" were kept in the books with yearly rests, and this was correct, because this was a course of dealing of the bank with their customers: accordingly, as against the debtors on such accounts, that mode of taking their accounts would shew the amounts due from them respectively.

But the manner in which it would operate against the estate of Thomas Bate, if the amount not recovered were to be charged against the estate of Thomas Bate, though not very obvious at the first sight, would soon be evident, and would tell very heavily. For instance, assume that one of these balances was, at the death of Thomas Bate, a sum of £10,000, the security for which, if then realised, would have produced £8000; the loss sustained by his estate would, on the mode I have stated that such accounts ought to be taken, be only £1000, if sold immediately, and if it did not ultimately produce more when sold, would still only be that same amount. But assume that, in the belief of Mr. Robins, it was settled that this security would ultimately produce more than £8000, and that therefore the ultimate realization of it was postponed for fourteen or fifteen years, then the nominal amount due on the dead balance might be £20,000, and if the security were then realized and produced £10,000, £5000 would be the loss to fall on the estate of Thomas [80] Bate. It is, in fact, a mode of compelling the estate of Thomas Bate to adopt half the "dead balance" as if he had been the original debtor to that amount. As long as he lived and carried on the business and participated in the profits, it did not materially affect him; but the moment that, on his death, though the real balance due to his estate is only £2000, £7000 is placed to the credit of it: the effect is this—the extra £5000 is in fact a mode of substituting his estate as a security for one-half of the debt; and although it be true that if the executors of Thomas Bate had drawn out nothing from this amount, it would have accumulated at compound interest in like manner, and that thus it would have balanced the "dead balance" set against it, yet its obvious tendency was to mislead the Plaintiffs, who would naturally have supposed that this was the amount or nearly so they might reckon upon, and which they might deal with as the balance due to their estate, unconscious of the fact that a large debt was accumulating against them at compound interest, simply because it was thought expedient to gain more for a security at a future time. If, by their postponement, the value of the security could have accumulated at compound interest, it would not have much mattered to the Plaintiffs, but this course of dealing has no effect, as against the continuing partner, similar to that which it has on the estate of the

deceased partner. The survivor has simply to pay with one hand what he received with the other, while to the estate of Mr. Bate and to those who are interested under the estate, it amounts to this—you have a nominal balance of £7000, of that you may draw out £2000, or if you retain it, it will accumulate at compound interest at £5 per cent. per annum; but if you draw out anything beyond that £2000, the sum you so draw out will accumulate against you at compound interest at £5 per cent. per annum; and if you [81] leave it in, it will simply balance so much of the “dead balances” as are accumulating, nominally, at that amount, as against you.

In addition to which, it appears by the evidence that this *extra* £5000 was, in a great measure, nominal, that Mr. Robins would not have permitted the Plaintiffs to exhaust the balance put to their credit, and his refusal to do so, beyond what he thought safe for the purpose of meeting the remaining “dead balances,” has occasioned this suit.

Not only is this not the mode in which the Court of Chancery takes the accounts of concluded partnerships, but even if an agreement were made for that purpose, it would require that so peculiar a method should be fully and accurately explained to and understood by the representatives of a deceased testator, before it could allow it to be binding upon them.

It is important to see to what result it might lead. Suppose an executor opened an executorship account with his banker, on the usual terms allowed by a banker, which is, giving interest on both sides, or at compound interest at £5 per cent. per annum, and I assume that the executor allows this account to be overdrawn, and that a balance became due against him, and that he allows this to go on so long as to exhaust the estate of the testator, and thus make an estate, which was solvent at his death, insolvent some ten years afterwards by this mode of dealing with it; would this accumulated amount of interest be allowed the executor in this Court, in passing his accounts in an administration of his testator's estate, against creditors or even against legatees? I apprehend that it would be contrary to all principle so to permit it, that it would be disallowed, [82] and that the executor would have to bear the loss himself.

Yet practically this is exactly what was done in the present case. The real actual balance due to the estate of the testator was about £2000, it is put down at £7000, but if more than £2000 is drawn out, the amount so drawn out will accumulate at compound interest against his estate. If it had been set at £2000, and if everything beyond that had been entered as an advance made by the banker, Mr. Robins, to the Plaintiffs, they would then have known what they were about, and it would have been at their option to have borrowed such money or not. But, as it stands, they are completely misled. It is not, in fact, a settlement of account between the late firm and the continuing partners, and it is a mode of inducing the legal personal representatives to open an account with the continuing partners in a most ruinous manner for the representatives, of which they are not likely to see the effect till after the lapse of a considerable time. When I say this I impute no fraud or deceit to anyone, it was done quite *bonâ fide*, it was thought right by the continuing partner and by his clerks, but, in my opinion, they were in error in so thinking.

The only additional question which I have to consider is, how far the Plaintiffs are bound by acquiescence. So far as the widow is concerned, I do not see any evidence affecting her, but as regards the son, the following facts are clearly proved:—he knew from the beginning that the account was so kept, he was a gentleman conversant with mercantile and banking accounts, and if he had considered the matter, he must have understood what the effect of it would be. His letters shew that he did so, and by one letter, dated the [83] 24th of August 1854, he urges the sale of the securities, because, he observes, *that these accounts are steadily increasing at compound interest*. I select this, as the strongest expression that I have found amongst them, and I think it unnecessary to go through the rest of the correspondence. This was the part of the case which, in my opinion, required most consideration, and for which purpose I reserved my judgment, and which I have fully considered, with a careful perusal of the evidence, in conjunction with it and the facts stated by Mr. Corser and the other witnesses for the Defendant.

My final conclusion is this:—Regarding the whole matter, the position of the

Plaintiffs, the absence of any settlement until 1851, when the Defendant was on the eve of selling the business, considering also the youth and, to some extent, the dependent situation of the Plaintiff C. J. Bate, I am of opinion that this knowledge, on the part of the testator's son, is not to be considered in this Court, as such an acquiescence in and adoption of this mode of taking the accounts, between the late firm and the continuing partners, as can bind the Plaintiffs into what, if I am correct, would amount to a *devastavit* of their testator's estate. Besides the various circumstances which weigh upon me and which I have already noticed, it is no immaterial circumstance to be considered that the late Defendant ceased to be a banker in August 1851, that since that time, although the account has been kept at the banking establishment of the Birmingham and Midland Banking Company, it is no account with them, or one in which they have any concern, it is simply an account between the executor of the late partner and the late Defendant, and it does not appear that at any time, certainly not after the sale to the Birmingham and Midland Company, it would have been open or possible [84] for the Plaintiffs to have paid a large sum of money into that account and have charged the Defendant with compound interest upon it. If, in September 1851, the Plaintiffs had raised, on other property of their testator, such a sum as £10,000, and paid it into the Birmingham and Midland Banking Company, not in order to open an account with that bank, but simply in order to increase the sum to their credit, in their account between them and Mr. Robins, I am of opinion that he would justly have been entitled to say, "I am not bound to pay interest at £5 per cent. with annual rests on the money so paid in;" and if I am right in this, it shews that, in this respect, the mode of keeping the accounts, contended for by the Defendants, is even worse than if it had been a mere common banking account between the Plaintiffs and Mr. Robins, in which case they might have paid in what they pleased and have obtained compound interest on their balance; but though the Plaintiffs could not adopt this course, yet the securities could not be realized without Mr. Robins' consent, and the longer he delayed that consent, the greater was the amount of compound interest which he was accumulating against the estate of his late partner. This system of taking accounts between the estate of a deceased partner and the surviving partner is radically defective, the more it is considered, the worse it appears, and, in my opinion, the acts of the Plaintiff have not bound them to adopt it. The consequence will be, that I shall make a decree to the following effect:—

This Court being of opinion, on consideration of the evidence given in this cause, that no account has been settled between the Plaintiffs or either of them and the late Defendant Robins, or between the Plaintiffs and the present Defendants, and being further of opinion that the Plaintiffs are not bound by the mode in which the accounts have been kept in the books of the late [85] Defendant William Robins:—take an account of all the partnership dealings and transactions of the firm of Bate & Robins, from the foot of the last account settled between the said testator John Bate and the late Defendant William Robins, and let the balance, if any, due to the estate of the testator at the time of his decease be ascertained. And take an account of what has been paid by the late Defendant Robins to the Plaintiffs or either of them, or by their or either of their order or for their or either of their use, since the decease of the said Thomas Bate; and in taking such accounts, let such sums only as were actually received and got in respect of the accounts in the pleadings in this cause entitled "*the dead balances*," and which were not taken to by the said William Robins in continuing to carry on his trade or business of a banker, be treated as assets of the said partnership of Bate & Robins, and let those sums, respectively, be treated as such assets only from the times when the same were got in or received respectively; and in taking such accounts the estate of the said Defendant William Robins is to be charged with simple interest at £5 per cent. per annum on such balances, if any, which may appear, after the decease of the said Thomas Bate, to have been due from Defendant William Robins, from time to time, to the estate of Thomas Bate; and in like manner, in taking such accounts, the estate of Thomas Bate is to be charged with simple interest at £5 per cent. per annum on all balances, if any, which appear to have been due, after the decease of the said Thomas Bate, from the Plaintiffs or either of them to the Defendant Robins. And the Defendants are to admit assets of William Robins

sufficient to answer what, if anything, on taking such accounts may appear to be due from him; or take an account of his estate, &c.

NOTE.—See *Boddam v. Ryley*, 1 Bro. C. C. 239; 2 Bro. C. C. 2; 4 Bro. Parl. Ca. 561, and *Fergusson v. Fyffe*, 8 Cl. & Fin. 121.

[36] CROSSKILL v. BOWER. BOWER v. TURNER. Jan. 26, Feb. 11, 1863.

[S. C. 32 L. J. Ch. 540; 8 L. T. 135; 9 Jur. (N. S.) 267; 11 W. R. 411. See *Barfield v. Loughborough*, 1872, L. R. 8 Ch. 7, *Daniell v. Sinclair*, 1881, 6 App. Cas. 184.]

Where the account between a banker and his customer is kept at compound interest, and the customer dies, the final balance at his death, in the absence of contract, carries no interest. It is the same where the balance is in the customer's favor, and the banker dies, or ceases to carry on business, or becomes bankrupt.

A bankers' account was kept at compound interest. In 1847 the customer gave the bankers a security for all moneys then due or thereafter to become due, "with interest for the same after the rate of £5 for every £100 by the year." In 1855 the customer assigned all his estate to trustees for the benefit of his creditor, and his banking account ceased. Held that, under this security, the bankers were entitled to compound interest down to the date of the creditors' deed, but to simple interest only afterwards.

The rule of the Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as trustees, derive any pecuniary benefit to himself.

Three trustees, two of whom were bankers, were empowered to carry on a business and to borrow money "from any bankers or other persons" for that purpose. The bankers made advances of money to the trust at compound interest. Held, that, having regard to their fiduciary character, they could make no profit, and were entitled to simple interest only on their advances.

These two suits, which involved similar questions, were heard together, and the Court declared one judgment only applicable to both.

It appeared that, in 1847, and previously thereto, Messrs. Bower & Hall carried on the business of bankers at Beverley, at which place Mr. Crosskill carried on the business of iron founder and agricultural implement maker. Mr. Crosskill was a customer of the bankers, with whom he had two accounts, one as iron founder and the other as partner of a firm of Malams, Crosskill & Co. of Hamburgh.

It was the custom of Messrs. Bower & Hall to keep their accounts with their customers at £5 per cent., making annual rests, and this mode had been followed in the accounts of Mr. Crosskill, and had been assented to by him.

In 1847 both these accounts were considerably overdrawn, and on the 15th of December 1847 Mr. Crosskill conveyed his interest in some gasworks, and [87] his mill and foundry and other property, to Messrs. Bower & Hall, to hold by way of mortgage for securing the payment to the bankers of all moneys then due or thenceforth to become due to them; in the first place, for such sum or sums as then were or thereafter should be so due from William Crosskill on his separate account, and in the next place, for such sum or sums as then were or thereafter should be so due from the firm of Malams, Crosskill & Co. on their co-partnership account, with interest for the same after the rate of £5 for every £100 by the year.

The dealings between Mr. Crosskill and the bankers continued, but Mr. Crosskill having in 1852 commenced a separate business of miller, two accounts were then opened with him and the bank, viz., "the general account" and "the mill account."

In January 1855 both these accounts were greatly overdrawn, and Mr. Crosskill executed two creditors' deeds, dated the 23d and 24th of January 1855, by which he conveyed all his real and personal estate to Messrs. Bower & Hall and Thomas Ellery Turner (their cashier), upon trust to realize and pay the expenses, and then to pay

the creditors of Mr. Crosskill rateably, and to pay the residue (if any) to Mr. Crosskill. The deed provided that the trustees might, "in their or his uncontrolled discretion, continue to carry on, for any length of time, either in their own names or in the name of Mr. Crosskill, or in the name or names of any other person or persons, so far as they lawfully might, as they should think best, all or any of the businesses and trades which he, Mr. Crosskill, had theretofore carried on, either at Beverley or elsewhere," &c. And also that the trustees "might, from time to time, pay all expenses incident to carrying on such trades and businesses, out of the trust [88] money and premises, or from time to time *borrow at interest, and with or without any security, from any bankers* or other persons, any sums of money, which the said trustees or trustee might think proper, for the purpose of carrying on the said businesses or paying creditors, in part or in full, or for any of the purposes of the trusts or powers therein contained, and without the said trustees or trustee being, in any manner, liable or accountable for or by reason of any pecuniary or other loss or injury which might happen to Mr. Crosskill or any of his creditors thereby."

On the execution of these deeds, Mr. Crosskill ceased to carry on business, and he neither paid into or drew out of the bank any other moneys, and the account was virtually closed. The trustees of the creditors' deeds, however, opened two accounts at the bank, one called the mortgage account and the other the general account, in the names of "The Trustees of William Crosskill." They carried on the mill business until 1860, and they still carried on the business of iron founders.

Accounts were furnished by the trustees to Mr. Crosskill in October 1851, when it appeared that they had kept their banking accounts with Messrs. Bower & Hall, and had obtained from them advances of money for the purposes of the trust, for which the bank had charged the trust estate with interest at £5 per cent., and with annual rests. The right thus to charge compound interest was contested by Mr. Crosskill and gave rise to these two suits.

The first suit of *Crosskill v. Turner* was instituted by Mr. Crosskill against the bankers, for the execution of the trusts of the creditors' deeds of 1855, and to take the accounts. It asked a declaration that, in taking the [89] accounts, the banking firm were not entitled to be credited with compound interest, but with simple interest only, at the rate of £5 per cent. per annum on the moneys due to them at the date of the indenture of 24th of January 1855, and on the moneys (if any) since advanced by them to the trustees of the same indenture.

The second suit of *Bower v. Turner* was instituted by Messrs. Bower & Hall against Thomas Ellery Turner, Mr. Crosskill and the new partners of the banking firm, for a foreclosure of the mortgage of the 15th of December 1847. It alleged that about £81,000 was due to the bank, with interest from the 31st of December 1861, but that Mr. Crosskill alleged that it was made up in part by computing compound interest, and that the Plaintiffs were not entitled to compute interest on that principle. The Plaintiffs charged that the debt was contracted with them as bankers, and that the balances had been properly computed on the principle of compound interest, according to the custom of the Plaintiffs and country bankers generally, and that with the knowledge of Mr. Crosskill. The bill also contained the following statement:—

"After the execution of the indenture of the 24th of January 1855, the trustees had not funds in their hands sufficient to enable them, conveniently, to pay the interest from time to time accruing on the balances due to the Plaintiffs on their aforesaid security, and therefore, for the benefit and convenience of the trust estate, T. E. Turner, on behalf of himself and his co-trustees, arranged with the Plaintiffs that the interest on the moneys due to the Plaintiffs, on their aforesaid security, should be continued to be computed and added to the amount of the Plaintiffs' debt, in the same manner as the same had been computed and added prior to the date of the in-[90]-denture of assignment. And in consequence of such arrangement, the Plaintiffs did not require the regular annual payment of the interest accruing due to them, as would otherwise have been the case. The Defendant W. Crosskill was aware of such arrangement and did not offer any objection thereto until the beginning of the present year."

"The Plaintiffs are advised and insist that the said T. E. Turner had full power,

under the provisions of the indenture of assignment, to enter into such arrangement with the Plaintiffs, and that the arrangement was and is valid and binding."

THE SOLICITOR-GENERAL (Sir R. Palmer), and Mr. L. J. Humphreys, for Mr. Crosskill, argued that his banking account closed on the 24th of January 1855, and that the balance, being then ascertained, carried simple interest only, under the mortgage deed of 1847, as it would in the case of the death, bankruptcy or insolvency of a customer of the bank; *Boddam v. Ryley* (1 Bro. C. C. 239); *Fergusson v. Fyffe* (8 Cl. & Fin. 139).

Secondly, that the bankers, being trustees under the creditors' deed, could not borrow of themselves at compound interest; that they could not derive any profit from their fiduciary duties; *Bentley v. Craven* (18 Beav. 75); *Broughton v. Broughton* (5 De G. M. & G. 160, 164); or place themselves in a position in which their interest conflicted with their duty. Here the trustees were dealing with themselves and not with strangers, and they might, for their own interest, postpone the realization of the assets and the winding up of the trusts, far beyond what was beneficial to their *cestuis que trust*.

[91] Mr. Baggallay and Mr. Fry, for other parties in the banking firm.

Mr. Selwyn and Mr. Bury, for Bower & Hall, argued that the mode of keeping the accounts with rests, having been originally adopted between the parties, must be continued until those accounts were closed by payment of the balance due; *Rufford v. Bishop* (5 Russ. 346); *Lord Clancarty v. Latouche* (1 Ball & B. 420).

Secondly, that the special terms of the deed justified the trustees in borrowing from the bankers on the usual terms, and that they could not be said to have derived any profit from their office, by advancing money on the same terms as any other bankers would have done.

THE SOLICITOR-GENERAL, in reply.

Feb. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. The first question I have to determine is, the propriety of allowing compound interest on the principal secured by the mortgage. In considering this point it is necessary to see whether it is concluded by any contract between the parties themselves, or whether their dealings, in the present case, amount to any implied agreement or acquiescence on their part. For this purpose it becomes necessary, in the first instance, to examine the mortgage deed of December 1847, in conjunction with the course of dealing between the parties themselves. This deed conveys certain property of the Plaintiff to Messrs. Bower & Hall, bankers at Beverley, to hold the same, by way of mortgage, to secure the payment [92] of all moneys then due or thenceforward to become due to them on the banking accounts, "with interest for the same after the rate of £5 for every £100 by the year."

It was the custom of Messrs. Bower & Hall to keep their accounts with their customers at £5 per cent. making annual rests, and Mr. Crosskill's accounts with them had been so kept and had been assented to by him. As long, therefore, as he carried on business, this was the proper mode of keeping the accounts, and this continued down to the execution of the deed of January 1855. But, on the execution of that deed, he ceased to carry on business, he ceased to pay any moneys into or to draw any moneys out of the bank, his account ceased as an ordinary mercantile current account, and the final balance due to the bank was then ascertained.

I am of opinion that, after that period of time, only simple interest at £5 per cent. per annum can be claimed under this mortgage deed, and that the Messrs. Bower & Hall are not entitled to take the account making annual rests and charging interest on the balance so augmented, year by year. Unless the interest were given by the words of the mortgage deed, and in the absence of any other agreement for that purpose, I am of opinion that only simple interest can be charged. I look at it in the same light as if a customer, keeping an account with the bank, had died; if, in that case, no fresh account had been opened by his executor, all that the bankers could have claimed against his estate would have been the balance due at his death, which would be a mere simple contract debt and not carrying interest at all. The arrangement between a customer and the bank terminates on his death, and in the absence of any contract varying it, all interest would cease at that period. It would be exactly the same if [93] the balance were in his favor, and the bankers had died or ceased to

carry on business, or had become bankrupt; in those events, the balance would have to be ascertained at that period and the interest would cease.

But this stoppage of interest is not confined to the case of death; a customer may say to his banker "I close my account with you, and I shall have no further dealings with you from this day," thereupon the balance of the account, whichever way it may be, would have to be ascertained at that period, and then all interest would cease. It depends on the pleasure of the bankers, either to enforce payment of the balance due to them or to abstain from doing so, or to obtain such security for it as they may be able. If the last course were adopted, a new contract would be entered into, which would regulate the matter of interest.

In this case, the deed of mortgage is exactly such a contract, and this is a continuing security for a fluctuating balance, to be kept on the former terms of customer and banker; but when the final balance is ascertained, it stops the dealings as between customer and banker, and it provides that the balance so ascertained shall bear interest at £5 per cent. per annum; but it makes no direction as to compound interest or annual rests, and it contains no reference to any custom of bankers. It is the contract between the parties which regulates how the debt is to be secured. As long as the account was kept as an open current account, it secured a floating balance, regulated by the custom of bankers and the dealing between the bank and the particular customer; but as soon as the account was closed as a current mercantile account, then the balance ceased to be the previous fluctuating balance, and upon that ascertained balance the deed gives only £5 per [94] cent. per annum. After that, the account remained open for the purpose of liquidation, but not for the purpose of receiving or paying anything. After the 24th of January 1855, as I understand the evidence, Messrs. Bower & Hall would not have honored any cheque drawn by Mr. Crosskill, and to have enabled him to do so, a fresh and distinct account must have been opened between him and the bank.

It is argued, on behalf of the Defendants, that a bankers' account is not closed until it is paid, and this is undoubtedly true, in one sense of the term, but its character is essentially altered. When a merchant who keeps an account current with his banker dies, it ceases to be a common mercantile account current, and becomes a simple contract debt due from his estate, on which, in the absence of any contract, no interest can be charged. It is true that, in many cases, a question of some nicety, in point of fact, might arise, as to whether the account was closed or not, in the sense in which I have used the term, and this question the Court might have to determine on evidence; but, in the present case, no difficulty arises on this point, for it is the common case that, in the sense in which I have explained the term, the account was closed with the execution of the deed of 24th of January 1855, after which time, it is regulated by the mortgage deed, which gives simple and not compound interest at £5 per cent. per annum.

On this point the deed of January 1855 has no application; it has a distinct and important application to the question of the interest to be allowed for moneys raised by the trustees; but it contains nothing that can affect the question as to whether, on the balance secured by the mortgage deed, interest is to be calculated at compound interest or at simple interest.

[95] This, which I consider to be the principle regulating the accounts of this character, is, in my opinion, very distinctly laid down by the authorities on this subject. The case of *Fergusson v. Fyffe* (8 Cl. & Fin. 139), is the only one of those cited to me which it is necessary to refer to. In that case, the House of Lords held, that the account between a customer and his banker in India was closed, for the purpose of compound interest, on the death of the customer. It is true that, in that case, the customer had become of unsound mind in 1793, when the balance was in his favour; but, as the bank had redeemed an account on his death in 1810, charging themselves with compound interest up to that time and admitting a certain balance to be then due from them, they were bound by that account, which they did not contest, and therefore nothing turned on the rate of interest during that period, but, from 1810, the bankers were held to be liable only for simple interest, and it was distinctly laid down, in that case, that no title to compound interest could exist without a contract or a custom, and their Lordships also held (which is more im-

portant, as it relates to a case which, being in India, was one to which the usury laws then in force did not apply), that a valid custom for compound interest could not exist, except in mercantile accounts for mutual transactions. If this remark be considered as confined to this country, at a time when the usury laws were still in force, it is to be observed, that the repeal of those laws does not make a custom valid which was invalid before, nor is any custom attempted to be proved, in this case, for the charging of compound interest when the account ceases to be an account current for mutual transactions. Custom, therefore, cannot be set up, in this case, and contract there is none.

[96] It is said that this view of the matter is inconsistent with other decided cases, and I am referred to *Rufford v. Bishop* (5 Russ. 346), and to *Lord Clancarty v. Latouche* (1 Ball. & B. 420). If this were so, I should be compelled to follow the decision of the House of Lords; but in truth, the cases are not inconsistent.

Rufford v. Bishop (5 Russ. 346) only decided that, in a case between customer and banker, where the account was kept with annual rests, and a mortgage had been given for the fluctuating balance, which might be due between the banker and his customer at the close of their account, it was perfectly legal that the final balance, though kept at compound interest, should, when ascertained, be charged on the lands. All that this case determines in favor of Messrs. Bower & Hall is, that the mortgage given in 1847, is a good mortgage for the balance due from the Plaintiff in January 1855, although that balance consisted partly of principal and partly of interest calculated with annual rests, which is admitted on both sides to be correct. But the point I am now considering, viz., whether, after the final balance had been ascertained, the interest could still go on and be calculated at compound interest, did not arise in that case, at least it was not contended for, and, as far as the words of the judgment go, would seem to be negatived by the words used by Sir John Leach.

In *Lord Clancarty v. Latouche* (1 Ball. & B. 420), the point I am now considering does not seem to have been argued, and as far as may be gathered from the Lord Chancellor's judgment, he treated the matter solely as an account between Mr. Conolly, who had died in 1803, and [97] the Defendants, the bankers. The decree in the cause was made five years after his decease, and the Master's report, allowing compound interest on the balance due at his death, had been disallowed by the Lord Chancellor. After this, the Master made a fresh report, finding a large balance due to the estate of Mr. Conolly; the case came before the Court on exceptions and on a petition to the Lord Chancellor to rehear his former order, and on that occasion, the Lord Chancellor varied his order and directed the accounts to be taken with annual rests, on the assumption that Mr. Conolly must be taken to have agreed at the end of each year, that this interest should be treated as capital. It certainly does seem as if the Court had made no distinction in the mode of taking the accounts before and after Mr. Conolly's death; but judging from four lines in page 429, it does appear that the executors of Mr. Conolly had carried on the account with the bankers on the same principle as a mutual account current, and also that it was for their interest that the account should be continued on the same principle, as they had made advances by which the principal had been reduced.

Lord Manners says (1 Ball. & B. 429), "In directing the accounts I am much inclined to adopt the principle on which the Defendants furnished the accounts; it is so far fair that the Plaintiffs" (that is, the executors of Mr. Conolly) "*get interest on their advances* by their being applied to reduce the principal."

On the first point, therefore, viz., the manner in which the account of the mortgage debt is to be calculated, I am of opinion, that in making the decree for foreclosure or redemption, the debt, consisting of principal, interest [98] and costs, is to be ascertained by calculating simple interest at £5 per cent. per annum from the 24th of January 1855.

The second point, on which the question of whether interest is to be allowed with yearly rests, arises in this way:—The trustees, in order to carry on and manage the business which was intrusted to them by the deed of 24th of January 1855, had large powers of borrowing money from bankers; and if they had, when occasion required it, opened an account with a banker and obtained an advance on the usual bankers' terms, of calculating interest at £5 per cent. with compound interest, it would

have been difficult to have held that they were not entitled to charge this against the Plaintiff; but the difficulty here arises from the circumstance, that they are both trustees and bankers, and that, in their character of trustees they have borrowed money from themselves in their character of bankers, and that they have, as bankers, charged themselves, as trustees, with interest at £5 per cent. on the annual balance to the debit of themselves, as trustees, in the books of the bank, such account of balance being composed of principal and interest.

The question is, whether having undertaken the office of trustees, it was open to them to adopt this course. It is argued that, in fact, the Plaintiff's estate had the benefit of this course of proceeding, and that, if the money had been obtained from any other banker, it would have been upon less advantageous terms, or fettered with securities, impediments and difficulties which would have been very injurious to the trades. I think the rule of this Court is imperative, that, in the absence of any contract for that purpose, no person can, by acting as a trustee, derive any pecuniary benefit to [99] himself. The cases are very numerous, the principle is clearly laid down in them, and is of universal application. It is well expounded in the case of *Broughton v. Broughton* (5 De G. M. & G. 164), which was cited to me, where, after stating the rule fully and as applicable to all cases, the Lord Chancellor observes, "The result therefore is, that no person in whom fiduciary duties are vested shall make a profit of them by employing himself."

In this case, Messrs. Bower & Hall, the trustees, have sought to make a profit of their fiduciary duties, by employing themselves as bankers, and by advancing, in that character, money to be repaid at compound interest. In the absence of a contract for that purpose, either express or implied, I am of opinion that they are not entitled so to do.

I have then to examine whether there exists any contract express or implied enabling them so to do. The only express contract between the Plaintiff and Defendants is the deed of 24th of January 1855, and the passage in it which bears on this subject is the following [see *ante*, p. 87]. The clause I have read does not, in my opinion, justify the trustees in lending to themselves, and I cannot look at this case in any different point of view than I should do, if the trustees had been private gentlemen instead of being bankers, the same duties attach to them and they are under the same obligations. The power to borrow from *any* banker does not mean that they could themselves, as bankers, advance the money. It may be, for aught the Court can now ascertain, that from other bankers they might have obtained an advance at simple interest, or that they might have obtained a loan from persons not [100] bankers, who might have advanced funds at simple interest at £5 per cent. on such security as the estate of Mr. Crosskill in their hands could have afforded. Whether this be so or not cannot be now ascertained, for the trustees have not made the attempt, but have considered themselves justified in advancing the money required. But this very impossibility of ascertaining whether it was or not necessary to do so, shews the reason of the rule. In order to entitle them to do so, the deed ought expressly to have authorized them, as bankers, to advance such moneys as they might think fit in the ordinary manner of an advance of bankers to customers; but the deed contains no such power. The consequence is, that there is no express agreement authorizing the trustees to advance money at compound interest to carry on the concerns intrusted to them.

I have then to consider whether there be any implied agreement to this effect. The only agreement that could be implied, in the circumstances of this case, and indeed the only implied agreement that is alleged by the Defendant is, the knowledge of the Plaintiff that they were so kept and his acquiescence in their being so kept. If this fact had been established, I should have adopted the conclusion come to by Lord Manners in *Lord Clancarty v. Latouche* (1 Ball & B. 420), and I should have held that Mr. Crosskill was bound, by seeing the accounts so kept and making no objection on the subject, to admit the claim. But, on examining the evidence on this point it appears that Mr. Crosskill deposes, positively, to his total ignorance of the fact that the accounts were so kept, until the accounts were furnished on the 7th of October 1861, and that he thereupon immediately objected to them. On the other hand, the evidence on [101] the part of the Defendants wholly fails in establishing any knowledge in the Plaintiff that the accounts were so kept, and as the burthen of proof lies

on the Defendants to establish this fact, I should, even in the absence of any express denial on the part of the Plaintiff, be unable to come to the conclusion that he had so acquiesced.

With regard, therefore, to this second point, as to the mode of calculating interest, I am compelled to hold that, by law, the trustees are not entitled to claim more than simple interest at £5 per cent. on the sums advanced by them, and that no agreement express or implied exists which entitled them to do otherwise.

[101] COTCHING v. BASSETT. Dec. 3, 4, 9, 1862.

[S. C. 32 L. J. Ch. 286 ; 9 Jur. (N. S.) 590 ; 11 W. R. 197. See *Russell v. Watts*, 1883-1885, 25 Ch. D. 579 ; 10 App. Cas. 613 ; *M'Manus v. Cook*, 1887, 35 Ch. D. 696.]

Any alteration of ancient lights, although not prejudicial to the owner of the servient tenant, gives him a right to obstruct them.

The owner of a dominant tenement, in the course of rebuilding, materially altered his ancient lights ; this was done after communication with the owner of the servient tenement, and with the knowledge and under the inspection of his surveyor, but without any express agreement. Held that, in equity, the lights, as altered, could not be interfered with, and a perpetual injunction was granted.

The Plaintiffs were the lessees of a house and premises, being No. 32, on the east side of Wood Street, Cheapside.

The Defendant was the owner of the adjoining house and premises on the north, being No. 33 in the same street.

The Plaintiffs' and Defendant's premises both consisted of houses abutting on the street, with a yard at the back separated by a wall some twelve or fifteen feet high. On the Plaintiffs' yard there were buildings about ten feet high at a distance of six and a half feet [102] from the party-wall. And on the Defendant's yard there were buildings whose heights varied from thirteen feet to twenty-three feet. The open space above these buildings in the yards afforded light and air to the backs of the two houses and to the back premises. The Plaintiffs' lights derived from the Defendant's premises were admitted to be ancient lights. It is also necessary to state that the Plaintiffs' yard was shut in on the south and east by walls about forty-seven feet high.

In 1861 the Plaintiffs were desirous of rebuilding their premises and of altering their ancient lights, and plans were prepared by Mr. Laws their architect, which were submitted to Messrs. Tillott & Chamberlain, the Defendant's architects, but they did not concur and no final agreement was come to on the subject.

In addition to this, the Plaintiffs, who were also tenants of No. 33, were desirous of extending their occupation to Lady Day 1862, in order to enable them to make the contemplated alterations in No. 32. After some negotiation the Plaintiffs and Defendant signed an agreement, dated the 4th of October 1861, by which it was agreed as follows :—"That the Plaintiffs, in consideration of the Defendant allowing the Plaintiffs to continue tenants of the premises, No. 33 Wood Street, from the 29th day of September 1861, to the 24th day of March 1862, would forthwith pull down and rebuild the party-wall between Nos. 32 and 33 Wood Street, in accordance with the plan and section thereto annexed, on a good, solid and sufficient concrete foundation, it being at the same time understood, that the east end of such party-wall should be of the same thickness in extent as the portion of the party-wall adjacent to it westward. And further that they would build up all flues," &c., &c. [103] And further, "that they (the Plaintiffs) would not encroach upon or attempt to interfere with any legal or other rights of the Defendant ; and that they would not interfere with the Defendant's rights (if any) to raise the eastern portion of the party-wall between the then present lead flats." The Plaintiffs agreed to pay £150 for rent ; and also that they would complete the whole of the work thereinbefore specified, or referred or incident thereto, before the 24th day of March 1862, to the entire satisfaction of Messrs. Tillott & Chamberlain and Mr. Laws.

In the same month of October 1861, the Plaintiffs pulled down and rebuilt the back premises, and the improvements were completed by Lady Day 1862. During the progress of the work, it was constantly inspected by the Defendant's architect Mr. Tillott, and there being a high wall of about forty-seven feet high to the south of the Plaintiffs' premises, and the party-wall of fourteen feet ten inches at the north, a line of light was drawn from the top of that wall on the south to the top of the party-wall on the north, above which it was settled by Tillott, Law and the builder, that the Plaintiffs' elevation should not transgress.

The Plaintiffs' alterations and improvement were completed by Lady Day 1862, and thereby the buildings in the Plaintiffs' yard were raised, though not above the line of light before alluded to, and the Plaintiffs' ancient lights were considerably varied and increased.

On the 16th of July 1862 the Defendant gave the Plaintiffs notice, under the Metropolitan Building Act (18 & 19 Vict. c. 122), of his intention, at the end of three months, to raise the party-wall between No. 32 and No. 33 to a height of thirty-four feet ten inches above the level.

[104] The Plaintiffs instituted this suit in October 1862, alleging that this would most seriously obstruct the access of light and air to their premises, and praying an injunction to restrain the Defendant from raising the party-wall.

Mr. Southgate and Mr. A. G. Marten, for the Plaintiffs, argued, first, that the Defendant had acquiesced in, encouraged and sanctioned the alterations made by the Plaintiffs in the ancient lights, upon the faith of which the Plaintiffs had made a great outlay in rebuilding and altering their premises. That consequently the Defendant was precluded, in equity, from insisting that the Plaintiffs by altering their ancient lights had, at law, forfeited all right to them; *The East India Company v. Vincent* (2 Atk. 82); *Leves v. Sutton* (5 Ves. 687); *Short v. Taylor* (2 Eq. Ca. Ab. 522); *Bankart v. Houghton* (27 Beav. 425); *The Duke of Devonshire v. Eglin* (14 Beav. 532); *Rochdale Canal Company v. King* (16 Beav. 630); *Somersetshire Canal Company v. Harcourt* (2 De G. & J. 596); *Duke of Beaufort v. Patrick* (17 Beav. 60); *Mold v. Wheatcroft* (27 Beav. 510); *Powell v. Thomas* (6 Hare, 300).

Secondly, that at all events, upon the Plaintiffs' restoring or undertaking to restore the ancient lights to their former state, the Court would then restrain the Defendant from interfering with them; *Hutchinson v. Copestake* (9 C. B. Rep. (N. S.) 863); *Jones v. Tipling* (11 C. B. Rep. (N. S.) 298); *Binckes v. Pash* (11 C. B. Rep. (N. S.) 324); *Cooper v. Hubbuck* (30 Beav. 160, and 12 C. B. (N. S.) 456); *Renshaw v. Bean* (18 Q. B. Rep. 112); and see *Weatherly v. Ross* (1 Hem. & M. 349).

[105] Mr. Baggallay and Mr. De Gex, for the Defendant, argued that the Defendant had in no way assented to the alteration of the ancient lights; that the Plaintiffs had varied and extended them in their own wrong, knowing that they had no right so to do; that they must therefore take the consequences of the wrongful act; *Clare Hall v. Hardey* (6 Hare, 273).

Secondly, that all the Defendant's rights had been expressly reserved to them by the terms of the agreement, by which the Plaintiffs agreed, "that they would not encroach upon or attempt to interfere with any legal or other rights of the Defendant, and that they would not interfere with the Defendant's rights (if any) to raise the eastern portion of the party-wall between the then present lead flats."

Thirdly, that by the alteration of the ancient lights, the Defendant had acquired, at law, a right to block out the whole, and that there was no equity to restrain the exercise of this legal power; *Garritt v. Sharp* (3 Adol. & Ell. 325); *Moore v. Rawson* (3 Barn. & Cr. 332).

Mr. Southgate, in reply, cited *Dann v. Spurrier* (7 Ves. 231-5).

Dec. 9. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case is, whether the Plaintiffs are entitled to an injunction to restrain the Defendant from raising the party-wall between No. 32 and No. 33 Wood Street, Cheapside.

The Plaintiffs are the lessees of No. 32, and the De-[106]-fendant is the owner of No. 33. The Plaintiffs were also lessees of No. 33, their tenancy of which expired at Michaelmas 1861, but which was extended to Lady Day 1862, in order to enable the Plaintiffs to make certain alterations in No. 32. At the back of these premises were two yards separated by a continuation of the party-wall some twelve or fifteen feet

high. The Plaintiffs wanted to alter their ancient lights looking into the back yard and improve their premises. According to the latest decisions, if they had done so without the sanction and permission of the Defendant, the Plaintiffs would have lost their right to preserve their own ancient lights, and the Defendant would have acquired what he did not before possess, namely, the right of raising his party-wall to any height and of excluding all the Plaintiffs' light.

In fact, the present state of the law would seem to establish that any alteration in ancient lights, although not prejudicial to the neighbour, gives the neighbour a right to obstruct them, and that no person possessing lights overlooking a neighbour's property can alter them, in any respect, without the permission of the neighbour.

In this state of the law, and before taking any steps, the Plaintiffs applied, by their surveyor, to the Defendant, for his permission to make certain alterations and improvements in his premises; thereupon several interviews took place between the surveyors of the Plaintiffs and the Defendant, and these ultimately ended in an agreement of the 4th of October 1861, executed by both parties [see *ante*, p. 102].

Thereupon the Plaintiffs proceeded to effect their improvements, which they completed by Lady Day 1862. They were examined all along by Tillott, and [107] were so arranged as not to exclude Defendant's light, and there being a high wall to the south of Plaintiffs' premises, they drew a line of light from the top of that wall to the top of the party-wall which divided the yards, in order that no part of Plaintiffs' elevation might transgress beyond that line of light. This was settled by Tillott, Laws and the builder.

Soon after this, and in May following, the Defendant gave notice of his intention to raise this party-wall between the two yards, thereby wholly excluding all the light from the north from entering the Plaintiffs' windows which look east and those which look north, and, in fact, making them quite dark.

The Defendant's case is that the Plaintiffs, by this course of proceeding which they have adopted, have conferred on him a right which he admits he did not before possess, namely, that of excluding all the Plaintiffs' light, by raising the party-wall to any height he pleases. If the Defendant be entitled to any such right, after the communication took place between the parties and the agreement of the 4th of October 1861, it would be necessary for him to shew that he very plainly and distinctly intimated this intention to the Plaintiffs, after, at their request, they were permitted by the Defendant to make the improvements designed and approved of by his surveyor.

The Defendant refers to the agreement of the 4th of October 1861, and says that the words that the Defendant "will not interfere with the Defendant's rights (if any)," were intended to meet this case. If the Defendant really, at the time, intended to use the privilege to be acquired by the acts of the Plaintiffs, as I have stated, it was incumbent on him to express this clearly. [108] This is certainly not done by these words in the agreement. *Prima facie* they mean rights then existing, that is, at the date of the agreement, and not rights to be acquired by reason of the acts of the Plaintiffs. Mr. Tillott says they were introduced for this purpose, but the solicitor who prepared this agreement does not say so, and I am confident that any solicitor of this Court would, in drawing this agreement, if he had intended such a serious consequence to follow, have made this clear. The solicitor is not called to give evidence, and it rests on Mr. Tillott's assertion expressly contradicted on the other side.

My opinion is, that the words do not bear that meaning and cannot be so construed, even in the absence of express contradiction on the other side. *A priori*, it would be supposed that so serious a consequence must have been fully discussed by both sides, if it had entered into their minds. But it is manifest, on the evidence on both sides, that no such right to be acquired by the act of the Plaintiffs was made the subject of conversation between the parties. The only passage which tends in that direction is in Mr. Tillott's affidavit, in which he says:—

"I deny that I acquiesced in such last proposal of Mr. Charles Laws, and I say that I always objected to the Plaintiffs raising the said buildings above their original height, and at one or more of the said interviews I distinctly told the said Charles Laws that if the Plaintiffs should open any additional lights in the said building, the

Defendant would insist upon and exercise his right of raising the party-wall to a greater height than its then existing height."

This at best is ambiguous, and is expressly contradicted by the witnesses on the other side. When [109] I contrast this with the reply given by Mr. Laws, and with the acknowledged facts of the case, I feel convinced that this remark was never said in such a manner as to convey to the mind of the Plaintiffs or their agents the meaning now sought to be attached to it. The whole course of proceeding is wholly inconsistent with any such meaning having been conveyed to the Plaintiffs. In the first place there was the letter of the 5th of September 1861; then four plans were submitted before the agreement of the 4th of October 1861; these plans shewed an obvious alteration of the ancient light. If the Defendant at that time intended to obtain an advantage not then possessed by him, and to derive it by reason of the acts which the Plaintiffs might be induced to perform, it was incumbent on him to express this to the Plaintiffs in such a manner as that it could not be misunderstood. The Plaintiffs would have been obviously devoid of sense to have laid out a large sum of money for the purpose of depriving themselves of an easement of great value, which was then to become unavailable. They would be spending much money to deprive themselves of a right, with a doubtful chance of regaining that right by spending as much more to undo all that they had done. It is impossible to impute to a reasoning being such an intention. It is manifest, therefore, that the Plaintiffs did not so understand it, and that they believed that they had the Defendant's sanction for doing what they did.

Not merely is this so, but the conduct of Mr. Tillott throughout is inconsistent with a notice of such an intention as is now asserted having been given. What was the use of limiting the height of the buildings to the line of light, if the Defendant acquired the right of stopping them all whenever he choose, by raising the eastern end of the party-wall to forty feet?

[110] It is obvious that it was wholly immaterial to the Defendant whether the Plaintiffs did or did not interfere with the line of light, if he intended to build a wall forty feet higher and if this were known. The evidence shews a plain case of dealing on both sides. Here the Plaintiffs are applying to the Defendant for leave to improve, then there is a meeting of the surveyors, a discussion as to the plan, the plan is settled and executed under the inspection of Tillott the Defendant's surveyor, the existing rights are preserved, and none on the Defendant's side are to be affected thereby. All this would be wholly useless if the Defendant not only did not secure the Plaintiffs' rights, but actually thereby acquired a right of forfeiting them all. After this, can a Defendant come into Court and say, "It is true I did not explain this myself to the Plaintiffs, nor did my solicitor, but still it was casually and as it were accidentally mentioned by my surveyor, in conversation with the surveyor on the other side, and therefore, though he did not so understand it, still I am entitled to enforce it as my strict legal right?"

One of two things is certain, either the Defendant, when he appointed Tillott to communicate with Laws and entered into the agreement of October 1861, and when the works were going on, intended to make use of a power, to be acquired by the Plaintiffs' act, to derive an advantage which he did not otherwise possess, or he did not so intend. If he did so intend, it was his bounden duty to make that intention so clear and distinct to the Plaintiffs that it could not be misunderstood. If he did not so intend at that time, then the agreement and the acts of the parties shew that the rights of both parties were to be left unaltered, and that neither was to acquire any advantage over the other, by reason of the works then contemplated.

[111] The way Lord Eldon puts the case in *Dunn v. Spurrier* (7 Ves. 235) is this:—"I fully subscribe to the doctrine of the cases that have been cited, that this Court will not permit a man, knowingly though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement; a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done but upon an expectation that the lessor would not throw an objection in the way of his enjoyment."

This case, I think, comes strictly within the rule so laid down, and that the Plaintiffs are accordingly entitled to a perpetual injunction against the Defendant.

[111] MEADE KING v. WARREN. Jan. 13, 1863.

A voluntary settlement in favor of several persons contained a power authorizing the tenant for life (a volunteer) to revoke the trusts of the property and again resettle the same upon such trusts as to her should seem meet. Held, that this general power could not be controlled, and that an appointment of the property to herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power.

In 1841 John Clitsome executed a voluntary settlement of certain sums presently mentioned, which he vested in trustees. This settlement recited that he was desirous of making a settlement of the sums after mentioned, in trust for himself for life, and after his decease, in trust for the benefit of his niece Clara Catherine Warren, and of his sisters Catherine Clitsome, Susannah Elizabeth Clitsome and Harriet Warren, and his great-nieces Jessie Louisa Warren, Catherine Emily [112] Warry and Florence Annette Allen, and of John Woolcott Warren in manner therein mentioned.

It then proceeded to declare the trusts, subject to his life-estate; by which two sums of £2000 and £2000, part of the funds, were to be held on certain trusts, and the deed proceeded as follows:—And as to one or the first moiety of and in the residue of the sum of £14,350, and one moiety of the sums of £1600 and £600 (thereinafter called the residuary trust moneys, stocks, funds and securities), in trust to pay one-third of the annual income thereof to each of them the said C. Clitsome [since deceased] and S. E. Clitsome [since deceased], for their respective lives, and subject thereto, to pay the annual income thereof to his niece C. C. Warren during her life, if she should so long continue unmarried; and in case of her marriage, to be paid to her for her separate use, and in the event of her marrying and afterwards becoming a widow, the capital to be in trust for her C. C. Warren absolutely. But in case C. C. Warren should marry and afterwards die in her husband's lifetime, or should not marry at all, then the capital to be held by the said trustees for the benefit of such person or persons as C. C. Warren by her will or codicil should appoint, and in default of appointment and in case of her marriage, in trust for her children, in equal shares, to be vested interests at twenty-one as to sons and at that age or marriage as to daughters, and in default of appointment and in case the Defendant C. C. Warren should not marry, upon such trusts for the benefit of the settlor's three great-nieces as should correspond with the trusts of the first-mentioned sum of £2000.

And as to the other or second and remaining moiety of and in the residue of the said sum of £14,350, and [113] of and in the said sums of £1600 and £600, in trust to pay one-third of the annual income thereof to each of them the said C. Clitsome (since deceased) and S. E. Clitsome (since deceased) for their respective lives, and subject thereto, to pay the annual income thereof to C. C. Warren during her life for her separate use. And after the decease of C. C. Warren, in trust for her child or children as she should by will or codicil appoint, and in default of appointment, for her children equally. But in case there should be no child of C. C. Warren who should acquire a vested interest, then the said trust fund should be held in trust for such person or persons as C. C. Warren by will or codicil should appoint, and in default of appointment, upon such trusts for the benefit of the settlor's three great-nieces as should correspond with the trusts of the first-mentioned sum of £2000.

The settlement contained a power for C. C. Warren (after the decease of the settlor), she being then not married, with the consent in writing of her father and mother (J. W. Warren and Harriet his wife), or of either of them, by any deed or deeds by her, C. C. Warren, duly executed, with or without power of revocation and new appointment, to revoke and make void all and every or any of the trusts, powers, provisoes, agreements and declarations thereinbefore contained and declared of the second moiety of the said residuary trust moneys (except the trusts for the benefit of the settlor's two sisters), and by the same deed to declare, limit and appoint any other trusts, powers, &c., in the place of the trusts, powers, &c., so revoked, *for the benefit of any person or persons whomsoever* as to her should seem meet.

The settlement also contained a second power for C. C. Warren, in case she should

survive the settlor and [114] attain the age of forty-five years, or be then unmarried or a widow, by any deed, by her duly executed, to revoke and make void all or any of the trusts, powers, provisoes, agreements and declarations thereinbefore expressed or contained of or concerning the said residuary trust moneys (except the trusts for the benefit of the sisters), and again to resettle the same or any part or parts thereof, upon such trusts, to and for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations as to her should seem meet.

The settlor, J. Clitsome, died in 1843. His two sisters died, respectively, in 1845 and 1856.

In January 1862 C. C. Warren attained the age of forty-five years, and she was still unmarried.

By a deed-poll, dated in August 1862, C. C. Warren, in execution of her second power of revocation, revoked all the trusts, &c., of the deed of 1841, which preceded the power, and she declared that all the residuary moneys, &c., should thenceforth be held in trust for herself, for her own use and benefit, but so that, in the event of her marrying, it might be held for her separate use.

C. C. Warren having thereupon required the trustees to pay over the fund to her, this special case was framed for the opinion of the Court on the following points:—First. Whether the second power extended to the entirety of the funds; and secondly, whether C. C. Warren was entitled to appoint the funds to herself absolutely, and to require a transfer of them, or was bound to make a resettlement in favor of the three great-nieces.

[115] Mr. Marten, for the Plaintiffs, the trustees.

Mr. Selwyn and Mr. F. Webb, for C. C. Warren. This appointment is authorized by the power. This is the case of a mere voluntary settlement, and not, as in *Bristow v. Warde* (2 Ves. jun. 336), a question arising on marriage articles, executory in their nature, and which had been followed by a settlement correcting the unlimited nature of the power given to the husband. In that case, the only object was to secure a provision for the wife and the issue of the marriage: it establishes no general rule. In a recent case, *Peover v. Hassel* (1 John. & H. 341), the same attempt was made to cut down a general power of appointment given to a husband. There, under a settlement of the wife's estate, a general power to appoint to any person or persons was given to the husband, if there should be children surviving both parents, before the limitation to children; a power in the same words was given to the wife in default of such children. Sir W. P. Wood held that the words being plain, the husband's general power could not be limited.

In this case the power is absolute and unlimited, and there is nothing which says that in the resettlement C. C. Warren is to be excluded. But if the power be limited, what are the limits and who are the persons in whose favor it is incumbent on the donee of the power to appoint the property?

Mr. Baggallay and Mr. Townsend, for the three great-nieces. The whole intent and object of this settlement and of the settlor was to provide for the various members of his family whom he named, and that is expressly recited. It is inconceivable that, with such [116] an intention, the settlor should give the niece the power of wholly destroying it and taking the property absolutely. The authorities shew that such a power of appointment is not general, but that it is confined to the objects of the settlor's trusts; *Bristow v. Ward* (1 Ves. jun. 347). By the second power she must "again resettle the same;" then in whose favor? plainly in favor of the objects of the settlement and of the settlor's bounty. The two powers when contrasted are in favor of that construction. Under the first, which related only to a moiety, she might, with the consent of her father and mother, appoint "for the benefit of any person or persons whomsoever;" but these words were purposely omitted in the second power, and under this, she is bound to make a resettlement. An appointment in her own favor is not a *resettlement*, on other trusts, intents and purposes, and subject to other powers, provisoes, &c. A resettlement contemplates a more extended alteration in the same trusts, some elaboration of details, and not a single appointment in favor of one individual absolutely.

THE MASTER OF THE ROLLS [Sir John Romilly]. I concur in the argument in favor of the appointment, and I think that it is scarcely possible to raise the question.

Here a power is given to this lady in case she survived the settlor and attained forty-five (which is a condition precedent and has been performed), to revoke all the trusts, &c., of the deed of 1841, and to resettle the property upon such trusts "as to her should seem meet." It seems meet to her to appoint it to herself, and [117] she revokes the existing trusts and appoints it to herself accordingly. It is impossible to say that this is not within the power. If every other species of limitation and trust is within it, why is she to exclude herself?

The argument used against this execution of the second power of revocation might be equally applied to the first, by which she might appoint "for the benefit of any person or persons whomsoever." The Court would be making a new settlement if it introduced arbitrarily some limit in this general power. The scope of the instrument also seems to me to shew that what is expressed was purposely intended.

I must declare accordingly.

[117] LAURIE v. CRUSH. Jan. 17, 1863.

[S. C. 7 L. T. 662; 9 Jur. (N. S.) 453; 11 W. R. 275; 1 N. R. 255.
Overruled, *Eyre v. Brett*, 1865, 34 Beav. 441.]

A sole Plaintiff died, having devised the estate, which was the subject of the suit. Held, that the devisee was not entitled to the common order to revive under the 15 & 16 Vict. c. 86, s. 52.

This was a motion, under the 15 & 16 Vict. c. 86, s. 52, for an order to revive the suit under the following circumstances:—This was a mortgagees' suit and was instituted in 1859, and a decree obtained in August in the same year. In December 1861 the Plaintiff, Sir Peter Laurie, died, having devised the mortgaged estate to his nephew, Northall Laurie.

Mr. G. N. Colt, for the devisee, in support of the application, said there was a difference of opinion in the other Courts as to whether such an order was, under these circumstances, proper, or whether a bill must be filed. That the Vice-Chancellor Wood in *Dendy v. Dendy* (5 W. R. 221), and the Vice-Chancellor Kindersley in *Williams v. Williams* (9 W. R. 296), had held that the Act did not apply, and that an original bill in the nature of a bill of revivor and supplement was necessary. But the Vice-Chancellor Stuart, in *Jackson v. Ward* (1 Giff. 30), held that the fifty-second section of the Act was applicable to every case where there had been a transmission of interest by the death of a Plaintiff or Defendant in a suit.

THE MASTER OF THE ROLLS [Sir John Romilly]. I must follow the majority of the decisions. Vice-Chancellor Kindersley and Vice-Chancellor Wood seem to have considered the point very carefully, and it is desirable that the practice should, as much as possible, be uniform.

[118] HALES v. COX. Jan. 21, 26, 1863.

[S. C. 8 L. T. 134; 11 W. R. 331; 1 N. R. 344.]

A. B. executed a voluntary settlement of real estate to uses in favor of his four children, and he covenanted that the estate should remain to those uses and for quiet enjoyment. A. B. afterwards mortgaged the settled estate with his own unsettled estates and died. Held, that the children were entitled to throw the mortgages on the unsettled estate, and, as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage.

By a voluntary settlement, dated the 28th of November 1829, and executed shortly before his second marriage, Thomas Hales, in consideration of the natural love and affection which he had and bore towards his four children by his first

marriage, conveyed certain hereditaments to trustees upon trust, out of the rents, to retain the yearly sum of £120 and apply it in maintaining and educating the four children, and to permit T. Hales to receive the residue of the rents for his life, and after the decease of T. Hales, on trust to stand seised of the hereditaments to the use of the four children and their children. By the same indenture, [119] T. Hales covenanted with the trustees for himself, his heirs, executors and administrators, that the hereditaments should remain to the aforesaid uses, for quiet enjoyment by the trustees and for further assurance.

In 1840 Thomas Harding Hales, one of the four children, became bankrupt, and his father, T. Hales, purchased his share in the hereditaments from his assignees, which was conveyed to him in April 1841.

By certain indentures, dated in 1845 and 1853, T. Hales mortgaged the settled property, together with other property, and gave to the mortgagees a power of sale. Afterwards, in 1857, Thomas Hales conveyed the share he had purchased from his son's assignees for the benefit of Thomas Harding Hales and William Hales.

Thomas Hales died in 1860.

After his death, the mortgagees, under their power, sold the whole of the mortgaged property for £11,148, and after retaining the mortgage debt and interest, there remained a surplus of £4961 of the purchase-money. The sum of £8025, 5s. represented the produce of the real estate settled by the deed of 1829.

The Chief Clerk's certificate found that the parties entitled under the settlement of 1829 claimed to have their interest in the settled property exonerated from the mortgages, so far as the unsettled property of the testator was sufficient for that purpose, and that they also claimed to be entitled, in equity, under the covenants contained in the indenture of 1829, to prove, as specialty creditors, against the estate of Thomas Hales, in respect of the loss occasioned to them by reason of his mortgages. They also claimed to have that portion of [120] the mortgaged property which was not comprised in the settlement applied, in the first place, to pay the mortgages, so far as it would extend, so as to leave the settled property free and absolutely discharged from the mortgages, so far as the same affected their interests therein.

The several claims were submitted to the judgment of the Court.

Mr. Lloyd and Mr. Bird, for the Plaintiff, the sole residuary legatee.

Mr. Baggallay and Mr. Roberts, for the executors and trustees.

Mr. Hobhouse and Mr. Rogers, for one of the four children.

Mr. Druce, for the assignee.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. The view I take is this:—It is clear that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, only take the property subject to those mortgages; but the mortgages ought, by marshalling, to be thrown as much as possible on the unsettled property, so as to liberate the settled property from the mortgage.

If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the cove-[121]-nants for quiet enjoyment, contained in the settlement of 1829, have a right to prove, against the assets of the settlor, for the amount to which they have been damaged by reason of his subsequently mortgaging the settled property; that is, after providing for the testator's debts, they are entitled to priority over the legatees.

But it appears that in 1841 T. H. Hales, one of the four children, became bankrupt and his share was sold to the settlor, who afterwards created the mortgages. As he had then a right to dispose of that share as he thought fit, I think that the persons who claim under the subsequent settlement of 1847 are not entitled to the benefit of the covenants in the deed of 1829; they can only have that to which the testator was entitled in 1847, which is the one-fourth diminished by its proportion of the mortgages.

Mr. Hobhouse. Your Honor declares these two principles:—That the claimants under the voluntary settlement are entitled, as against the testator, his heirs and devisees, to marshal the securities, and they are also entitled, as against the legatees, to prove under the covenant.

THE MASTER OF THE ROLLS. Yes, as against his assets.

[122] *In re KEEP'S WILL*. Jan. 31, Feb. 10, 1863.

The rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification, of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will.

The word "survivors" of nieces construed "others," in consequence of the gift over and of the subsequent part of the will referring to the "issue" of a deceased niece participating in an accrued share.

The case of *Wilmot v. Wilmot* (8 Ves. 10) is not overruled by *Winterton v. Crawford* (1 Russ. & Myl. 407).

The testator, by his will made in 1834, gave his residuary estate to trustees, upon trusts which he declared in the words following:—

"In trust, as to the ten eleventh parts, thereof for all and every my nieces," Jane Barton and nine others (naming them), "during their respective lives in equal shares," but for their separate use; "and after the decease of each of my said nieces, my trustees shall stand possessed of the share to which the niece so dying shall become entitled during her life, as aforesaid, in trust for all and every her children, who being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or previously marry, to be divided between the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one child. And in case and so often as any of my said nieces shall die without leaving any child who shall become entitled under the trusts aforesaid, then and in every such case, and so often as the same shall happen, my said trustees shall stand possessed of the share to which such niece for the time being dying without leaving such child, as aforesaid, shall become entitled during her life, as well originally under the trusts aforesaid, as by survivorship under this present clause, in trust for the survivors or survivor of my said nieces during her or their respective life or lives, and in equal shares, if more than one," but for their separate use; and after the decease of each of such survivors, my trustees shall be possessed of the accruing share to which such survivor for the time being shall [123] become entitled for her life under the trusts aforesaid, in trust for all and every her children and child, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or previously marry, to be divided amongst the said children, if more than one, in equal shares, and if but one, the whole to be in trust for that one or only child. And in case all my said nieces should die without leaving any child who shall become entitled to the said trust moneys and premises, under the trusts aforesaid, then my trustees shall stand possessed of the same, and the interest, dividends and annual produce thereof, in trust for the person who would have been entitled to my personal estate at my decease if I had died intestate."

The will then contained provisions for the application of the income of a share to which any niece would be entitled for her maintenance and for raising any part not exceeding one-half of the presumptive share of such niece for her advancement.

The trusts of the remaining one-eleventh share of the residuary estate were declared as follows:—"And my will is, that my said trustees shall stand possessed of the remaining one-eleventh part of my said residuary estate, in trust for Edward Tubb during his life, and after his decease, in trust for all and every the children of my late niece Sarah Tubb, deceased, by her husband the said Edward Tubb, who being a son or sons shall attain twenty-one, or being a daughter or daughters shall attain that age or previously marry, to be divided between them, if more than one, in equal shares, and if but one, then the whole to be in trust for that one. And in case there shall be no such child who shall live to become entitled, then my trustees shall stand possessed [124] of the same, in trust for my said other nieces and their issue, or of my next of kin, in the same manner as is before by me provided with regard to their original shares. And it is my will that, notwithstanding anything before to the contrary, the children of my niece Sarah Tubb shall be entitled to share in the division of any of the share and shares before provided for my said other nieces, which may happen to

accrue by survivorship, and in such division to take amongst the whole of them the same share as a niece or the issue of a deceased niece would be entitled to receive. And my will is, that my said trustees shall have the same powers as to maintenance and advancement of the children of my said deceased niece Sarah Tubb as are provided for the children of my said other nieces."

The testator died in 1855.

Prior to August 1861 six of the ten nieces and Edward Tubb had died leaving children.

Jane Barton (whose share was now in controversy and had been paid into Court), died in August 1861 a spinster. Three of the nieces were still living.

The question was, whether the word "survivors" was to be read "others," so as to let in the children of those who had predeceased Jane Barton to participate in her share (£2034 consols).

Mr. J. H. Palmer and Mr. Dewsnap, for the four Petitioners, who were children of nieces who had predeceased Jane Barton. The gift over to the next of kin, if all the nieces should die without leaving any child, shews that by the word "survivors" the testator meant "others." The effect of holding otherwise [125] would be to exclude the children of the niece who predeceased one dying without issue, and yet the gift over would not take effect. It is clear from the limitations of the last eleventh share that the testator intended that the issue of a deceased niece should participate. They referred to Jarman on Wills (vol. 2, p. 587 (2d edit.)); *Lowe v. Land* (6 L. J. (Ch.) 234); *Leeming v. Sherratt* (2 Hare, 14); *Holland v. Allsop* (29 Beav. 498); *Hawkins v. Hamerton* (16 Sim. 410, 421); *Smith v. Osborne* (6 H. of L. Cas. 393).

Mr. Hobhouse, for the other persons in the same interest as the Petitioners. It is one of the commonest errors in wills to use the word "survivors" for "others." Here the testator was most anxious to put the various stocks of his eleven nieces on an equality; the fact of one being dead created a difficulty in framing a gift contained in one clause. The gift over in mass shews that no part was to go over while there existed children of any niece, for otherwise there would be an intestacy, for it could not go to the stocks whose mother predeceased the one dying without children, nor could it pass under the ultimate limitation, because the event had not happened. The case is governed by *Wilmot v. Wilmot* (8 Ves. 10).

Mr. Dunning, for the children of nieces and for Sarah Trimmer, one of the three nieces still living.

Mr. Southgate and Mr. Dickinson, for nieces who were still living. The word "survivors" must, according to the modern doctrine, be strictly construed, as in *Winterton v. Crawford* (1 Russ. & Myl. 407). Here ten-elevenths and not the whole is given to the nieces for life, and the [126] gift over being to the next of kin is the same as an intestacy, and as if that limitation had been omitted; *Aiton v. Brooks* (7 Sim. 204).

THE MASTER OF THE ROLLS. My impression is very strong that the gift over and the reference to the share of Sarah Tubb's children shew that "survivors" must be construed "others." The testator there speaks "of a niece or the issue of a deceased niece" being entitled to an accrued share, and such issue could only take by "survivors" being construed "others."

Feb. 10. THE MASTER OF THE ROLLS [Sir John Romilly]. The question which arises on the construction of this will is that which has so often come before the Court, viz., whether the word "survivors" is to be read "others." There is no question but that the rule of law, as laid down by modern authorities, is, that the word "survivors" is to be confined to its literal signification of survivors at the period spoken of by the testator, in every case where it is possible to do so without violating the clear meaning of the rest of the will, and that the burthen of proof lies on those who contend, for a different construction, to shew, from the words of the will, taken together, that the true meaning of the word, as used by the testator, is "others," and not "survivors."

The words of the will are these [see *ante*, p. 122]. I think that the gift over here, coupled with what is [127] afterwards stated in the will, requires that in this case the word "survivors" should be read "others."

This matter came before Lord Eldon in *Wilmot v. Wilmot* (8 Ves. 11), in a will where a similar gift over occurred, in which Lord Eldon observed:—"It must be argued that the word 'surviving' means the same as 'other' or living at the age aforesaid. In the clause in which the gift over is made, it was never meant that any portion should be taken. It was to be either the whole or none. There is a number of authorities for construing the word 'surviving' to mean 'other.' I think they are right in contending that this vested."

This applies strictly to the present case; here the gift over is not to take effect unless all his nieces die without leaving any child. Unless, therefore, the word "survivors" is to be read "others" this result must follow:—In the event of two or three nieces dying without leaving a child, their shares would be undisposed of by the testator's will.

It is endeavoured to get over the effect of this, first, by pointing out that the gift over is to the testator's next of kin according to the Statute of Distributions, and that, consequently, the identical persons would take the shares lapsed by the death of the niece without children, as those who would take the whole in case the gift over took effect. But I am of opinion that this circumstance cannot properly affect the construction to be placed on the testator's will. It would be much too fine a distinction to hold, that if the gift over had been to A. B. absolutely, the word "survivors" must be read "others;" but that it is not to have the same meaning, if the legatees in the gift over are the next of [128] kin. It would, in my opinion, be a very unusual mode of construing a will so to hold, and if it became prevalent, would fritter away established principles of construction.

The other ground which is relied on and urged as an argument for the strict reading of the word "survivors" is, that the case of *Wilmot v. Wilmot* is not now to be relied upon, by reason that the matter was fully considered and otherwise decided by Sir John Leach in the case of *Winterton v. Crawford* (1 R. & M. 411), where he observes:—"In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivors' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention, and the survivors are to take as tenants in common for life, for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true that in the gift over, after the death of the surviving daughter, to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters, and this intention would be defeated if, upon the death of Lady Winterton without issue, which is stated to be a probable event, the children of the deceased sister were excluded. The question cannot, however, be decided during Lady Winterton's life, and all that can now be done is, to declare that Lady Winterton is entitled for life, to her separate use, to the one-third share of the [129] real estate, which by the will was given to her sister Louisa Moreton."

A careful consideration of the cases leads me to an opposite conclusion; I think that the case of *Wilmot v. Wilmot* is not overruled by *Winterton v. Crawford*, and that if they cannot subsist together, that the case of *Winterton v. Crawford* cannot be relied upon. It may be doubted whether, in that case, it was intended to decide this question; for it is to be remarked that Sir John Leach stated that he considered the question arising on the gift over was not then ripe for decision, and the case of *Wilmot v. Wilmot* was not brought to his attention; and in addition to which, if it be considered as determining this matter, it has been questioned, or at least it has certainly not been followed in later cases, of which *Smith v. Osborne* (6 H. of L. Cas. 375), *Hawkins v. Hamerton* (16 Sim. 410), may be cited as examples. I also, in the case of *Holland v. Allsop* (29 Beav. 498), where I considered the authorities on this point, thought myself bound by the later authorities, and I was compelled to disregard the decision of Sir John Leach in *Winterton v. Crawford*, and to follow the principle laid down by Lord Eldon in *Wilmot v. Wilmot*.

There is, besides the gift over, another circumstance in this will which confirms me in the view I take of the construction to be put on the word "survivors" in this will;

and this is the manner in which the testator disposes of the remaining one-eleventh share in his residuary estate. Here the words "*or the issue of a deceased niece*" plainly shew that he considered that the issue of a deceased niece might, in some event, take a [130] part of an accruing share. But to enable the children of a deceased niece to do so, it is obvious that the word "*survivors*" must be read "*others*;" for if one niece died first leaving children, and then a second niece died leaving no issue, if the word "*survivors*" is to be construed strictly, the child of the deceased niece could take nothing, while the children of a surviving niece obviously took nothing while their mother was alive.

In every view of this will, therefore, adhering rigidly to the rule that the word "*survivors*" is to be construed strictly, when it is possible to do so, I am of opinion it is not possible to do so here, and that the testator has plainly expressed his opinion that the word "*survivors*" here means "*the other nieces*," amongst whom he had divided the ten-elevenths of his residue.

I will make a declaration accordingly.

[130] GIBBONS v. SNAPE. Feb. 10, 1863.

[Affirmed, 1 De G. J. & S. 621; 46 E. R. 246; 33 L. J. Ch. 103; 9 L. T. 132; 9 Jur. (N. S.) 1096; 11 W. R. 1087. Followed, *Green v. Paterson*, 1886, 32 Ch. D. 95.]

In this case, THE MASTER OF THE ROLLS, adhering to his decision in *Honeywood v. Foster* (No. 1) (30 Beav. 1), held that, in order to bar an equitable estate tail in copyholds by deed, under the 3 & 4 Will. 4, c. 74, such deed must be entered on the court rolls within six months after its execution.

Mr. Swanston, Mr. Hobhouse, Mr. Townsend and Mr. Villiers, for different parties.

Upon appeal, the Lords Justices, on the 28th of July 1863, affirmed the decision.

[131] FOLIGNO'S MORTGAGE. Feb. 16, 1863.

Trustees who had, without sufficient reason, paid a trust fund into Court under the Trustee Relief Act, were ordered to pay the costs of a petition for its payment to the party entitled.

A. and B., being each entitled to one-fifth of a reversionary fund, mortgaged their shares with a power of sale. B. was a mere surety for A., and A. afterwards assigned his share to B. for his indemnity, with a power to sell and to give receipts for the share and the produce of the sale. The mortgagees sold the reversionary interest, and refused to pay the surplus to B. without the concurrence and release of A., and they paid the fund into Court under the Trustee Relief Act. Held, that this was improper, and they were ordered to pay the costs of a petition to get the money out of Court.

Gilbert Brandon and Lionel Brandon were each entitled to one-fifth of a sum of £7305, 9s. 6d. in reversion expectant on the death of their parents.

In 1844 Gilbert and Lionel conveyed these two-fifths to Foligno by way of mortgage to secure the repayment of £1000. The mortgage empowered the mortgagee to sell and to hold the produce "upon trust" to pay the costs and the mortgage, and to pay the surplus to Gilbert and Lionel Brandon, or as they should respectively direct.

In this transaction Lionel was a mere surety for Gilbert, who received the whole money borrowed.

In 1848 Gilbert by deed covenanted to save harmless and indemnify Lionel and his share in the fund from the mortgage; and Gilbert thereby assigned his one-fifth to Lionel to indemnify him and his one-fifth. And it was declared that if the mortgage should be enforced against Lionel or his share, then that Lionel might sell

Gilbert's share, and that he might stand possessed of the share of the moneys to arise from such sale in trust for his indemnity. And it was declared that the receipt of Lionel and his executors and administrators for the share so assigned, or the moneys to arise from such sale, should be good discharges.

[132] In October 1862 the executors of the mortgagee sold the two shares by auction for £1655, and after payment of the expenses of the sale and the amount due on the mortgage, there remained a sum of between £400 and £500 in their hands.

The administrator of Lionel (who had died in 1855) applied to the executors of Foligno for the balance, but they refused to pay it without the concurrence of Gilbert (who was resident in Lima), evidenced by his execution of a release by attorney. After some correspondence, the executors paid the balance (£403) into Court, under the Trustee Relief Act, after deducting costs amounting to £52.

The administrator of Lionel presented a petition for payment to him out of Court of the fund. The only question was, as to the costs of this petition.

Mr. Selwyn and Mr. Jessel, in support of the petition, argued that the mortgagees, after payment of the amount of their mortgage, were bound to pay the balance to the Petitioners even without a release, and that the payment into Court was so vexatious that the Respondents ought to pay the costs. They cited *In re Waring* (21 L. J. (Ch.) 784); *Re Woodburn's Trusts* (1 De G. & J. 333); *In re Cater's Trust* (25 Beav. 361-366); *In re Knight's Trusts* (27 Beav. 45); and see *Wyll's Trusts* (28 Beav. 458); *Re Brocklesby* (29 Beav. 652).

Mr. Waley, *contra*, argued that the Respondents had acted *bona fide*, and that there was a well-founded doubt as to whether the fund could be safely paid over without the concurrence of Gilbert. That by the express terms of the mortgage deed the mortgagee was bound to pay over the surplus to Gilbert and Lionel, and that it was [133] by a subsequent deed, to which the mortgagee was no party, that these rights had been altered. That the deed of 1848 contained no power to give receipts for the surplus produce of a sale by the mortgagees, but only for the share itself and the produce of a sale by Lionel and his representatives of Gilbert's share. That the mortgagees were therefore entitled to a release and discharge both from Gilbert and Lionel. That all that Lionel could require was the payment of his one-fifth share on the death of the tenant for life, and that therefore the surplus produce of the sale ought to be invested and accumulated to wait the event of the reversion falling into possession, before which the failure of any part of his share could not be ascertained.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the trustees were not justified in paying this money into Court. I think that the point raised at the Bar does not arise here, and that it does not lie in the mouth of mortgagees, after a sale, to raise this question. There is nothing more in it than this:—Two reversionary sums of stock, amounting together to above £2900, were mortgaged by two persons who were entitled to them in equal moieties. The mortgage contained a power of sale. The mortgage money, amounting to £1000, was raised for the benefit of one, the other being a mere surety. Gilbert, who received the money, executed a deed, by which he assigned his one-fifth to Lionel for his indemnity, with a power to sell it and to give receipts. After that, the mortgagees sell, and having a balance of £400 in hand, after paying what was due on the mortgage, they say, "We will not pay the balance to Lionel's representative without the concurrence of and a release from Gilbert." In no possible way in which I can look at this matter can I [134] see anything to justify this refusal; the mortgagees were not bound to see the surplus invested and accumulated until the death of the tenant for life at compound interest.

The property mortgaged was a reversion, and as soon as it had been sold the balance, after satisfying the mortgage, was a present debt due to the mortgagors, one of whom was a mere surety for the other, who had received the whole money and who had assigned the whole of his interest to the other for his indemnity. I think that the Respondents were entitled to no more than the production of the deed and a receipt for the money, and that they were not justified in paying the fund into Court, and trying to raise questions and equities in which they had no concern, and which could scarcely be sustained in any case. It was also next to impossible, considering the age of the tenant for life, that the surplus, if accumulated, could ever

have amounted to the £1461 to which Lionel eventually would have become entitled, in case he had not joined in Gilbert's mortgage.

The pressure applied by trustees in these cases is very great, and the power of paying trust funds into Court has been, in many cases, used as the means of extorting costs. I have no doubt that these Respondents acted *bonâ fide*, but it is essential that the Court should put an end to such cases. The rights of the parties would be the same if a bill had been filed. If the trustees had said, "We will not pay over the balance until we have the concurrence and release of Gilbert," and a bill had been filed to compel them, I should have ordered them to pay the costs of the suit. They are as much liable on a petition as in a suit.

I am of opinion that the trustees must pay the costs of this petition.

[135] *Re LEAKE'S TRUSTS.* Feb. 14, 16, 17, 1863.

[S. C. 7 L. T. 816; 9 Jur. (N. S.) 453; 11 W. R. 352; 1 N. R. 417.]

Trustees who, after accepting the trust, had paid the trust fund into Court without sufficient reason, refused their costs of an application to pay the income to the tenant for life.

A fund was held in trust for A., an unmarried lady, for life, but to cease if "by any means whatever" it should vest or become payable to any other person. A. afterwards married, and her life interest was settled to her separate use, without power of anticipation, by a settlement to which the trustees purported to be parties, but to which they never assented. The trustees thereupon paid the trust fund into Court under the Trustee Relief Act. Held, that as the trusts which they had accepted had not been varied either by the marriage or the settlement, they were not justified in paying the money into Court, and they were refused their costs of appearing on a petition for payment of the income to the tenant for life.

Costs of a petition by a tenant for life to obtain the income of a fund, paid into Court under the Trustee Relief Act, ordered to be paid out of the *corpus*.

The testator directed his executors, William Wing and Zachariah Watkins, to invest £1100 in consols, and stand possessed thereof upon trusts declared in the words following:—"To empower Charlotte Hitchon to receive the annual produce of the same sum of £1100 or the investment thereof during her life, and after her decease, then as to as well the capital as the annual produce thenceforth to become due, in trust for my nephews and nieces" (naming seven of them), or such of my said nephews and nieces as shall be living at my death, and the issue of such of them as shall be then dead leaving issue, equally to be divided between them if more than one, the issue of such of them as shall be then dead to take the shares which their respective parents would have taken if then living. But I declare that if, during the life of the said Charlotte Hitchon, the said annual produce or any part thereof shall, *by any means whatever, vest in or become payable to any other person or persons than the said Charlotte Hitchon*, then the trust hereinbefore contained in her favor shall, as to the annual produce which shall so vest in or become payable to any person or persons, thenceforth absolutely cease, and the same annual produce shall, during the remainder of her life, be applied in the same manner as the same would be applicable if she were dead."

[136] The testator died on the 15th of December 1860, and the legacy was duly set apart and invested by his executors.

On the 19th of May 1862 Charlotte Hitchon married Edward Coundley, and by a marriage settlement, dated the 6th of May 1862, and purporting to be made between them and the two executors, it was declared and directed that the trustees of the will should pay the dividends of the legacy to Charlotte Hitchon for her separate use, without power of anticipation. This deed was executed without the concurrence of the executors, but notice of and a copy of it were given to them on the 26th of May 1862.

On the 21st of November 1862 the executors paid the fund into Court under the

Trustee Relief Act, minus about £17 stock, which they had sold out to pay the costs. Their affidavit stated that they had not been consulted with reference to the settlement, that they had been made parties thereto without their consent, and that they were unwilling to act as trustees.

Charlotte Coundley now presented a petition, praying that the executors might be ordered to transfer the £17 retained for costs into Court, that the dividends of the trust fund might be paid to her for life, and that the costs of the Petitioner and all other parties might be paid by the executors.

Mr. Selwyn and Mr. Caldecott, in support of the petition, argued that there was no reasonable doubt that the settlement had not affected the right of the Plaintiff to the dividends. That, in effect, it merely excluded the marital right, and thereby prevented the forfeiture by reason of the legacy becoming, "by any means whatever [137] vested in or payable to any other person" than the Petitioner. That the condition did not apply to a change in the ownership consequent on a marriage; *Bonfield v. Hassall* (32 Beav. 217); and that if it did, then that such a condition in restraint of marriage was simply void; *Newton v. Marsden* (2 John. & Hem. 366). That the payment into Court was improper and vexatious, and that the executors ought therefore to pay the costs; *Knight's Trusts* (27 Beav. 45); *Woodburn's Trusts* (1 De G. & J. 333).

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot make the trustees pay the costs. Trustees are not bound to accept a trust, but after undertaking it can they pay the fund into Court and call on the Court to perform it, and that in a case where there is a simple gift to one for life and afterwards to other named persons? Again, were the trustees entitled to deduct anything from the legacy? Ought not the costs to have been paid out of the general estate of the testator?

Mr. Baggallay and Mr. Speed, for the trustees. The fund was severed, and, after that, all subsequent costs relating to it were properly payable out of the legacy itself; *Jenour v. Jenour* (10 Ves. 562).

The trustees acted *bonâ fide*, and were justified in paying the fund into Court. They objected to be trustees for a married woman and to be mixed up with the subsequent settlement, to which they had been made parties without their consent.

[THE MASTER OF THE ROLLS. But was it not a mere [138] act of caprice and vexation to throw up the trusts after six months?]

Here a new state of circumstances had arisen, the *status* of the lady had become altered by a new deed executed, and there was sufficient doubt as to the effect of the marriage and of the deed to justify the trustees paying the fund into Court; *Re Wylly's Trusts* (28 Beav. 458); *Williams's Settlement* (4 Kay & J. 87); *Re Feltham* (1 Kay & J. 528).

Mr. Selwyn, in reply, referred to *Greenwood v. Wakeford* (1 Beav. 576); and see *Howard v. Rhodes* (1 Keen, 581); *Coventry v. Coventry* (1 Keen, 758), and *Courtenay v. Courtenay* (3 J. & L. 529).

Feb. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot give the trustees their costs of this petition. They were entitled, when they opened the will, to say "this is a trust of a very peculiar nature and of a very singular description, not such a one as we will take upon ourselves to perform." They might then have paid the fund into Court or have caused the trusts of the will to be administered; but in that case the legacy would not have been severed, and the costs would then have fallen on the residue. They did not take that course, but they adopted one which was quite inconsistent with it. They severed the fund and accepted the trust, and this they did in November or December 1861, the period is not very material. About six months after this, this lady marries, and I do not find that the situation of the [139] trustees was in any way varied, or that their responsibilities were in any way increased; if they had been, I should then have said that they might have taken the course they did. But it is impossible to adopt the argument that this declaration of forfeiture was intended to be in restraint of marriage, or that the legatee could not marry at all, and the argument has not even been pressed to that extent.

The only additional thing is this:—On the marriage, the husband, in order to secure the life interest from forfeiture, agreed that he should not take any interest in it and that the trust in the lady's favor should remain the same as it was: and it is

the same, for it is held for her separate use without power of anticipation. The settlement is inoperative to alter the trusts, for the will overrides it; and all that the settlement did was this:—The husband says, “I will not interfere with the trusts of the will, and in consideration of the marriage, my wife shall have the legacy for her separate use without power of anticipation.” I think that the trusts remain the same, though the husband and wife ought to have informed the trustees that they proposed to make them parties to the settlement.

I think that the trustees were not justified in saying “We will throw up the trust which we accepted twelve months before.” I shall not make them pay the costs, but I think their situation is similar to that, where a trustee, without sufficient reason, gives up his trust, as in the case before Lord Langdale, and in such cases he cannot have his costs.

I must order the dividends to be paid on the lady’s separate receipt for life, or until further order, with liberty to apply. The costs of the petition must be paid out of her income.

[140] Mr. Selwyn asked that the costs might be paid out of the *corpus*; *Re Hadland’s Settlement* (23 Beav. 266); and see *In re Hamersley’s Settlement* (*Ibid.* 267).

THE MASTER OF THE ROLLS. I will reconsider the question as to the costs of the petition.

Feb. 17. THE MASTER OF THE ROLLS. You may have the costs out of the *corpus*; I find it is a course I have adopted on former occasions. The fund is secured for the benefit of the persons entitled in remainder.

[140] VACHELL v. ROBERTS. Feb. 19, 1863.

[Commented on, *In re Game* [1897], 1 Ch. 881.]

Devise of residue of real and personal estate on trust to permit A. B. to “receive and take the rents, issues and profits” for life, with remainder over. Held, that A. B. was entitled to enjoy leaseholds and railway stock in specie.

The testator, by his will, expressed himself as follows:—

“I give, devise and bequeath unto Charles Redwood Vachell, of Cardiff, doctor of medicine (the Plaintiff), all my real and personal estate, whatsoever and wheresoever, upon trust to hold and stand possessed of the same and every part thereof for the absolute use and benefit of my daughter Maria Williams. And I direct that in case my said daughter shall marry, that devise and bequest shall be to her sole and separate use, independently and exclusively of her husband, and without being in anywise subject to his debts, control or interference; and in the event of my said daughter dying in the lifetime of her husband (if any), it shall be lawful for him to receive *the profits or income* of my [141] said real and personal estate for and during his life, and if there shall be issue of such marriage, I direct that my said real and personal estate shall be for their benefit absolutely, in equal shares and proportions. But if my said daughter shall die without leaving any child or children her surviving, then my will is, that after the determination of the life interest so given as aforesaid to the husband (if any) of my said daughter, in the event of his surviving her, the whole of my said real and personal estate be equally divided amongst such of my next of kin as shall then be living. And upon trust to permit my said daughter to receive and take the *rents, issues and profits* of the said real and personal estate during the continuance of her estate therein.” “And all the residue of my estate I give, devise and bequeath unto the said C. R. Vachell, his heirs, executors, administrators and assigns upon the trusts aforesaid.”

The testator died in 1858, possessed of a freehold tenement, a leasehold house and some stock in the Taff Vale Railway Company, yielding a dividend of £8 per cent.

The testator’s daughter married Mr. Roberts, and they had three children.

The trustee instituted this suit, to have it determined whether the tenant for life was entitled to enjoy the property in specie or whether it ought to be converted.

Mr. Gordon Whitbread, for the Plaintiff.

Mr. Selwyn and Mr. Roberts, for the tenant for life, argued that she was entitled to enjoy the whole real [142] and personal estate in specie; *Goodenough v. Tremamondo* (2 Beav. 512); *Crowe v. Crisford* (17 Beav. 507); *Alcock v. Slopier* (2 Myl. & K. 699).

Mr. Lewis, for the children, argued that there ought to be a conversion; *Thornton v. Ellis* (15 Beav. 193); *Howe v. Lord Dartmouth* (7 Ves. 137).

THE MASTER OF THE ROLLS [Sir John Romilly]. The word "rents" being used, I think that I must follow the authorities cited. Where there is both freehold and personal estate the expression "rents" would refer to and include leaseholds as well as freeholds; the words "issues and profits" seem to point to the Taff Vale Railway stock.

I will make a declaration that the trustees are not bound to convert.

[142] *Re THE PATENT SCREWED BOOT AND SHOE COMPANY.* Jan. 12, 1863.

The four days, within which the affidavit in support of a petition to wind up must be sworn and filed, extended by the Court.

The 4th of the General Orders of the 11th November 1862, made under the Companies Act, 1862, directs, that the affidavit verifying the petition for winding up any company "shall be sworn after and filed within four days after the petition is presented." In this case the petition for winding up the company had been presented on the 5th of January. It had been duly served upon the parties interested in the company, the necessary advertisements had been inserted in the papers, and the petition stood for hearing on the 17th of January.

[143] But, in consequence of the absence of the Petitioner in the country, the affidavit verifying the petition was not sworn until the 10th of January.

Mr. Roxburgh now applied for leave to file the affidavit, notwithstanding the four days had expired. See the 73d Order of 11th November 1862.

THE MASTER OF THE ROLLS [Sir John Romilly]. You may take the order, but you must send a copy of the affidavit forthwith to the Respondents.

NOTE.—See the Western Benefit Building Society (M.R., 19th January 1864), *post*.

[143] *SHOVELTON v. SHOVELTON.* Jan. 12, 1863.

[S. C. 1 N. R. 226. See *In re Williams* [1897], 2 Ch. 18.]

A testator gave the residue of his personal estate to his wife, "for her own absolute use and benefit, in the fullest confidence that she would dispose of the same, for the benefit of her children, according to the best exercise of her judgment and as family circumstances might require at her hands." Held, that the widow was entitled for life, with a precatory trust in remainder in favor of her children.

The testator, by his will, gave as follows:—

"I bequeath unto my dear wife Anne all my household goods, furniture, books, and other effects, and all the ready money of which I may be possessed, together with all moneys due to me from the funds of the Wesleyan connection, and all moneys assured to me by my policy in the Star Life Assurance Society, for her own absolute use and benefit, she paying thereout all my just debts and funeral and testamentary expenses. I bequeath unto each of my daughters the legacy of £300 apiece, to be paid to them on and when they shall respectively attain the age of twenty-one years. And subject thereto, I bequeath all the rest and residue of my personal estate and effects, whatsoever and wheresoever, unto my said dear wife, *to and for her own* [144] *absolute use and benefit, in the fullest confidence that she will dispose of the same for the benefit of her children, according to the best exercise of her judgment and as family circumstances may require at her hands.*" He appointed his wife, his brother, and his nephew to be his executors.

Mr. Bristowe, for the children, argued that the widow took beneficially for her life, with remainder to her children as she should appoint, in the nature of a precatory trust; *Gully v. Cregoe* (24 Beav. 185); *Wace v. Mallard* (21 L. J. (Ch.) 355). He argued that as the executors had severed in their defences, only one set of costs ought to be allowed; *Attorney-General v. Wyville* (28 Beav. 464).

Mr. Walford, for two executors.

Mr. Selwyn, for the widow, argued that she took the residue absolutely, for that there was an unlimited gift to her in the first instance, followed by something which was too uncertain for the Court to act on. He cited *Fox v. Fox* (27 Beav. 301); *Webb v. Woods* (2 Sim. (N. S.) 267); *Palmer v. Simmons* (2 Drew. 221).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this is a precatory trust. I cannot get over the cases first cited. *Palmer v. Simons* and *Fox v. Fox* differ from this; the words were too ambiguous. In one case, the testatrix trusted that her nephew, to whom she gave her residue, would leave the "bulk" of it to certain persons. In the other, the donee was to [145] make a "sufficient and judicious provision." If the words had been certain in those cases, there would, undoubtedly, have been a trust to carry into execution. I must come to the same conclusion as in *Wace v. Mallard* and *Gully v. Cregoe*, and make a declaration that there is a precatory trust in favor of the children after the widow's death. I will not now say how the residue is to be divided if she should not dispose of it.

As to the costs, I cannot vary from the usual rule, as I see no reason for the executors severing, I can allow one set of costs only to the three executors.

[145] SARAZIN v. HAMEL (No. 1). Dec. 19, 1862; Jan. 14, 1863.

[S. C. 32 L. J. Ch. 378; 7 L. T. 660; 9 Jur. (N. S.) 192; 11 W. R. 326.]

By the Copyright of Design Act (5 & 6 Vict. c. 100, s. 4) no person is to have the benefit of the Act, unless every article has attached thereto the letters "Rd." A bill to prevent an infringement did not allege that this had been done. Held, that the bill was not, on that ground alone, open to a demurrer. Whether, upon a bill to restrain the infringement of a patent, it is necessary to allege that the patentee has duly paid the instalments of stamp duties necessary to keep the patent alive, under the 16 & 17 Vict. c. 5, s. 2, *quære*?

This bill was filed by Messrs. Sarazin of Calais and Messrs. Gower of London, against Mr. Hamel, a lace manufacturer of Nottingham.

The bill alleged as follows:—

"The Plaintiffs, having become the joint proprietors of two original designs, applicable to the ornamenting of lace, which had not previously been published, either within the United Kingdom of Great Britain and Ireland or elsewhere, caused the same designs, respectively, and the Plaintiffs' proprietorship thereof, respectively, to be *duly registered* by the Registrar of Designs, at the times hereinafter mentioned, in pursuance of and in ac-[146]-cordance with the provisions of the 5 & 6 Vict. c. 100, on the 12th of August 1862."

"Such designs, and Plaintiffs' proprietorship thereof, having been respectively so registered, the Plaintiffs, in virtue of the said Act, became, from the time of the registration thereof, respectively entitled to the sole right of applying the same, for the term of twelve calendar months from the date of such registrations, respectively, to articles of manufacture comprised in the thirteenth class mentioned in the said Designs Copyright Act (that is to say):—To lace and any other article of manufacture or substance not comprised in either of the twelve other classes in the said Act mentioned." It then alleged that the Defendant had since, "without any leave or licence from Plaintiffs, and in violation of their rights and privileges, to which they are entitled by virtue of the said Act in respect of such designs, and to their great wrong and damage, been applying the said designs to lace manufactured by himself," and had sold great quantities of lace so manufactured, and made large profits thereby.

The bill, however, contained no allegations that the Plaintiffs had affixed the letters "Rd" on every article of their manufacture.

The bill prayed an injunction for the delivery up of the pirated articles, and that the Defendant might account to the Plaintiffs for the profits made by him, and compensate them for the damage they had sustained.

To this bill the Defendant put in a general demurrer for want of equity.

[147] Mr. Selwyn and Mr. Freeling, in support of the demurrer. The Plaintiffs have not shewn, upon the face of their bill, that they are entitled to the benefit of the statute. Their right is created by statute, and the 4th section says that they are not to have the benefit of it, *unless* certain acts be done, that is, unless the design be registered in the mode pointed out, and *unless* every article be marked "Rd." (1) The compliance with these conditions is an essential part of the Plaintiffs' title, and ought to be stated with precision. (See Mitford on Pl. pp. 41, 42 (4th edit.)) The Plaintiffs have not stated that they have marked every article "Rd," so as to bring themselves within the protection of the Act, and therefore they cannot sue. According to the allegations in the bill, and which are to be taken most strongly against the Plaintiffs, they have "duly registered," but not duly marked the articles; *Heywood v. Potter* (1 Ell. & B. 439); 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73.

[148] Mr. Baggallay and Mr. Fooks, in support of the bill. It is not necessary to allege that every article sold prior to the institution of the suit was marked "Rd." The bill sufficiently alleges that the Plaintiffs are joint proprietors of the design, and that it was "duly registered," &c., "in accordance with the provisions of the Act." This makes their title complete, and it is unnecessary to negative subsequent Acts, which might destroy the existing right. It is not a condition precedent, but it is matter of defence to state subsequent Acts by which the Plaintiffs' rights became forfeited. The production of the certificate (s. 16) will prove "that the provisions of the Act and of any rule under which the certificate appears to be made, having been complied with." This certificate will of itself make out a *prima facie* title in the Plaintiffs at the hearing. According to the form of information given in the 8th section, it is sufficient to allege that the informant "was the proprietor" of the design, and such is the form of declaration at common law. They referred also to the form of pleading in the case of patents; *Harrison v. Taylor* (4 Hurl. & N. 815).

Mr. Selwyn, in reply.

Jan. 14, 1863. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on this demurrer is whether the bill is defective for not alleging that the Plaintiffs have complied with all the provisions of the 5 & 6 Vict. c. 100, or for not alleging, in express terms, that they affixed the letters "Rd" in some convenient place, on every article of the manufacture in question which has been published by them.

(1) The 5 & 6 Vict. c. 100, s. 4, is as follows:—"Provided always, and be it enacted, that no person shall be entitled to the benefit of this Act, with regard to any design in respect of the application thereof to ornamenting any article of manufacture, or any such substance, *unless* such design have, before publication thereof, been registered according to this Act, and unless, at the time of such registration, such design have been registered in respect of the application thereof to some or one of the articles of manufacture or substances comprised in the above-mentioned classes, by specifying the number of the class in respect of which such registration is made, and unless the name of such person shall be registered, according to this Act, as a proprietor of such design, and *unless*, after publication of such design, every such article of manufacture or such substance to which the same shall be so applied, published by him, hath thereon, if the article of manufacture be a woven fabric for printing, at one end thereof, or if of any other kind or such substance as aforesaid, at the end or edge thereof, or other convenient place thereon, the letters "Rd," together with such number or letter, or number and letter and in such form as shall correspond with the date of the registration of such design, according to the registry of designs in that behalf; and such marks may be put on any such article of manufacture or such substance, either by marking the same in or on the material itself of which such article or such substance shall consist, or by attaching thereto a label containing such marks."

[149] The principle upon which a demurrer lies to a bill may, for the purpose of the question before me, be broadly stated thus:—If the Plaintiff proves all the facts alleged in his bill, will he, in the absence of any other evidence, be entitled to any decree at the hearing? If this question must be answered in the affirmative, the demurrer must be overruled.

Here the Plaintiff alleges that he has “duly registered” his design. At the hearing he must prove this, and the proof of it is by the production of the certificate of the registrar. This is provided for by the 16th clause of the Act, which says that the certificate “shall, in the absence of evidence to the contrary, be sufficient proof, as follows:—

Of the design, and of the name of the proprietor, therein mentioned, having been duly registered; and

Of the commencement of the period of registry; and

Of the person named therein as proprietor being the proprietor; and

Of the originality of the design; and

Of the provisions of this Act, and of any rule under which the certificate appears to be made, having been complied with.”

At the hearing of this cause, therefore, assuming the Defendant to admit nothing, and to require the Plaintiff to prove everything, the Plaintiff will, by the production of this certificate, establish the five propositions enumerated and included in this section, and will throw on the Defendant the burthen of disproving them, or such one or more of them as he shall contest.

It follows, therefore, from this, that upon the Plaintiff proving what he has alleged by his bill, he will at the [150] hearing be entitled to a decree, upon the principle I have enunciated. This demurrer must, therefore, be overruled.

I am confirmed in this view of the case, by the circumstance that the form of information which is given by the Act (sect. 8) contains merely an allegation that the informant is “the proprietor of a new and original design,” and nothing more; this proprietorship can only be proved by the production of the certificate, which will establish the fact of the registration, and also the compliance, by the informant, with the other provisions of the Act.

The analogy also to the case of patents assists this view of the case; in which, I am not aware that this Court has ever required the Plaintiff to allege in the bill or to prove at the hearing, unless put in issue by the Defendant, that he, the Plaintiff, has duly paid the two instalments of stamp duties (16 & 17 Vict. c. 5. ss. 2, 3) necessary for the purpose of keeping his patent alive. If the Defendant, in the case of a patent, insist that the patent is lost by reason of this neglect, or if, in the case before me, the Defendant insist that the Plaintiff has lost the monopoly given to him by the statute by reason of his non-compliance with the provisions of it, as to matters to be performed subsequently to registration, he must raise that question either by answer or by plea; in which case, the Plaintiff will simply produce his certificate of registration, and the burthen of proving that the Plaintiff has not complied with such provision of the statute will fall on the Defendant, liable, however, to be rebutted by the Plaintiff.

As it is, I must overrule the demurrer.

[151] SARAZIN v. HAMEL (No. 2). Jan. 15, 1863.

The copyright of a registered design is lost, if the proprietor (English or foreign) sell the registered article abroad without the letters “Rd” being attached thereto, as required by the 5 & 6 Vict. c. 100, s. 4.

The Plaintiffs, who as before stated (*ante*, p. 145), registered a design for lace under the Copyright of Design Act, 1842 (5 & 6 Vict. c. 100), instituted this suit against the Defendant for an injunction and for relief against an infringement of their copyright in the registered design.

Upon a motion for an injunction, it appeared that the Plaintiffs had sold a quantity

of lace of the same pattern in France, without attaching thereto the letters "Rd" and the distinctive number, as required by the 4th section of the Act; and the question was, whether by these acts done abroad, the Plaintiffs had forfeited their exclusive right to the pattern under the Act.

Mr. Baggallay and Mr. Fooka, in support of the motion for the injunction, argued that acts done abroad by foreigners did not invalidate the rights given by the Act; that it did not apply and was not intended to apply to persons and acts out of the jurisdiction of the English Courts.

Mr. Selwyn and Mr. Freeling, *contra*, were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will not trouble you. I am of opinion that by the evidence and by the very proper admission of the Plaintiffs, it appears that they have sold and have [152] been in the habit of selling large quantities of this lace abroad, without anything to indicate that it had been registered in this country, and without marking it with the letters "Rd."

The question is whether the previous monopoly given by this statute is lost by the non-compliance with the conditions imposed by the 4th section. It would be singular if the Act did not apply to every sale and wherever it might be made.

The Plaintiffs are manufacturers at Calais, and it is contended that if they sell the lace there, to an Englishman, it need not be marked registered, but if the sale be made at Dover, it must be so marked.

The only difference is that one man purchases on the other side of the Channel and another on this; while the object of this section of the Act was, that the public should be warned against infringing a registered design and prevented from getting into litigation, by inadvertently imitating designs which have been registered and are entitled to protection.

Whatever the person having the monopoly of the design sells, he must give notice on the piece that it has been registered. It is true that the mark may be taken off by the purchaser, but that does not affect the vendor, as there is no privity between them.

The question is, is this proviso or condition limited to this country or does it apply everywhere? I read the two Acts together.

By the 3d section of the first Act (5 & 6 Vict. c. 100), the proprietor of a design not previously published, [153] "either within the United Kingdom of Great Britain and Ireland or elsewhere," is to have the sole right of applying it, it being registered according to the Act, "provided the same be done within the United Kingdom of Great Britain and Ireland." But the subsequent statute of 24 & 25 Vict. c. 73, omits the latter words, and says, "that the previous Acts and all Acts extending or amending the same shall be construed as if the words 'provided the same be done within the United Kingdom of Great Britain and Ireland,' had not been contained in the said recited Act; and the said recited Act and all Acts extending or amending the same shall apply to every such design as therein referred to, whether the application thereof be done within the United Kingdom or elsewhere, and whether the maker or proprietor of such design be or be not a subject of Her Majesty."

The Act applies to everybody, to a design anywhere made, to foreign and English subjects. It is not compulsory, but any person, if he wants the benefit of this Act, may register any design anywhere made; but what is he to do? He must register it, and then the 4th section says that no person shall be entitled to the benefit of the Act, unless (amongst other things) every such articles published by him shall have thereon the letters "Rd" and the particular distinctive number.

What does that mean? The Act applies to everybody who invents a design, and everyone, Englishman or foreigner, is to have the benefit of this Act, but he is to lose it, unless after the publication every article is marked "Rd."

Has every article published by the Plaintiffs had the letters "Rd?" No; the Plaintiffs say, we are foreigners, and this part of the Act does not apply to articles pub- [154]-lished abroad. Why not, what is there to say that it means published within England or Ireland, what power has the Court to introduce into the Act these words, which relate to all foreigners as well as to all Englishmen?

I am of opinion that the condition, the performance of which is necessary, is just as general as the benefit given by the Act, and that if a foreigner choose to take the

benefit of this statute, he must comply with its conditions and put on the registered article the letters "Rd," and if he do not, he loses the benefit of the Act.

It is not of the slightest importance whether the sale is at Calais or at Dover; the spirit, the meaning and the words of the Act are clear, and they apply to every person and to every place. The Plaintiffs not having complied with the terms of the statute I must refuse this motion, with costs.

NOTE.—By consent, the bill was dismissed with costs.

[155] SANDERSON v. STODDART. Jan. 16, 1863.

[S. C. 7 L. T. 662; 9 Jur. (N. S.) 1216; 11 W. R. 275.]

An executor voluntarily confessed judgments, which he paid, and afterwards, in an administration suit, the assets were insufficient to pay the remaining debts. Held, that the executor was still entitled to priority for his costs of suit.

On the application of a creditor, the usual administration order had been made against the executor.

It appeared from the certificate that the executor had received £2871 and had paid £2613, part of which was for judgments voluntarily confessed by him, leaving a balance due from him of £257. This sum constituted the whole assets.

The debts remaining unpaid amounted to £1490.

Mr. Ince, for the Plaintiff, asked that, as the estate was deficient, the costs of all parties might be paid *pro rata*, and the residue, if any, divided amongst the creditors.

Mr. Selwyn, for the executor, claimed to have his costs in priority of all other claims; *Gaunt v. Taylor* (2 Hare, 413).

Mr. Ince, in reply, insisted that the executor had disentitled himself to priority by voluntarily confessing judgments which had swept away the assets.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the executor must have his costs allowed in priority.

[156] THURGOOD v. CANE. Jan. 16, 17, 1863.

A decree for foreclosure was made against a *cestui que trust*, and the bill was taken *pro confesso* against his trustees. The decree was served on the trustee, but without the necessary notice. After the expiration of three years, the Court dispensed with service of the decree on the trustee altogether, and made it absolute against him.

The 22d Consolidated Order, art. 2, r. 11, requires that "unless the Court shall dispense with service thereof," an office copy of a decree taken *pro confesso* shall be served on the Defendant, *with notice* of the time within which he may apply to set aside the decree.

By the 22d Consolidated Order, art. 15, r. 3, a decree *pro confesso* may be made absolute "after the expiration of three years from the date of the decree, when a Defendant has not been served with a copy thereof."

Mr. L. Field now applied to the Court to dispense with service of the decree on a trustee altogether. He stated that on the 3d of December 1859 a decree for foreclosure had been made against one of the *cestuis que trust*, who was interested in the mortgaged estate under the will of the mortgagor, and that it had been taken *pro confesso* against his bare trustee, who was resident abroad. That the decree had been served, but without any notice as required by the 22d Consolidated Order, art. 2, r. 11.

He submitted that, under the circumstances, the Court might dispense with the service altogether, and make the decree absolute, although the service had been informal. That in all cases, under the General Orders, the Court had a dispensing power; *Ferrand v. The Corporation of Bradford* (21 Beav. 422; 8 De G. M. & G. 93);

but that here the order [157] expressly gave such a power. That the Court had acted similarly in *Benbow v. Davies* (12 Beav. 421), under the same order, and that the proper course seemed to be to wait until the expiration of the three years before applying for the order to dispense with service; *James v. Rice* (5 De G. M. & G. 46).

THE MASTER OF THE ROLLS [Sir John Romilly]. I will consider whether I can do it. My difficulty is that the trustee knows that the service on him was informal, and may not have come forward to set aside the decree, because he knows that, as matters stand, you cannot obtain the order absolute.

Jan. 17. THE MASTER OF THE ROLLS dispensed with service of the decree on the trustee and made the order absolute.

[158] FAIRFIELD v. BUSHELL. Jan. 17, 1863.

Devise to A. for life, and after her decease to her "lawful issue" then living and the "children" of such of them as should be then dead, in equal shares, the children of such issue to take their "parent's share." Held, that the word "issue" was to be construed "children," and that the children of A. and the children of A.'s children who predeceased her took for life only.

The testator, John Carter, by his will dated in 1815, devised as follows:—

"I give and devise unto my daughter Mary Bushell, all my messuages or dwelling-houses, lands and premises, with the appurtenances thereto belonging, situate in Liscard, in the county of Chester, to hold to her and her assigns during the term of her natural life, without being subject to the debts or control of her present or after-taken husband. And after her decease, I give and devise the same unto the *lawful issue* of my said daughter then living, and the child or *children* of such of them as should be then dead, whether male or female, in equal shares and proportions, the child or children of such deceased issue to take his, her or their deceased *parent's* share only, and each and every of them to hold the same as tenants in common and not as joint-tenants. And I strictly order and enjoin that the said last-mentioned premises or any part thereof shall not, on any account, be sold, mortgaged or in anywise encumbered."

The testator also gave, devised and bequeathed all the rest and residue of his estate and effects, of what nature or kind soever and wheresoever, not thereinbefore given and disposed of, unto his son John, his heirs, executors, administrators and assigns for ever.

The testator died in 1821, and his daughter Mary Bushell, who survived him, died in 1854, leaving two children then living, viz., John and Sarah, and two [159] children of a deceased son Samuel, viz., Mary Ann and John the younger.

This bill prayed a partition, and a question arose as to the true construction of this devise.

Mr. Selwyn and Mr. North, for the Plaintiffs Sarah and others, who were entitled to the interest, if any, of John, the residuary devisee and heir at law. The words "lawful issue" must, in this case, be construed "children," and be limited to issue of the first generation, in consequence of the subsequent direction that the "children" shall take their "parent's share;" *Sibley v. Perry* (7 Ves. 522); *Pope v. Pope* (14 Beav. 591); *Jarman on Wills* (vol 2, p. 83 (2d edit.)).

Secondly. There being no words of inheritance attached to the gift to the children or to that to the grandchildren (who take by substitution only) they are entitled for life only, and the remainder in fee passes, under the devise, to John the heir at law, and is now vested in the Plaintiffs under his will; *Sturgis v. Dunn* (19 Beav. 135).

Mr. Kay, for John Bushell the elder. The daughter Mary Bushell took an estate tail; for it is a devise to one for life, with remainder to her lawful issue, which plainly gives an estate tail. That which is engrafted on it makes no difference, as the direction is that the issue shall take as tenants in common, that was the case in *Jesson v. Wright* (2 Bligh (O. S.), 1); *Roddy v. Fitzgerald* (6 H. of L. Cas. 823). The testator intended that the estate should remain in the family of the devisees for all generations and should never be sold.

[160] Mr. Cole and Mr. F. Webb, for John the younger. *Sibley v. Perry* and that class of cases, where the word "issue" is limited for the purpose of giving effect to a gift and of preventing its being too remote, have no application. The issue living at the decease of Mary Bushell take an estate tail, and those who take the substituted gift to the children of deceased issue take the same estate. A devise to the heirs of A. would pass the fee, so one to the issue of the body of A. would give an estate tail, and therefore a devise to the issue simply would give the same interest or an estate tail. They cited *Whitelock v. Heddon* (1 Bos. & Pul. 243); *Harrison v. Harrison* (7 Man. & Gr. 938).

THE MASTER OF THE ROLLS [Sir John Romilly]. I regret to say I must decide this case in favor of the Plaintiffs.

There can be no doubt but that the rules of law which give a strict construction to technical words very often violate the intentions of testators, but I cannot disregard those rules, without overruling a series of decided cases, which I have no power to do. The principles and rules of construction must therefore be followed in this case.

Here the devise is to the daughter for life, and after her decease unto her lawful issue then living. If it had stopped there, I should have adopted *Whitelock v. Heddon* (1 Bos. & Pul. 243) and have taken the word "issue" in its most comprehensive form, and have held that it meant all the issue of the daughter, of every sort and however remote, as children, grandchildren and great-grandchildren and so on. But I think it improper so to treat it, for, first, there are the words "then living," which create some [161] difficulty, and then we have the words "and the child and children of such of them as should be then dead," in "equal shares," the *children* taking their deceased *parent's* share. It is clear that where a testator speaks of the "children" of "issue" taking their parent's share, you must cut down the meaning of the word "issue" to "children." For as the word "issue" unrestricted includes all the descendants, when you speak of the children of the issue those words have no meaning unless you restrict the word "issue." I must, therefore, hold that the word "issue," in this will, means "children," and that "the children of such deceased issue take" their parent's share only.

If I could find any words to enlarge the devise, or anything amounting to a gift of an estate of inheritance, or if there had been any gift over, I should be bound to follow *Jesson v. Wright*. But I think that the Court is concluded by these technical words, and, therefore, that the children of Mary Bushell living at her death, and the children of her son Samuel who died in her lifetime, take respectively for their lives only, and that on their deaths the shares will fall into the residue.

[162] FORD v. TENNANT (No. 2). June 27, 28, 1863.

[S. C. 32 L. J. Ch. 465 ; 7 L. T. 733 ; 9 Jur. (N. S.) 292 ; 11 W. R. 324.]

Professional privilege is limited to communications of a solicitor with his client and with those persons necessarily employed under the solicitor ; it does not extend to communications between a solicitor and third parties.

In a dispute between A. and B. the solicitor of A. had communications with B. Held, that they were not privileged.

By this bill, the Plaintiff (the executor of the late Lord Kensington) sought to have the benefit of a purchase made by Mr. Tennant (his, Defendant's, late solicitor) of an annuity of £1050 granted by Lord Kensington to a Mr. Savage. (See 29 Beav. 452.)

Mr. George Booth, a solicitor, was *subpœnaed* on behalf of the Plaintiff to give evidence in the case. He attended and counsel proceeded to examine him as to certain letters which he had received from and communications he had formerly had with Messrs. Harrison & Finch (the solicitors of the Defendants in this suit), at a time when he (the witness) was acting as the solicitor of Captain Rooke, in asserting a claim to the annuity in question in this suit.

The witness declined to produce the letters or to give the dates of them or answer the question put to him, stating that he conceived that all letters received by him

respecting the business of his client were privileged communications, and that he was directed by Captain Rooke not to give any information he was in possession of as his solicitor respecting Captain Rooke's matter.

The questions put to the witness and his answers thereto, as taken down by the Examiner, were as follows :—

"In the month of November 1857, as I believe, Mr. [163] Rooke of Ilford manor employed me as his solicitor respecting a matter relating to Lord Kensington's estate. That matter was in respect of the annuity granted to a Mr. Savage. I communicated with Mr. Finch, of the firm of Harrison & Tennant, on the subject, and I also saw Mr. Charles Tennant on the matter, I had also communications in writing with Mr. Finch. I have some papers with me relating to the matter. The date of the first letter I received from Messrs. Harrison & Finch was in January 1858. I decline to produce that letter, on the ground that I consider all letters received by me respecting the business of my client are privileged communications, and that I ought not to produce that letter. I am employed by Mr. Rooke and his brothers, and I hold that letter and other papers as the solicitor and professional adviser of Mr. Rooke and his brothers.

"Question. I ask the date of all the other letters you have?

"Answer. I decline to give the dates of all the letters received by me in the matter in which I was employed as the solicitor of Mr. Rooke and his brothers, on the ground above stated.

"Question. Did you make a claim on behalf of your clients on Messrs. Harrison & Finch?

"Answer. I decline to answer the question.

"Question. Did Messrs. Harrison & Finch make any representations to you on the subject of Savage's annuity?

"Answer. I had several conversations with them and they with me on the subject, chiefly with Mr. Finch, but I had some with Charles Tennant. Messrs. Harrison & Finch was then the firm.

"Question. What did Mr. Finch say?

"Answer. I decline to state.

[164] "Question. What did Mr. Tennant say?

"Answer. I decline to state. I was directed by Mr. Rooke not to give any information I was in possession of as his solicitor respecting Mr. Rooke's matter. I cannot say when I last saw Mr. Finch, it was perhaps in 1858 or 1859 that I last saw him about Mr. Rooke's matters. I have not had any conversation with him respecting the matter of this suit. I prepared a case for the opinion of counsel, and I obtained my information to enable me to prepare that case from my clients, some from Mr. Rooke and some from his brother; I cannot remember whether I obtained my information from any other person. I do not remember whether I obtained my information from Mr. Tennant, and I decline to look at any papers I may have, to search when I received any information from Harrison & Finch. I obtained some copies of documents from some one, but I do not remember from whom I received them. I do not remember whether I received any documents from Mr. Tennant. I do not know what is meant by documents, but I believe I received some papers, I believe from Mr. Finch; to the best of my remembrance I received a copy of some deed from him, but no agreement or copies of agreements that I remember. I ceased to act as solicitor for Mr. Rooke in that matter either in 1858 or 1859. I believe that my bill has been paid.

"Question. By whom was it paid?

"Answer. I decline to answer the question. I did not act as solicitor for Mr. Rooke in the matter of an assignment of Savage's annuity.

"Question. Did you act as Mr. Rooke's solicitor on the occasion of his abandonment of his claim to Savage's annuity?

"Answer. I object to answer the question."

[165] The usual order of course had been made to set down the witness's objections to be argued, and they were now brought on for argument.

Mr. Lloyd, in support of the objections. The rules as to the privilege of a solicitor, which is really that of the client, have of late been somewhat relaxed. The

privilege is no longer restricted to those which take place after a litigation has been commenced; *Herring v. Cloberry* (1 Phil. 91); *Desborough v. Rawlins* (3 Myl. & Cr. 515). The rule is not restricted to communications between the solicitor and client, but extends to information acquired by him solely in the character of solicitor. Lord Brougham held that as to communications received by solicitors "in their professional capacity, either from a client or on his account and for his benefit," . . . "they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information;" *Greenough v. Gaskell* (1 Myl. & K. 102). Lord Lyndhurst held that a solicitor was not bound to disclose information which he "acquired in his character of solicitor of the mortgagees" (his clients); *Jones v. Pugh* (1 Phil. 99).

If communications between the two opposing solicitors and their clients are respectively protected, the communications between the two solicitors themselves are equally protected as against third parties, for the information, on each side, is derived by the solicitor from his client.

Mr. Southgate and Mr. Hemming, *contra*. The privilege of a solicitor is limited to what takes place between him and his client, and does not extend to [166] communications between the solicitor and adverse parties or strangers; the reason for the rule does not apply in such cases. It is impossible that anything which Messrs. Harrison & Finch said or wrote to Mr. Booth, the solicitor of Captain Rooke, can be privileged, for there was no professional confidence between them. The case of *Greenough v. Gaskell* (1 Myl. & K. 98) arose on the answer, and the passage relied on in the judgment was a mere *obiter dictum*. In *Jones v. Pugh* (1 Phil. 96) the question did not relate to communications, but to mortgage or title-deeds. In suits for the specific performance of contracts entered into by correspondence between solicitors, the correspondence is constantly ordered to be produced; Taylor on Evidence (vol. 1, pp. 730, 744, 751); *Steele v. Stewart* (1 Phil. 471); *Tippins v. Coates* (6 Hare, 16); *Griffith v. Davies* (5 Barn. & Ad. 502); *Spenceley v. Schulenburg* (7 East, 357); *Sauryer v. Birchmore* (3 Myl. & K. 572); *Gore v. Bawser* (5 De Gex & S. 30); *Desborough v. Rawlins* (3 Myl. & Cr. 515).

Mr. Lloyd, in reply. The statement of Lord Brougham in *Greenough v. Gaskell* was not an *obiter dictum*. The question raised related to papers and letters written or received by a solicitor "in his capacity of confidential solicitor for Darwell, for whom he had been professionally concerned for a number of years," and were not limited to those between the solicitor and his client. The evils arising from the revelation of secrets derived from professional employment are (in the language of Lord Justice Knight Bruce) "too great a price to pay for truth itself," *Pearse v. Pearse* (1 De Gex & Sm. 28).

[167] Jan. 28. THE MASTER OF THE ROLLS [Sir John Romilly]. This is the demurrer by a witness, who objects to answer certain questions, on the ground that the information was acquired by him solely in the character of solicitor of his client; and on that ground, and on that ground alone, he insists that he is not bound to answer the questions. That he was the solicitor of Captain Rooke, and that during the time in question he was actually engaged as his solicitor, is not disputed. The question is whether these communications are privileged or not? They were not derived from the client, but from a person who was a stranger to him, and I concur that the decision depends on whether he can avoid the discovery, in consequence of having been then the solicitor of Captain Rooke, and that nothing which had previously occurred between Mr. Tennant and Captain Rooke can affect the question.

The reason for the rule which establishes the privilege is obvious, and it is acknowledged in all the cases. It is for the interests of justice that the most full, free and complete communication should take place between a client and his solicitor, for, if that did not take place, it would be impossible to conduct a suit or to obtain justice, or for a man to defend himself and prevent an injustice. It is, however, important that this rule should not be extended further than is necessary for the purposes of justice, and it struck me, during the argument, that the rule could not extend to a case where the information was obtained by a solicitor acting as such, but was not derived from the client himself. In the course of the argument, I suggested a case where it was admitted that the privilege must be qualified to this

extent:—That the communication must be one in which the client had an interest, and that otherwise the solicitor could not protect himself from answering.

[168] My opinion is that the authorities restrict the rule to communications between a solicitor and his client, extending it to all other persons with whom the solicitor must communicate in order to conduct the cause; such as communications between the client or the solicitor with persons employed to get up evidence, as in the case of *Steele v. Stewart* (1 Phil. 471). But there is a very broad and marked distinction between information derived in those cases and information derived from third parties, from strangers, or from the opponents of the client.

I should not have had much doubt on this point had it not been for the *dictum* in *Greenough v. Gaskell* (1 Myl. & K. 102), and I was desirous to read and consider it before I decided this case. The passage is this:—"If, touching matters that come within the ordinary scope of professional employment, they (solicitors) receive communication in their professional capacity, either from a client or on his account and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they knew only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or Equity, either as party or as a witness."

Now it must be admitted that this extends beyond the communications between a client and his solicitor, it is expressly stated that, if solicitors "receive communications in their professional capacity, either from a client or on his account and for his benefit," they are bound [169] to withhold such matters. Such communications might be from any person whatever; and I certainly must admit that Mr. Lloyd was just in stating that this was not an *obiter dictum*, for the Court did not compel the solicitor to produce papers, some of which were received from his client and some apparently from other persons. If the communications with strangers were liable to production, the solicitor would have been ordered to shew which of them had been communicated to him from his client and which from strangers; so that those derived from the client might be protected and the others ordered to be produced; and Lord Cottenham, in *Desborough v. Rawlins* (3 Myl. & Cr. 515), suggested that that would be the proper course. The case of *Greenough v. Gaskell* has been repeatedly followed and repeatedly approved of, but not on this particular point, and I thought it necessary to consider whether this question had been pointedly brought to the attention of Lord Brougham. Unfortunately it does not appear, for, although Lord Brougham states many cases, it does not appear that any case, on this particular point, was cited in the argument. For instance, the case of *Spenceley v. Schulenburg* (7 East, 357) is not mentioned. I am therefore bound to look how that case has been followed, and I cannot find, nor has my attention been called to a single case, in which that particular part of the judgment has been followed, and I do not believe that such a case can be found to exist. I think that Lord Brougham can hardly be considered to have overruled the cases previously decided, which had confined privilege to communications between solicitors and their clients or the agent of clients.

In *Spenceley v. Schulenburg* (*Ibid.*) it was proposed by the Plaintiff to call the Defendants' attorney to prove a [170] notice to produce an agreement which had been served on him by the Plaintiff's attorney, and Lord Ellenborough held that the Defendants' attorney was not bound to disclose the contents of the paper, which he had become acquainted with in his confidential character of attorney. But when the case came into Bank, he admitted that he was wrong, and stated "he had had great doubts at the time he rejected the witness, and was afterwards satisfied that he had acted hastily. That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him, as attorney in this cause, from the opposite party, in the disclosure of which there could be no breach of confidence."

Lord Cottenham in *Desborough v. Rawlins* (3 Myl. & Cr. 515) did not profess to doubt the passage in Lord Brougham's judgment, but it is impossible that the passage in *Desborough v. Rawlins* can be maintained, consistently, with the passage in *Greenough v. Gaskell*. Lord Cottenham says, "Both *Bramwell v. Lucas* and *Greenough v. Gaskell*

shew that the privilege only applies to cases in which the client makes a communication to his solicitor with a view to obtaining his legal advice. That is undoubtedly the same ground upon which I held, in *Sawyer v. Birchmore*, that a solicitor, when examined as a witness, was bound to produce letters communicated to him from collateral quarters, and to answer questions seeking information as to matter of fact, as distinguished from confidential communications; and I so decided, not on the authority of *Bramwell v. Lucas* only, but I distinctly referred to *Spenceley v. Schulenburg*. In *Sawyer v. Birchmore* (3 Myl. & Cr. 522) [171] the question arose as to a solicitor being bound to disclose the circumstances of certain transactions in which he had been concerned as solicitor. I was of opinion that the facts were not sufficiently brought before me to shew that they were privileged, and finding it laid down by the Court of Queen's Bench that communications are not privileged if coming from any other quarter, but that they would be if they came from the client, I found that a case might exist in which many papers in a solicitor's hands would not be privileged. It was precisely the same in *Spenceley v. Schulenburg*. I thought, therefore, that the facts did not bring the case within the privilege applicable to confidential communications."

Here then is an express and direct decision, after considering the case of *Greenough v. Gaskell*, that the communication must come from the client directly or indirectly, and that the principle of privilege does not apply to communications which come from any other quarter. The same thing is expressly decided not only in *Spenceley v. Schulenburg*, but also by a very careful Judge, Sir James Parker, in *Gore v. Bowser* (5 De G. & Sm. 33). In that case, the Defendant sought to examine the Plaintiff's solicitor, Mr. Goode, as to what passed at an interview between the solicitor and the Defendant, and the witness demurred. Sir James Parker says, "I cannot doubt that Mr. Goode is bound to answer this interrogatory. In the course of a transaction in question in the cause, the Plaintiff employs his solicitor as his agent to communicate with the opposite party. I do not see how this can be regarded as a confidential or privileged communication, and I consider that the Defendant must be at liberty to give the communication in [172] evidence, and to examine the solicitor as a witness to prove what it really was. Suppose the communication had been by letter, it is every day's practice to order parties to produce letters or copies of letters passing between their solicitors and the opposite parties or their solicitors."

The judgment puts it very clearly, and it is precisely this case. In this case, it appears that the solicitor acted for his client in the character of an opponent.

I have this option:—Either to follow *Greenough v. Gaskell* or the two other cases, in which a different doctrine is laid down and appears to have been acted on. I am of opinion that this point was not brought to Lord Brougham's attention, which was directed to communications between solicitor and client, and it is clear that Lord Cottenham entertained that view of the case, he having been the successful counsel in *Greenough v. Gaskell*.

I am of opinion that the demurrer must be overruled and that the usual order must be made.

NOTE.—See *Walsham v. Stainton*, V.-C. Wood, 10 Dec. 1863.

[173] *Re PUGH*. Jan. 30, 31, 1863.

[Affirmed, 1 De G. J. & S. 673; 46 E. R. 266; 11 W. R. 762. See *In re Newman*, 1867, 15 W. R. 631.]

A client paid his solicitor's bill in January; he changed his solicitor two months and a half afterwards, and in November following he presented a petition for the taxation of the bill, on the allegation of simple overcharges. The application was refused.

On a meeting in June to settle a purchase, the solicitor for the first time delivered his bill, and he insisted on payment before completion. It was paid under protest,

and in November following a petition was presented for taxation, alleging items of overcharge. The Master of the Rolls ordered a taxation, and his decision was affirmed by the Lords Justices.

In December 1861 the Petitioner Mr. Briscoe employed Mr. Pugh as his solicitor in matters relating to his father's settlement, and as to an advance of £500 required by him upon the security of his reversionary interest therein.

Mr. Pugh himself agreed to make this advance of £500 on account, of which he paid the Petitioner £150 on the 4th of January 1862, and £250 on the 8th of January 1862. On the 20th of January Mr. Pugh delivered his bill of costs, amounting to £89, 9s. 2d., and he paid over the balance to Mr. Briscoe, who gave a receipt for the amount, and a mortgage of his reversionary interest to secure the £500.

After this, Mr. Briscoe continued to employ Mr. Pugh until the 27th of March 1862, when he changed his solicitor.

The mortgaged property was afterwards sold, and the 27th of June 1862 was appointed for completing the purchase at Worcester. The parties, some of whom came from a distance, met, and on that day Mr. Pugh, for the first time, delivered his second bill of costs for business done subsequent to the 20th of January, amounting to £113, 14s. 5d. He insisted on having it paid before he completed the purchase, and the client was thus compelled, but under protest, to allow him to retain that sum out of the purchase-money.

The petition was presented on the 16th of December 1862, praying the taxation of the two bills. It specified items of overcharge.

[174] Mr. T. A. Roberts, in support of the petition, argued, first, that Mr. Pugh, as mortgagee, had no right to charge the Petitioner for his trouble in matters relating to his mortgage; *Langstaff v. Fenwick* (10 Ves. 405); *French v. Baron* (2 Atk. 120); *Godfrey v. Watson* (3 Atk. 517).

Secondly, that the bills had been paid under pressure, the first while the relation of solicitor and client subsisted, and when it was, therefore, the duty of the solicitor to state to his client that the first bill contained overcharges; and the second, under irresistible pressure, as the purchase could not be delayed until a taxation of the bill could be procured.

He referred to *In re Rance* (22 Beav. 177); *In re Steele* (20 L. J. (Ch.) 563); *Horlock v. Smith* (2 Myl. & Cr. 495); *Ex parte Wilkinson* (2 Coll. 92).

Mr. Southgate and Mr. Elderton, *contrà*, insisted that, to entitle a client to a taxation after payment, there must be pressure and common overcharges, or overcharges so gross as to amount to fraud; and that there must be no delay in making the application. That all these requisites were wanting in this instance. They relied on the acquiescence of the Petitioner after the relation of solicitor and client had ceased, and on the long unexplained delay in making the application.

They cited *Re Fyson* (9 Beav. 117); *Re Broune* (15 Beav. 61; 1 De G. M. & G. 322); *Re Hubbard* (15 Beav. 251); *Re Barrow* (17 Beav. 547); *Barwell v. Brooks* (8 Beav. 121); *Re Finch* (4 De G. M. & G. 108).

Mr. Roberts, in reply.

[175] THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Petitioner is not entitled to a taxation of the first bill.

I have always held that when a client is practically obliged to pay a bill of costs without having an opportunity of inspecting and examining it, it amounts to pressure.

I have also held that mere retention of the amount of a bill of costs is not to be regarded in same light as a voluntary payment of it by the client.

But the circumstances are different as to the two bills. It appears that the solicitor was employed to raise a sum of £500. He agreed to advance it himself, and paid £150 on the 4th of January and £250 on the 8th of January. There, therefore, only remained £100 to be paid, and it is clear that the solicitor was to have his costs out of that sum. On the 20th of January the client signs a receipt for the balance, and this was a simultaneous transaction with the delivery of the bill. If the client had come immediately afterwards and said, I trusted to the delivery of a proper

bill, but I find that it contains improper items, I should probably have thought that on proof of overcharges he would have been entitled to tax that bill. But he made no claim to tax this bill until November following. Mr. Roberts, however, argues that the fact that Mr. Pugh continued the Petitioner's solicitor is a sufficient excuse; but I am not of that opinion. The reason why the Court does not allow a taxation after payment, and where there has been delay in making the application, is this:—A solicitor loses vouchers, and no objection being made to his bill, he does not think it necessary to preserve them, [176] and he cannot, therefore, after a long delay, prove the facts material for the allowance of many items. But the fact of Mr. Pugh's continuing the Petitioner's solicitor for two and a half months afterwards is rather unfavorable to his case. Nothing is more common than to pay a solicitor's bill every year. The Petitioner continued during two and a half months the client of Mr. Pugh, he then changes his solicitor, and makes no complaint as to that bill for ten months. I do not think I ought, if that stood alone, to tax that which is the first bill.

It is justly observed that the two bills are not connected together; the second bill stands in different situation. The Petitioner came by appointment to receive the surplus of the purchase-money, but he could not get it unless he paid the second bill. It was a matter of importance to him to receive the balance, and to postpone the settlement of the purchase would have put all persons to great inconvenience. I have always held that this is evidence of pressure in a greater or less degree. The client could not then tell whether there were overcharges or not. He paid the bill in June, and complained of it in November following, and it was not possible, under the circumstances of this case, to obtain the common order to tax. This brings it within the cases where taxation after payment is ordered.

Tax the second bill, but not the first.

Jan. 31. THE MASTER OF THE ROLLS. I think that this is not a proper case to give any costs.

NOTE.—On an appeal by Mr. Pugh the Lords Justices, on the 2d of June 1863, affirmed the decision as to the taxation of the second bill. [1 De G. J. & S. 673.]

[177] BROMLEY v. WILLIAMS. Feb. 11, 12, 1863.

[S. C. 32 L. J. Ch. 716; 8 L. T. 78; 9 Jur. (N. S.) 240; 11 W. R. 392. See *Gray v. Gibson*, 1866, L. R. 2 C. P. 125; *Marine Mutual Insurance Association, Limited*, v. *Young*, 1880, 43 L. T. 444.]

Some shipowners joined in a club, and provided for the mutual insurance of their respective vessels. Held, that this was not an illegal association under the 35 Geo. 3, c. 63; but whether it is necessary to have a policy in such cases, *quære*.

By the rules of a shipping insurance club, its affairs were to be managed by the members, assisted by the treasurer and secretary, and the "finance committee" were to sign all cheques and see that the funds were duly appropriated. A ship of a member having been lost at sea, he sued seven of the members and the treasurer and secretary to obtain payment of the loss. There being no finance committee: Held, on demurrer, that these Defendants had not improperly been made parties.

By a rule of a shipping insurance club, a fine was imposed on non-payment of the premium for a month after it became due, and at the end of two months he was to be deprived of the benefit of insurance until the arrears were paid. A member insured his ship, which was lost at sea after the premium became due but before the expiration of the month. Whether, on subsequently paying the premium, the member was entitled to the sum insured, *quære*.

As to the modern practice of making several of a numerous class represent the class both as Plaintiffs and Defendants.

This case came before the Court on general demurrer to the whole bill.

According to the statements of the bill, a mutual insurance society had, previously

to 1858, been established at St. Ives, called "The St. Ives Shipping Insurance Club," the members, consisting of shipowners, mutually insured their ships against loss, and agreed to contribute to such loss in rateable proportion, to the extent of the amount insured by them respectively.

The club was regulated by certain rules and regulations binding on all the members, and which were set out in the bill, which so far as material were as follows :—

"13. Vessels entering shall pay as follows :—One-third part of the percentage of the amount of the stock in hand when entered, one-third at the end of two months, and the remainder at the end of four months from the date of entry ; but should losses or other circumstances require an earlier payment of the second [178] and third instalments, it shall be made accordingly, on the secretary giving notice thereof."

"14. When the stock of the club is reduced below £5 per cent., there shall be a payment of 10s. per cent. per quarter on the amount insured on each vessel ; and if the funds are at any time found insufficient to meet the claims, the treasurer shall be ordered to collect from each member such a percentage as shall be deemed necessary."

"16. Any member neglecting to pay any premium, call or fine for the space of one calendar month after it becomes due and notice thereof given by the secretary, shall pay a fine of £10 per cent. per month on the amount, and at the end of two calendar months from the date of the notice shall be deprived of all benefit of insurance until such arrears are paid."

In July 1858 John Dale, the owner of a vessel called "The Betsey," became a member of the club in respect of that vessel, which he insured in the club for £250.

Down to October 1860 John Dale paid the secretary all his premiums, calls and fines, but, as the bill alleged, "through some mistake he omitted to pay the premium which became due in October 1860," and on the 18th of that month William Tonkin, the secretary, sent him a notice that unless the premiums then due from him in respect of the said vessel, and which amounted to £3, 15s., were paid on or before the 13th day of November next, his claim upon the club would be forfeited.

[179] On the 23d of October 1860 "The Betsey" was totally lost at sea.

On the 25th of October 1860 John Dale sent to William Tonkin, the secretary of the club, notice of the loss of the vessel by John Rowe the captain, and William Tonkin then told him that the premium due in respect of the vessel had not been paid, and desired him to go back to John Dale and tell him to remit to him, William Tonkin, the sum of £3, 15s. In consequence thereof, John Dale, on the following 26th of October, remitted the sum of £3, 15s. to William Tonkin, as the secretary of the club ; but William Tonkin refused to receive, and in fact returned it, and subsequently John Dale, on three different occasions before the 13th of November 1860, sent a cheque on the Penzance Bank for the sum of £3, 15s. to William Tonkin, which William Tonkin each time refused to receive and returned. Finally John Dale, before the 13th day of November 1860, tendered to Mr. Williams, the treasurer of the club, £3, 15s. in cash ; but Mr. Williams, on the part of the club, refused to receive the same, and such premium had therefore never been paid.

The Plaintiff, who was the assignee in bankruptcy of John Dale, filed this bill against Williams (the treasurer), Tonkin (the secretary) and seven of the members of the club, stating the above circumstances, and alleging, in the usual way, that the other members were too numerous to be made parties, and that the Defendants sufficiently represented them.

The bill prayed, 1. A declaration that the Plaintiff was entitled to be paid the £250 out of the moneys and [180] property of the St. Ives Shipping Insurance Club, or by the rateable contributions of the persons who were members thereof at the time of the loss of the vessel.

2. That the Defendants might be decreed to pay the amount due to the Plaintiff out of the funds of the club, or to cause the amount to be raised and paid by the persons who were members of the club at the time of the loss of the vessel, or such of them as were liable to contribute thereto, according to the rules and regulations of the club and the customary mode of payment and satisfaction of claims in use in the club.

The bill contained no allegation that any policy had been granted to John Dale.

To this bill, the seven members together, and the secretary and treasurer separately, demurred for want of equity.

Mr. Speed, in support of the demurrer of the seven members. First, this bill shews no liability on the part of the Defendants, and it alleges a several and separate legal liability which cannot be the subject of such a suit as this; *Strong v. Harvey* (3 Bing. (O. S.) 304). The finance committee, if there had been one, would have been the proper parties to sue. Secondly, the society is illegal and the contract is rendered invalid by statute. By the 35 Geo. 3, c. 63, s. 11, it is enacted, "That every contract or agreement which is made or entered into for any insurance, in respect whereof any duty is by this Act made payable, shall be engrossed, printed or written, and shall be deemed and called a policy of insurance, and that the premium, or consideration in the nature of a premium, paid, given or contracted for upon such insurance, and the particular risk or adventure [181] insured against, together with the names of the subscribers and underwriters and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof, every such insurance shall be null and void to all intents and purposes whatever;" and by the 14th section no contract or agreement for insurance can be given in evidence unless properly stamped. See *Reid v. Allan* (4 Exch. 326); *Dowdall v. Allan* (19 L. J. (Q. B.) 41). The contract, therefore, which wants these requisites and the insertion of these particulars required by the Act, is wholly void. What are the terms of the insurance, or the nature of the liability, depends on the policy, and no other evidence of them can be given. How then can any decree be made, unless it be shown, by a legal instrument, that the Defendants are personally liable to pay.

Thirdly, the premiums which were due at the time of the loss had not been paid, and therefore no insurance then existed. Courts of Equity never relieve under such circumstances, and revive a contract for insurance after the loss has occurred. Except under the recent statute, it never relieves against forfeiture of leaseholds occasioned by their non-assurance.

Mr. Southgate and Mr. Bevir, in support of the bill. First, the bill is framed on the authority of *Taylor v. Dean* (22 Beav. 429), where the suit was instituted against seven members of the committee. The right to equitable relief and the mode of enforcing it, in cases like these, is shewn by *Hutchinson v. Wright* (25 Beav. 444), followed in *Turnbull v. Woolfe* (3 Giffard, 91). In the latter case a decree was made, and on appeal the Lord Chancellor decided against the Plaintiff on the merits, but not on the jurisdiction. The [182] second point was argued in *Taylor v. Dean* (22 Beav. 435, 437), but the Court would not allow it to prevail upon demurrer. On this point they referred to *Pattison v. Mills* (1 Dow. & Cl. 342), where no policy had been executed. Thirdly, the non-payment of the premiums is provided for by the 16th rule: one calendar month is allowed for payment after it becomes due and notice given by the secretary, and the member is subject to a fine. The insurer therefore still remained a member and liable to all payments and entitled to all privileges.

Mr. Speed, in reply. These Defendants are not alleged to be liable, and, for anything that appears, they may have paid everything due from them to the common fund; it is not alleged that they have not contributed every shilling for which they were liable to that fund, and there is no charge in the bill that they are liable to pay any part of the £250. There is nothing to shew that these Defendants have power to compel the other members to contribute; the committee alone can do it. In *Taylor v. Dean* the objection arising under the statute of 35 Geo. 3, c. 63, s. 11, was not taken; that Act does not appear to have been cited. *Hutchinson v. Wright* was a suit against the managing committee, who could compel contributions and payment; here the suit is against individuals who have no such power.

THE MASTER OF THE ROLLS reserved his judgment until he had heard the other demurrers.

The demurrers of the treasurer and secretary (Williams and Tonkin) were then argued. As to these Defendants [183] the following additional statements are necessary. Their duties were regulated by the following portions of the rules:—

"1. Its (the club's) affairs shall be managed by the members generally, assisted by a treasurer and secretary."

"3. The treasurer shall keep the accounts of the club, collect all premiums, calls, fines and other items of income, and dispose of the same in accordance with the orders of the annual or other meetings; but he shall not disburse any of the funds, unless by order of such meetings respectively, signed by the chairman, secretary and at least four other members."

"4. The secretary shall attend all meetings, and enter in a book the resolutions which, from time to time, may be adopted. He shall keep a record of all other proceedings, issue the notices necessary for convening meetings, preserve all letters, notices and papers received by him, and keep a copy of all correspondence carried on on behalf of the club."

"5. The finance committee shall consist of three members, who shall examine the treasurer's accounts monthly, sign all cheques and see that the funds are duly appropriated."

"9. The secretary, on receiving a requisition signed by five or more members, shall call a special general meeting," &c.

"14. When the stock of the club is reduced below £5 per cent., there shall be a payment of 10s. per cent. per quarter on the amount insured on each vessel; and [184] if the funds are at any time found insufficient to meet the claims, the treasurer shall be ordered to collect from each member such a percentage as shall be deemed necessary."

The Plaintiff by his bill alleged that he had applied to Tonkin and Williams, as secretary and treasurer of the club, and required them to pay or procure payment from the members of the club of the sum of £250, and to raise the necessary amount, out of the funds of the club or by contribution from the members thereof liable thereto, but that they had refused to pay the same. It also alleged that there was not, as far as the Plaintiff could discover, in the year 1860, nor at any other time, any finance committee appointed by the club, or any other committee by which the affairs of the club were managed.

The demurrers of the treasurer and secretary were then argued.

Mr. Speed. These Defendants are only servants or officers of a private partnership, and the secretary is a mere witness. You cannot make persons standing in such a situation parties to a Chancery suit which relates to their principal and in which they are not interested; *Fenton v. Hughes*.⁽¹⁾ The case of a corporation is an exception, their secretary, book-keeper or other officer may then be made a party, but merely for the purpose of making a discovery of the acts of the corporation, and which cannot be obtained on oath from such corporation; *Redesdale* (pp. 188, 189 (4th ed.)). No relief can be had [185] against these parties at the hearing, their duties are merely ministerial.

Mr. Southgate and Mr. Bevir, *contrà*. The duties of these Defendants, as appears from the rules, and the non-existence of a finance committee, render it necessary to make them parties, in order that the Plaintiff may have relief at the hearing. They have active powers and duties to exercise and perform in raising the contributions. By the modern practice, in bills against companies, the directors are constantly made parties; *The Great Western Railway Company v. Rushout* (5 De G. & S. 290); *Simpson v. Denison* (7 Railw. Cas. 403); *Munt v. The Shrewsbury Railway Company* (13 Beav. 1); *Beman v. Rufford* (1 Sim. (N. S.) 550); *Sturge v. The Eastern Union Railway Company* (7 De Gex, M. & G. 158); *Allen v. Talbot* (30 L. T. 316).

Mr. Speed, in reply. If the Plaintiff be right, there is no case of a partnership, in which the clerks, shopmen and assistants may not be made parties to a bill against their employers. Here these Defendants have nothing to do except as agents of the club. The treasurer is (rule 3) to keep accounts "in accordance with the orders of the meetings," and he can only disburse the funds by such an order countersigned by the chairman, &c. The secretary is (rule 3) to attend the meetings and enter the resolutions.

The cases cited have no application, they were cases against corporations, which

(1) 7 Ves. 287; and see *Few v. Guppy*, 13 Beav. 457; *Glyn v. Soares*, 1 Y. & Coll. Ex. 644; *The Queen of Portugal v. Glyn*, 7 Cl. & Fin. 466; *Irving v. Thompson*, 9 Sim. 17; *Kerr v. Rew*, 5 Myl. & Cr. 154.

are admitted exceptions to the rule, or where there has been fraud or misconduct, or to restrain them from doing acts contrary to their [186] duty. In *How v. Best* (5 Madd. 19) a demurrer of an officer of the Bank of England was allowed, he being a mere witness.

THE MASTER OF THE ROLLS [Sir John Romilly]. These demurrers must be disallowed. Four objections have been taken to this bill, three are technical and the fourth is upon the merits. The first objection is, that the association is an illegal one; the second, that the Defendants are not personally liable to be sued; the third, that, at all events, the treasurer and the secretary cannot be sued; and the fourth is, that upon the facts stated the Plaintiff has no equity.

The state of the case is this:—The St. Ives Shipping Insurance Club was composed of a set of shipowners who joined together and put into a common fund sums of money proportioned to the amounts to be paid to them in case of the loss of their vessels. This may be called, and it was in fact, a mutual insurance; they were in the nature of a joint stock company or partners in a particular adventure. Each member had a ship which was insured against loss for a certain sum, and to provide for the payment each member paid a percentage into a bank or common fund.

It is suggested that the statute of the 35 Geo. 3, c. 6, makes this an illegal association; but upon looking at the statute I am of opinion that it is not so. The statute was really intended to prevent gaming among underwriters, and has reference to the underwriting of [187] policies. This case is not at all affected by the Act, which does not make it illegal for the owners of ships to join together and contribute to a common fund to provide against the loss of their ships; the cases cited, as *Strong v. Harvey* (3 Bing. (O. S.) 304), shew that. Therefore, upon the nature of these associations, as stated in the bill and the rules affecting them, I do not see anything which makes it illegal for shipowners to enter into a joint adventure for providing, amongst themselves, for the loss of their ships. Whether it is, under these circumstances, necessary to have a policy appears extremely doubtful; I should be inclined to think that it is not, but that point will be open to the Defendants at the hearing of the cause. At present it is not necessary to go beyond what the bill states.

The second objection is that the Defendants (other than the treasurer and secretary) are not the persons to be sued. It is true they are members of the association and they have agreed among themselves to contribute to the losses; but it is said that by the rules the association is to be governed by the finance committee, which is to carry on the whole business of the concern. The bill however alleges that no finance committee has ever been appointed, and that, consequently, there is no body of management, and that being so, it is impossible to have any remedy against the association, except by suing the individual members.

The first question is, can you sue all the individual members, and if they were all made parties, what objection would there be? It is to be observed that unless I hold that the Plaintiff can sue all the members and that this association is not an illegal association, [188] the only consequence would be that the treasurer and secretary, if they have the control over the funds of the association, might put the whole into their pockets and retain them and tell the shareholders, "We have nothing to do with you, you have no right of suit against us." The same objection would apply to any one of the other Defendants if he lost a vessel and came to have the insurance paid, the rest of the members and the treasurer and secretary might equally say, "We have nothing to do with you, we will act and deal with the fund as we think fit." The object of the Defendants in raising this objection is, no doubt, by a side-wind, to avoid contesting the question of merits; but if I allowed it, the necessary effect would be that it would depend upon the honor of the treasurer whether he put the money in his pocket or not. But I think that the other members might object and say that he was bound to account, and that they were entitled to have the funds of this association set apart and duly administered, according to the terms upon which they had contributed it. If that be so, provided all the members of the association were made parties, then this rule is well established:—That if they are so numerous that they cannot be made parties to the cause, with any chance of bringing it to a hearing, in consequence of abatements and the like difficulties, then you may make two or three of a class Defendants to represent the interest of all of that class. Formerly

that was not the practice of this Court, but the rules have been modified and altered so as to suit the exigencies of modern practice, as was done by Lord Cottenham in several instances. But if there be three or four classes who have separate and conflicting interests, then you may select two or three from each class to represent that interest, in the same way as if the whole class had been brought before the Court.

[189] It is obvious that this is not a case in which the Plaintiff could have sued on behalf of himself and all other members of the concern, because he is actually suing the concern, and his interest is in conflict with all the other members. It sometimes happens that there is a class of members of a company who have a conflicting interest with the others; and then the Plaintiffs, if the class to which they belong are very numerous, put forward two or three of their body who sue on behalf of themselves and all the others of that class, and make the other persons who have conflicting interests, or some, on behalf of the rest if numerous, Defendants. This case comes within that rule; a few persons have been selected and made Defendants to represent the interests of the rest of the members, and consequently, in that respect, I think the bill is correct in form.

The next question is, whether the treasurer and secretary can be sued. This is certainly a question of more nicety and difficulty, as it does not appear by any allegation in the bill that they are members of the concern. But it is quite clear that they are part of the governing body, because the affairs are to be managed by the members generally, "assisted by a treasurer and secretary." Then it appears that the treasurer has got the funds of the company, and every member of the company has a right to know how the treasurer administers them, and in what manner he employs them, and the treasurer, on his part, is bound to account for the mode in which he has administered them. It appears from the statements in the bill that the treasurer has acted in the matter upon his own authority, or upon the authority of some other member of the company, by refusing to receive certain moneys and refusing to pay certain other moneys. I think that the Plaintiff who makes a claim on the [190] funds is entitled to an account of how they have been administered, and, as it appears, from the statements here, that the treasurer and secretary are the only two persons who manage the concern and have the control of the funds, I think they may properly be made parties, and that this case is distinct from the ordinary case of a corporation, where the clerk of a corporation is made a party merely for the purpose of giving discovery on oath, which a corporation cannot do. These three grounds, which may be more fully considered at the hearing of the cause, are mere technical matters raised by the Defendants to avoid going into the question of merits. But, in my opinion, their case fails in this respect.

I have now to consider whether the case also fails upon the merits. The case is this:—Mr. Dale had a ship called "The Betsey;" he joined the insurance club and valued the ship at £250. The premium of £3, 15s. was duly paid down to October 1860, but after that he did not pay the premium, and the secretary wrote to him, on the 18th of October, to inform him that unless he paid it before the 13th of November his claim upon the club would be forfeited. In the meantime, on the 23d of October, the vessel was lost. Upon the 25th the owner of "The Betsey" sent to the association notice of the loss, upon which the secretary says, "You have not paid the premium due last October," and tells him to remit it, upon which, two days after, he sends the amount tendered, but the secretary refuses to take it. The question then arises whether the payment or tender, after the loss, will entitle the owner of the vessel to the same benefit as if he had paid it before he knew of the loss? I think that is a question of some nicety; but the 16th rule induces me to overrule the demurrer. It says, "Any member neglecting, &c." [See *ante*, p. 178.] [191] There is some ambiguity as to its effect and meaning, but it is sufficiently in favor of the Plaintiff to say that he is entitled to have this cause heard.

It appears also that the premium only was tendered; but the fine of £10 per cent. was only payable at the expiration of one calendar month after the premium became due. The question, whether the knowledge of the loss would make any difference with respect to the 16th clause, must, I think, be deferred to the hearing, when the matter may be determined.

I think the demurrers cannot be sustained.

NOTE.—At the hearing on the 20th of April 1864, this bill was dismissed with costs.

[191] *Re* BEAUMONT'S TRUSTS. Feb. 14, 1863.

Trustees had a discretionary power of investing a residue either on Government or "real securities," and to alter or vary the investment. A. B., who, subject to a prior life-estate, was absolutely entitled, gave the fund to charity, both by deed not enrolled and by her will, and she died in the life of the tenant for life. The fund had always been invested in the public funds. Held, that, notwithstanding the Mortmain Act, the gift to the charities was valid.

By her will, Jane M. Beaumont gave all her real and personal estate to her two executors, upon trust to convert and invest the produce in their names in the Parliamentary stocks or public funds of Great Britain or at interest on Government or real securities, and upon trust, that the trustees or trustee for the time being of her will should, at their or his discretion, alter, vary and transpose the said stocks, funds and securities for or into other stocks, funds and securities of a like nature; and upon trust to pay the income to Mrs. Wynn during her life, and on her decease, to pay, assign and transfer the capital of all her said property to Charlotte Beaumont.

The testatrix died in 1846, and her will was proved [192] by her executors Charlotte Beaumont and John Shapter.

In 1847 the residue was ascertained and consisted of about £7000 Bank annuities, which investment had never been disturbed or varied.

In 1852 Charlotte Beaumont, by deed, not enrolled, assigned her reversionary interest in these Bank annuities (specifically describing them as constituting the residuary estate of the testatrix), unto John Shapter and two other trustees, upon such trusts as she should by deed appoint, and in default, upon trust for two charities which she described, equally.

She never executed the power of appointment, but by her will, dated in 1852, she confirmed the deed, and she gave the ultimate residue of her estate to the same two charities equally, and appointed the three trustees of the deed to be executors of her will.

In 1857 Charlotte Beaumont died. Mrs. Wynn survived her and died in 1862, and thereupon the trustees of Jane Mary Beaumont's will transferred the Bank annuities into Court under the Trustee Relief Act.

The representative of the next of kin of Charlotte Beaumont now presented a petition, claiming the fund, and insisting that gift of it to charity was void under the Mortmain Act.

Mr. Baggallay and Mr. Prendergast, for the Petitioner. As Charlotte Beaumont died in the lifetime of Mrs. Wynn, she never had an absolute interest in or complete control over the stock, she had merely a reversionary interest in a fund or residue, which, until the [193] death of Mrs. Wynn in 1862, was liable to be laid out in real securities. Her interest in the fund therefore savoured of realty, and could not be devoted to charity by a deed not enrolled as directed by the statute or by will.

This case is wholly different from one where a discretion, either of investing on real or purely personal securities, is given to the trustees of a charity. In those cases, the trustees are bound to exercise their discretion in such a way as will give effect to the charity. But here, the trustees were bound to exercise their discretion as to the investment of the fund on real securities for the benefit of Mrs. Wynn; and if they had invested it on real securities, it is clear that it could not have been given to the charities (9 Geo. 4, c. 36).

The rights, as between the next of kin and the charities, cannot depend on which way the trustees might think fit to invest the fund. The exercise or non-exercise of a trust or discretion by trustees never affects or varies the rights of the parties.

Mr. Selwyn and Mr. Cotton, for the charities, were not called upon.

Mr. Dickinson, for the trustees.

Shadbolt v. Thornton (17 Sim. 49) and *Edwards v. Hall* (6 De G. M. & G. 74) were referred to; and see *Aspinall v. Bourne* (29 Beav. 462); *Marsh v. Attorney-General* (2 John. & Hem. 61); *Graham v. Paternoster* (31 Beav. 30).

[194] THE MASTER OF THE ROLLS [Sir John Romilly]. I really think there is nothing in this case.

Charlotte Beaumont did not know whether the fund would consist of pure personalty or not. But she has in effect said "if I can give it to charity, I do so, but if I cannot so dispose of it I cannot help it."

It turns out that she can, and the two charities are therefore entitled to the fund.

[194] SHEPPARD v. SHEPPARD. Feb. 14, 1863.

[Considered, *In re Roper*, 1890, 45 Ch. D. 127.]

A testator devised his real estate to trustees upon trust, in the first place, out of the rents, issues and profits, to pay life annuities, "and, subject to the trusts aforesaid," to pay the residue of the rents, issues and profits to his four grandsons for life, and as any of them died, he devised his one-fourth of the real estates to their children in tail. Held, that the annuities were not charged on the *corpus* of the estate.

The testator, by his will dated in 1815, after making a provision for his four grandsons, by name, out of specific real and his personal estate, gave and devised all other his real estate to trustees "upon trust, from time to time, out of the rents, issues and profits of the said devised hereditaments and premises, in the first place, to pay one annuity" of £60 to his son for his life. The testator then proceeded as follows:—

"And upon further trust, by and out of the rents, issues and profits of the said devised hereditaments and premises, to pay unto each of my granddaughters Sarah Caroline Sheppard, Caroline Sarah Wilson (the Plaintiff), and Charlotte Walls Sheppard, one annuity or clear yearly sum of £25 apiece, for and during the terms of their respective natural lives," &c. And he directed his trustees to pay the property tax and legacy duty on the annuities out of the rents and profits of his real estate; "and, subject to the trusts aforesaid, upon further trust that my said trustees," &c., "do and shall, [195] during the respective natural lives of my said grandsons, pay and apply the residue of the rents, issues and profits of my said real estates, in and towards their support and maintenance and for their benefit and advantage, in equal shares and proportions; and when and as any of my said grandsons shall respectively depart this life, I give and devise an equal undivided fourth part or share (the whole into four parts or shares being divided), of the entirety of my said hereditaments and real estates unto the respective child or children of each of my said four grandsons and the heirs of their respective bodies."

The trustees had a power to sell the estate for payment of debts and legacies.

The testator died in 1816, and the only fund available for the payment of the annuities was £1394 £3 per cents., standing in Court to the credit of "the annuitants account," and a sum of £550, 13s. 2d., the dividend received upon a debt due from a trustee who had become bankrupt.

This was a petition of C. W. Sheppard, the survivor of the three granddaughters, whose annuity was considerably in arrear, and she now claimed payment of the arrears of her annuity, both out of the income and *corpus* of the fund in Court.

Mr. Hobhouse and Mr. Fry, in support of the petition. First, there is an unlimited charge on the rents for payment of the annuity, and this amounts to a charge of the *corpus*; *Foster v. Smith* (1 Phill. 632); and see *Phillips v. Gutteridge* (32 L. J. (Chanc.) 1). Secondly, the gift to the annuitant "is [196] in the first place," and that to the grandsons and their children made expressly "subject to the trust aforesaid," and is of "the residue," they can therefore take nothing until the annuities have been fully paid; *Playfair v. Cooper* (17 Beav. 187).

Mr. Selwyn, for the grandsons and their representatives. These annuities are merely charged on the "rents, issues and profits" accruing during the lives of the

annuitants. The testator not only considered that the rents would be sufficient for that purpose, but that there would be an excess or *residue* of such rents, which he gave for the maintenance of his grandsons. Again, the testator made the great-grandchildren tenants in tail of the estates, no construction can therefore be admitted which would defeat those interests. The words "subject to the trusts aforesaid" do not extend the prior gift, and they are applicable to the rents, issues, and profits only; *Stelfox v. Sugden* (John. 234; and see 30 Beav. note, 519). The prior excess of income is not applicable to the payment of the arrears; *Darbon v. Rickard* (14 Sim. 537).

Mr. Hobhouse, in reply. The testator intended that the grandchildren should succeed to their parents' share, they therefore take in the same way and subject to the same annuities. The word "subject" applies both to the surplus income given to the parents and to the estate given to their children.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the income only is charged with the annuities. The trust is distinct, "out of the rents, [197] issues and profits thereof" to pay the annuities, and the property tax and legacy duty are to be paid in the same manner out of the "rents and profits." And subject to the trusts aforesaid, the testator directs the trustees to pay "the residue of the rents, issues and profits" to the grandsons; this shews that he is dealing only with the rents and profits, and that the words "subject to the trusts aforesaid" are confined to the rents and profits. When the gift over takes place it is a gift in tail of the whole *corpus*. I agree that the great-grandchildren who are named take subject to the annuities; but I should require some strong words to shew that the annuitants could sell the estate and defeat the estate tail of the great-grandchildren. Such a question never arose in the mind of the testator as a deficiency of his estate to pay the annuities occasioned by bankruptcy of one of the trustees. This cannot alter the construction of the will. The annuitants are entitled to say that all the income is now liable to pay both the annuities and all the arrears, but this is all. There must be an inquiry as to what is due and how much of this fund is capital and how much income, and I must declare that the income only is applicable to the payment of the annuities and arrears.

[198] *Re THE COMMERCIAL DISCOUNT COMPANY (LIMITED)*. Feb. 14, 1863.

[S. C. 7 L. T. 816; 11 W. R. 353.]

The Court will not, upon the hearing of a petition to wind up a company, enter into a contest as to the person to be appointed official liquidator, and it will not appoint one, on that occasion, unless with the concurrence of all parties.

Costs of a second petition to wind up allowed, under the circumstances.

On the 23d of January 1863 Mr. Cooper, a shareholder, by the solicitors of the company, presented a petition to wind it up.

An extraordinary general meeting was held on the 2d of February, when resolutions were passed for voluntarily winding up the company and for appointing Mr. Cooper one of the liquidators, with a commission on the moneys received.

On the 3d of February Mr. Drage, a shareholder and creditor of the company, presented a second petition for winding it up, and praying that Mr. Hart might be appointed official liquidator, and affidavits were filed to shew his fitness for that office. The two petitions now came on for hearing, when the necessity for winding it up was not contested.

Mr. Hobhouse and Mr. Beavan, in support of Cooper's petition, asked for the usual order.

Mr. Baggallay and Mr. J. N. Higgins, in support of Drage's petition, asked, first, that the order might be made on their petition, the Petitioner being unconnected with the managers of the company, and not appearing by its solicitors; secondly, that Hart might be appointed official liquidator (8th General Rule of 11th of November 1862); and thirdly, that the Petitioner might have the costs of the second petition.

[199] Mr. Roxburgh, for some creditors, objected to the appointment of Mr. Hart.

Mr. Selwyn, for the company, contended that the second petition was unnecessary, and he objected to the order asked by Drage.

THE MASTER OF THE ROLLS [Sir John Romilly]. I have a great objection to more than one petition being presented, it only leads to unnecessary litigation. I can make only one order and that on the first petition. I am convinced that by one petition, although presented by the solicitor of the company, the concern may, if the proceedings are carried on *bond fide*, be wound up as well as if the petition had been presented by one who is not the solicitor of the company. But considering that, after the presentation of the first petition, the Petitioner accepted the office of official liquidator, I think that the second Petitioner had sufficient reason to suspect that there was a probability of the first petition not being duly prosecuted. I therefore think that there was a sufficient justification for his presenting the second petition, and although I shall make but one order and give the carriage of it to the first Petitioner, I think the second Petitioner should be allowed his costs.

I object very much to the practice, which seems to have been suggested by the 8th of the General Orders of November 1862, which was framed with great care, of praying, in the petition to wind up a company, that a particular person may be appointed official liquidator. The object of the order is simply this:—to enable the Court, when all the parties are agreed as to the propriety of making the winding-up order, and as to the [200] selection of the person to be official liquidator, to appoint one at once, and thus hasten the matter and carry on the winding up more rapidly. But the object of the order now suggested is, to transfer into Court the contest for the appointment of an official liquidator, a matter peculiarly fitted for Chambers. Though as this is a new matter, I do not intend to make the second Petitioner pay the costs of the affidavits on that subject.

For the future I will not, on the hearing of petitions to wind up companies, allow any contest to take place as to who is to be the official liquidator; but if I make the order to wind up and all parties concur, and there is no doubt of the fitness of the person proposed, I will make an order for his appointment.

[200] WINDOVER v. SMITH. Jan. 29, 30, 31, 1863.

[S. C. 32 L. J. Ch. 561; 7 L. T. 776; 9 Jur. (N. S.) 397; 11 W. R. 323;
1 N. R. 349.]

Distinction between the two Acts relating to the copyright of design (5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 75). The first applies to new designs for the ornamentation of articles, the second to new designs of articles of utility.

A design of a carriage was registered under the 6 & 7 Vict. c. 75. The inventor claimed four things as new, and as conducive to the "utility" of the design. There was no novelty as to three of them, and they did not contribute to the "utility." The fourth tended to its utility, but was the mere extension of a well-known principle. Held, that the claim to monopoly could not be supported under the above Act, and that the design was not protected under the former Act (5 & 6 Vict. c. 100), as an ornamental design, it not having been registered under that Act.

According to the statement of the Plaintiff, he had, some time previous to October 1859, "invented and perfected a new and original design for the shape or configuration of the body of a certain four-wheeled carriage called a *dog-cart phaeton*. On the 19th day of October 1859, and before any publication of his design, he caused the same to be duly registered at the Office of Designs in London pursuant to the 6 & 7 [201] Vict. c. 65,(1) and he thereupon obtained from the Registrar of Designs the usual certificate of registration.

(1) The 6 & 7 Vict. c. 65, after reciting that, by the 5 & 6 Vict. c. 100, "there was granted to the proprietor of any new and original design" the sole right to apply

The Plaintiff, upon the registration of his design, furnished the registrar with drawings, together with the title and description of the design. The bill contained a copy of such drawing, and stated that title of the design was "*Windover's Registered Dog-cart Phaeton*." According to the drawing, it consisted of an open four-wheeled carriage with double seats back to back. The fore wheels were of considerable size, and the body of the carriage was curved underneath, so as to allow a space for the fore-wheels to pass under the body of the carriage.

The description of the design was as follows:—

"The purpose of utility to which the shape or configuration of the new parts of this design have reference is, that much higher front wheels can be used, or closer coupling is effected and a saving in horse power.

"The carriage is built with a double-curved arch, as shewn at 4.—1, the seat, 2, the opera board, 3, the boot, and 4, the curved arch under which the wheels turn.

[202] "The parts marked 1, 2, 3 and 4 are new, the rest is old, so far as regards the shape and configuration thereof."

The Plaintiff instituted this suit against the Defendant in June 1862, complaining that the Defendant had, for some time past, been making and exposing for sale and selling divers of the said carriages called *dog-cart phaetons*, made according to and in imitation of the Plaintiff's design, and in direct piracy and infringement of the Plaintiff's sole and exclusive rights under the registration of his said design.

The bill prayed for an injunction, for the delivery up of the pirated articles, for an account of profits and for damages.

The case now came on upon a motion for a decree.

Mr. Selwyn and Mr. Bevir, for the Plaintiff. The Defendant insists that the Plaintiff's registration is invalid and ineffectual; but that is not the case. The shape and configuration of the carriage are new, and the whole, when combined, is conducive to the purposes of utility. The validity of the Plaintiff's exclusive right cannot be determined by a consideration of the carriage in its component parts, for the new and original design consists in the combination of the whole. The whole together is also useful and ornamental, and, as a design, it is protected by the 5 & 6 Vict. c. 100.

Mr. Baggallay and Mr. Shebbeare, for the Defendant. If the Plaintiff relied on the ornamentation of the carriage, he ought to have registered it under the first Act (5 & 6 Vict. c. 100); but his registration is under [203] the second Act (6 & 7 Vict. c. 65), and his right is therefore confined to a new and original design of an article of utility.

The first Act relates to a "new and original design," which is "applicable to the ornamenting of any article of manufacture," and which is "applicable for the pattern or for the shape or configuration or for the ornament thereof." The second Act applies to a different subject; it is for the protection of a "new and original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article."

The Plaintiff claims four things, but the utility of the registered article is confined to the increase of the fore wheels, effected by means of an arch in the body of the carriage, which allows them to pass under it during the turning of the carriage. But this is not new, it is the old mode by which such an object has always been effected.

the same to the ornamenting of any article of manufacture," and that it was expedient to extend the protection afforded by the said Act to such designs hereinafter mentioned, not being of an ornamental character, as are not included therein, enacts as follows:—

"And with regard to any new or original design for any article of manufacture having reference to some purpose of utility, so far as such design shall be for the shape or configuration of such article, and that whether it be for the whole of such shape or configuration or only for a part thereof, *be it enacted*, that the proprietor of such design, not previously published within the United Kingdom of Great Britain and Ireland or elsewhere, shall have the sole right to apply such design to any article, or make or sell any article according to such design for the term of three years, to be computed from the time of such design being registered according to this Act.

It is a question of utility and not of beauty that the Defendant has been brought to meet. Three of the items claimed as new being confessedly old invalidates the Plaintiff's right; *Morgan v. Seawan* (2 Mee. & W. 562); and the whole of the components being old, the whole of them are not protected by the statute; *Norton v. Nicholls* (Ellis & Ellis, 761).

Secondly, the time granted by the statute for protection of designs has now expired, and no relief can therefore be granted; *Smith v. The London and South-Western Railway Company* (1 Kay, 415).

Mr. Selwyn, in reply. The word "utility" in the 6 & 7 Vict. c. 65, s. 2, has reference to the "article" and not [204] to the "design." It is the new shape and configuration that is protected.

THE MASTER OF THE ROLLS [Sir John Romilly]. After the fullest consideration of this case, I am of opinion that the Plaintiff fails in establishing the novelty of his invention according to the terms of the registrar's certificate.

It is a question depending in some degree on the construction of the statute, and it is proper to refer to the two Acts which relate to the subject, namely, the 5 & 6 Vict. c. 100, and the 6 & 7 Vict. c. 75. The object of both is to give to the discoverer of a "new and original design" a temporary monopoly. The first relates to designs "applicable to the ornamentation of an article of manufacture," the second to designs "for any articles of manufacture having reference to some purpose of utility;" both may be for the "shape or for configuration" of the design. I have no doubt that the two Acts must be construed together, and that a design in which both beauty and utility are combined may be registered under either and probably under both the Acts. But when it has been registered, the Court is bound to look at the purpose and object of the design which has been registered. The patent law does not apply to these cases, but there is this analogy between them:—The patent law requires that an invention should be accurately described; and, under these Acts, the nature and object of the design must appear on the certificate of registration (6 & 7 Vict. c. 65, s. 8).

When I come to look at this matter, I find that the article registered is a "*dog-cart phaeton*," and [205] that the "purpose of utility" is thus described:—"The purpose of utility to which the shape," &c. [See *ante*, p. 201.] No doubt this phaeton is, at first sight, of a very agreeable and elegant form, and I think its beauty is not exaggerated by the Plaintiff. The novelties claimed consist of four things, first, the seat, secondly, the opera board, thirdly, the boot, and fourthly, the curved arch under which the fore wheels pass while the carriage is in the act of turning. The purpose of utility is thus stated:—"That much higher fore wheels can be used or closer coupling is effected and a saving in horse power." Now the part marked number 1, which is simply the seat, obviously does not tend to enable you to use higher wheels, which is the utility claimed by this discovery; the second is the opera board, and the evidence shews that there is no novelty whatever in this; it is of considerable advantage in assisting a person to lift himself up in getting into the carriage, and it may also be a protection against the pole of a carriage following behind it. But it is not new; and even if it were, it is no part of the purpose of utility claimed, which is simply the enlargement of the fore wheels, the closer coupling and the saving of horse power, and it is obvious that this opera board does not, in the slightest degree, conduce to either of these objects.

No. 3 is the boot, which does not contribute to the utility claimed. The only thing which does contribute to it is number 4, which enables a larger wheel to be used, and this I think is a matter of considerable utility. I do not go into the question whether the fact of three out of the four items not being conducive to some purpose of utility would of itself vitiate the registration, as it would in the case of a patent; I assume that it would not.

[206] The question really is, whether the curved arch can be considered such a novelty as to entitle a person to register it under the Acts, and I am of opinion that it is not. I have no doubt that it is useful, but it is the common case of the Plaintiff and Defendant that these arches existed before. I have, since the argument, looked in coach-maker's shops and have not discovered one phaeton without such an arch, and it is the common case that they always did exist, to enable the front wheels to pass under the carriage in turning.

In the present case, the front wheels are five or six inches higher than the ordinary size, which is extremely beneficial, and this is effected by having a larger arch. But it is impossible to say that the application of the same thing, for the same purpose, can be made the subject of registration as a new and original design. There is no novelty in making the front wheels a little larger by increasing the arch, they are always in proportion to each other, and the size of wheel must be limited by the size of the arch.

It was argued that the four matters claimed as new, when put together, formed a new design of great beauty in shape and configuration; but it was pointed out to me that this was not the case which the Defendant was called on to meet, the result is, that I am compelled to say that I cannot afford the Plaintiff any relief, and that his bill must be dismissed with costs.

After the recital in the second Act, that it is expedient to extend the first Act "to such designs thereafter mentioned as are not included in the first Act, not being of an ornamental character," I feel satisfied that the design referred to in the second Act means one of an article having reference to some purpose of utility and not merely of ornamentation.

[207] PARISH v. PARISH. Jan. 15, 16, 1863.

The testimony of a claimant alone cannot be acted on, unless there be some corroborative evidence.

The Plaintiff asserted that he had contracted to purchase some shares from the Defendant, but the contract was not in writing, the fact was contested, and it was proved by the Plaintiff alone. There was, however, proof that the Plaintiff had paid the Defendant money, but on what account did not appear, and that the Defendant had admitted, in writing, that the shares belonged to the Plaintiff, though they had not been transferred for fourteen years. Held, that the contract was sufficiently proved.

This suit was instituted by a son against his father to obtain a transfer of eleven shares in the Agra Banking Company.

It appeared that, in 1847, the Defendant was the owner of thirty-one shares, and the Plaintiff alleged that, in December 1847, the Defendant agreed to sell him eleven of such shares for £500, which sum he alleged he had accordingly paid. The agreement was by parol only, and the fact of such sale having been made was contested by the Defendant. It however appeared by the evidence that, on the 2d of December 1847, the Defendant had written to the secretary of the bank at Agra, desiring him to transfer eleven of his shares to the Plaintiff, and that the Plaintiff had also, at the same time, inclosed instructions as to the appropriation of the dividends on those shares.

The secretary answered on the 31st of January 1848 that he was unable to do so, having a certificate for four shares only, and asking the Defendant to send certificates for the other seven, when his wish would be complied with. The Defendant sent the secretary's letter to the Plaintiff, who was in America, with an indorsement thereon written by the Defendant, which was as follows:—"These eleven certificates I shall send forthwith. I have received the balance, £33, 9s., for my last half-year's dividend up to 31st December 1847. The half-year's now going on, which will be due June 30th, and which I shall receive about September or [208] October, if your proportion should come with it, I will calculate and pay into Currie's, as *very likely the bank will not have transferred the eleven shares to you till they have received these certificates.*"

On the 4th of October 1848 the secretary sent to the Defendant the half-yearly account of the bank to June 1848, shewing the amount of dividend on the whole thirty-one shares. This account the Defendant forwarded to the Plaintiff, and in the columns referring to the thirty-one shares was written, in the Defendant's handwriting, "*of these, eleven are your shares.*"

There was an indorsement on the account, in the Defendant's handwriting, containing the following passages:—"Your portion I calculate is £24, 15s. up to June

30th, 1848." Then followed the calculation of the proportion of the dividend produced by eleven out of the thirty-one shares. "And your shares (eleven) produce £24, 15s." &c. "Preserve this statement, it is a voucher for the number of our shares. They have not made a separate account for you," &c. ; "you know that eventually they will all be yours."

The Plaintiff returned to England in June 1851, when he urged the Defendant to transfer the eleven shares, but the Defendant excused himself, holding out that the Defendant would take the whole of the shares and other property under his will.

The fact of the payment of the consideration for the purchase of the shares was disputed by the Defendant, but the Court was of opinion, from his books of account, that the Defendant had received from the Plaintiff £385, though on what account did not distinctly appear.

[209] The Plaintiff filed his bill in December 1861, and prayed for a specific performance of the contract, for a transfer of the eleven shares, and that the Defendant might account for the dividend.

Mr. Selwyn and Mr. Tripp, for the Plaintiff, argued that the contract and payment of the consideration were proved by the evidence of the Plaintiff and the written acknowledgment of the Defendant; that the Plaintiff was, therefore, entitled to a transfer of the shares, and that the Defendant was a mere trustee of them for his son.

Mr. Baggallay and Mr. De Gex, for the Defendant, argued that there was no proof of any contract for purchase except the bare testimony of the Plaintiff, and that no dividend had ever been paid to him. That the written documents pointed rather to an intention to transfer the shares voluntarily by way of gift, than to a contract of sale. That, in that view of the case, the gift was incomplete and ineffectual, and that there was no declaration of trust on which the Court could act; besides which, that this was not the case made by the bill. They also urged that the lapse of time and the *laches* of the Plaintiff in filing his bill had disentitled him to any relief.

Jan. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion, after reading over these papers, that the Plaintiff is entitled to a decree. The case stands thus:—The written statements made by the Defendant upon two occasions, and especially the indorsement on the document of the 4th of October 1848, shew in the most conclusive manner that the Defendant considered that [210] the Plaintiff was entitled to the eleven shares in the Agra Bank. In what character was the Plaintiff entitled to those eleven shares? He was either entitled to them by virtue of a voluntary gift of them by his father, or as a purchaser for valuable consideration. If by gift from the father, there is, in my opinion, amply sufficient on this memorandum to shew that the father treated himself as a trustee of the shares, although they had not been transferred, and that it was not a mere contract to be performed or one remaining *in fieri*.

But the Plaintiff says that it was a purchase of the eleven shares for £500, although that was not the full value of them. On looking into the books of account, it appears clearly that the father had, at that time, received from the son £385; but the son says that he had paid £500. Whatever the arrangement was by which these shares were to be transferred to the Plaintiff, it appears to have been not in writing, but to have rested on parol only. The amount of money does not appear to me to be very material, because £385 would constitute as good a consideration for the purchase of these shares as £500.

The next question is, in what character was this money paid? It does not appear to have been ever repaid by the father. The son says that it was paid as a consideration for the shares; why am I to doubt that assertion? Here is a sum of money paid to the father and which is never repaid. The father, after that or contemporaneously with it, says to his son, "The shares are yours," and he gives a direction to the secretary of the bank to transfer them into his son's name; that could not be accomplished, but he says nevertheless, it does not matter, preserve this statement, it is a voucher for our number of shares, and that I have [211] twenty and you eleven. Am I to disbelieve the whole of this because it is not specifically mentioned that the payment was made in respect of those eleven shares?

Mr. De Gex pressed upon me the rule which I am in the habit of enforcing very strictly, that the sole testimony of a person applying to prove a debt, unsupported by

any other testimony, is not such evidence as the Court can act upon. That undoubtedly is the rule which I invariably follow, and which I have found absolutely necessary; but I am at a loss to know how it applies to this case. I will illustrate what I mean by giving an instance. Under a decree for the administration of a testator's estate, a person comes in and says the testator owed me £1000. He swears to that fact, but his is the only evidence. In that case, I could not act upon such unsupported evidence, for any other man might equally come and swear the same thing. But supposing that, in addition to his assertion, he proves that the £1000 was paid to the testator, at the time stated, by the bankers of the claimant, am I not to allow the debt? Go a step further and take the present case, and suppose that £385 is proved to have been paid to the Defendant by the Plaintiff, who says it was paid in respect of the purchase of the eleven shares, and that you have the Defendant, at the same time, by writing under his own hand, acknowledging that the Plaintiff was the owner of eleven shares, why am I not to couple those circumstances together? It is what in the Ecclesiastical Courts they used to call "the adminicular evidence," that is, the corroborative evidence and which props up and supports the allegation of the Plaintiff. It is true, that whenever the oath of the Plaintiff alone supplies one particular link in the evidence which is wanting, that particular link is unsupported and must be rejected if it be not confirmed by any evidence but [212] his own; but if it be confirmed by all the surrounding circumstances proved in the case, then it is supported by what I hold to be corroborative testimony. If I were not to adopt that rule, it would lead to this:—That I should never take a claimant's testimony, unless the case were conclusively proved by other evidence, in which case it would not be required. That is not what I mean, and I therefore thought it desirable to explain my meaning.

Here I have the proof of the payment of the money, I have the statement of the Plaintiff that it was paid in respect of the purchase of these shares, and I have also proof that the father acknowledged that the person who paid him that money was the owner of the shares. If I couple these three things together, I must come to the conclusion that the money was paid in respect of the purchase of those shares, and unless the Plaintiff has done something to forfeit his right, I think he is now entitled to have those shares.

The next question is, whether the Plaintiff has done anything to forfeit the right, which he possessed in 1848, to those shares. He is now coming in 1862, never having received but one dividend or rather an acknowledgment of his right to one dividend, which is the same thing. I think there is quite sufficient to explain the delay. In the first place, it is a transaction between father and son, the father by an indorsement on a document says, the transfer of the shares is not very material, "You know that eventually they will all be yours," what does that mean? It means I will give them all to you by will. Would not any son be satisfied with that statement of his father, even though the father did not pay the dividends to him, he might not have wished to press him. I have no evidence as to what wills the father made previously to 1857, but I have [213] evidence that in 1857 the father intended to give the shares to the son, that therefore the expression of his intention, expressed in October 1848, existed nine years afterwards, in 1857, and I therefore conclude that it existed during the whole of the interval. I think that this and the relation that existed between father and son is a sufficient reason for the son's not coming to the Court before to enforce his rights. But the state of circumstances becomes entirely altered when the father says "I deny that you are entitled to the shares at all," and when he says that, the son immediately takes proceedings to enforce his right to the eleven shares and institutes this suit.

I think, therefore, that the Plaintiff is entitled to those shares, which the Defendant must transfer, and he must account for the dividends, but I cannot give him any costs of this suit.

NOTE.—Affirmed by the Lords Justices.

[213] SHARPLES v. ADAMS. Feb. 18, 19, 1863.

[S. C. 8 L. T. 138; 11 W. R. 450. Decision approved, but *dictum* (32 Beav. 216) questioned, *Maxfield v. Burton*, 1873, L. R. 17 Eq. 15.]

The priorities of successive incumbrancers are not altered by one of them getting in the legal estate from one who is a trustee for them all.

In 1856 the Defendant Samuel Adams was declared bankrupt, and in October 1856 part of his estate, consisting of some freehold land at Ware, was sold by his assignees to Fuller Coker for £209. Although the fact was contested, yet for the purpose of the decision, the Court assumed that Coker had made the purchase as a trustee for Adams. In February 1857 the property was conveyed by Adams and his assignees to Coker in fee.

In June 1858 Coker deposited his conveyance with [214] the Plaintiffs, his bankers, as a security for £150 and the balance due to them. Whether this had been done with the knowledge and concurrence of Adams was a fact also in contest; but the Court came to the conclusion that it had been done with Adams' knowledge and assent. Adams admitted that, in September 1859, he had been informed of the deposit, and, his bankruptcy having been annulled in March 1860, he, in August 1860, instituted a suit against Coker, but without making the Plaintiffs parties, to obtain a conveyance of the property from Coker under the alleged trust. Coker became bankrupt, and his assignees having disclaimed, Coker, in July 1861, conveyed the legal estate in the property to Adams.

Under these circumstances, the Plaintiffs instituted this suit against Adams alone, insisting on their priority over him and praying that the Defendant might redeem them or be foreclosed.

Mr. Southgate and Mr. E. G. Marten argued that the Plaintiffs had priority over the Defendant although he had got the legal estate; first, because the evidence shewed that the deposit had been made to the Plaintiffs with the knowledge and assent of the Defendant; and secondly, because the subsequent acquisition of the legal estate had not, under the circumstances of this case, altered the rights and priorities of the parties; *Rice v. Rice* (2 Drew. 73); *Colyer v. Finch* (19 Beav. 500, and 5 H. of L. Cas. 905); *Clack v. Holland* (19 Beav. 262).

[THE MASTER OF THE ROLLS referred to *Willoughby v. Willoughby* (1 Term Rep. 763) and *Evans v. Bicknell* (6 Ves. 174).]

[215] Mr. Selwyn and Mr. C. H. Smith, for the Defendant. The evidence shews that the equitable mortgage was created without the knowledge of the Defendant. The Defendant had the prior equity under the original agreement, and he has obtained the legal estate. Under such circumstances he has the prior right to the estate; *Joyce v. De Moleyns* (2 Jones & Lat. 374); *Roberts v. Croft* (2 De G. & J. 1); *Hunt v. Elmes* (27 Beav. 62, and 2 De Gex, F. & J. 578).

Mr. Southgate was not heard in reply.

Feb. 19. THE MASTER OF THE ROLLS [Sir John Romilly]. I am quite clear that this case depends, first, upon whether Mr. Coker was in fact originally a trustee for Mr. Adams; and secondly, if he was, whether Mr. Adams sanctioned and knew of the deposit by Coker of the purchase-deed with the Plaintiffs, for the purpose of raising £150 and of securing any balance which might be due from time to time to the Plaintiffs.

I will not go into the question of whether, upon the sale of this property, Coker was or was not a trustee for Adams; I assume that to be the case. In that view of the case, I do not think that anything turns upon the possession of the legal estate. I do not think that Mr. Adams would gain anything by obtaining the legal estate, upon the assumption that the purchase was made for him, or by reason that the assignees of Coker who could have contested it, had assigned all their interest over to him, for, on this assumption, his was the first equity.

I fully concur in the observation that there is often [216] a great misapprehension as to the value acquired by obtaining the legal estate. The case of *Willoughby v.*

Willoughby (1 Term Rep. 763), referred to, is one in which Lord Hardwicke goes fully into the matter. I may illustrate it in this way:—If the owner in fee-simple, having the legal estate, creates an equitable charge in favor of A., and afterwards a second equitable charge in favor of B., and then a third equitable charge in favor of C., I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C., the owner of the third equitable charge, would not affect the rights of the first or second. (See *Prosser v. Rice*, 28 Beav. 68; *Carter v. Carter*, 3 Kay & J. 617; *Sturgis v. Morse*, 3 De G. & J. 1.) It is true that if the legal estate is outstanding in a third person having no privity with the others, then the person who gets the legal estate would get priority; but where the person having the legal estate holds it in the character of trustee for them all, he cannot prefer either or create a priority, by giving the legal estate to anyone in particular. I do not think that question arises here, and I merely state this for the purpose of removing a misapprehension which appeared to me to exist in the argument as to the possession of the legal estate. But on the assumption I have made, that Coker was a trustee for Adams, he would have the prior equity, he would be entitled to exclude the Plaintiffs, unless he sanctioned the deposit with them.

[His Honor, after examining and weighing the evidence, proceeded:—] Upon the evidence I am bound, therefore, to consider that the advance made by the Plaintiffs to Coker was sanctioned by Adams, and the Plaintiffs are therefore entitled to the decree which they ask.

[217] As I have come to the conclusion that he knew of and sanctioned it, the Plaintiffs may either have a decree for foreclosure or for a sale. In the latter case, the Plaintiffs are entitled to have against the Defendant, personally, so much of the costs of the suit as the produce of the sale may be insufficient to pay. But if the Plaintiffs take a foreclosure decree, they must add their costs to their security.

[217] BONFIELD v. HASSELL. Jan. 16, 1863.

[S. C. 32 L. J. Ch. 475; 7 L. T. 776; 9 Jur. (N. S.) 453; 11 W. R. 297.]

A voluntary deed, though retained by the grantor until his death, held valid.

In 1852 A. B. voluntarily covenanted to pay an annuity to C. D. until she "should do any act whereby the same or any part thereof should be vested or become liable to be vested in any other person." She married in 1859, but it did not appear that the husband had, in any way, interfered with the annuity. Held, that, by the marriage alone, she had not forfeited the annuity.

The testator executed a voluntary deed, dated the 5th of October 1852, by which he covenanted to pay a lady named Emily Goode an annuity of £100 "for and during the natural life of Emily Goode until she shall be declared a bankrupt, or take the benefit of any Act of Parliament for the relief of insolvent debtors, or shall assign or dispose of the said annuity or yearly sum, or do any act whereby the same or any part thereof shall be vested or become liable to be vested in any other person."

The testator retained the deed in his own possession until his death. But he signed a memorandum, addressed to a friend, desiring the bond to be handed over to him, "in case of his death," for the protection of the annuitant. The deed and memorandum were sealed up by the testator in an envelope, outside of which was indorsed a memorandum, signed by the testator, requesting that, in case of his death, it should be opened by the friend above referred to.

On the 29th of March 1859 Emily Goode married Mr. Bonfield.

[218] The testator regularly paid the annuity from 1852 to Michaelmas 1861, and he died on the 25th of December 1861. His executors, having insisted that the annuity had ceased by the marriage, Mr. and Mrs. Bonfield instituted this suit against the executors, praying a declaration of their right to and for payment of their annuity.

Mr. Selwyn and Mr. Freeling, for the Plaintiffs, argued that marriage was no forfeiture of the annuity, for *non constat* that the husband would ever reduce it into

possession during his life. They cited *Avison v. Holmes* (1 John. & Hem. 530, and see p. 540, note), and *Lumley v. Croft* (6 H. of L. Cas. 672), in which it was held that a warrant of attorney given by the lessees, though it may lead to a charge on the leasehold, was not such a charge as to create a forfeiture of the lessee's interest.

Mr. Prideaux and Mr. Druce, for the executors. First, the deed was kept in the testator's possession from 1852 to his death in 1861; there was no unconditional delivery of it, and therefore it operated merely as an escrow. Secondly, on the construction of the deed, marriage was such an act of the lady as to determine the annuity, for thereby the annuity or some part of it became vested or liable to be vested in her husband. We concede that the annuity did not vest by marriage, and that it could only become the property of the husband by being reduced into possession. The law is, that marriage is a gift to the husband of the wife's choses in action, on condition that he reduces them into possession; Co. Lit. (p. 351); Bright on Husband and Wife (vol. 1, p. 36). The husband might receive the annuity, at least during [219] the coverture; *Stiffe v. Everitt* (1 Myl. & Cr. 37); and therefore, by the marriage, some part became liable to vest in him, and this Court would not prevent his obtaining payment, or settle a mere life interest; *Tidd v. Lister* (3 De G. M. & G. 857, 867).

THE MASTER OF THE ROLLS [Sir John Romilly] [without hearing a reply]. I am clear that the wife is still entitled to this annuity. The first question is, what is the effect of the execution of the deed? and I think that there was a valid execution of it, and that the mere fact of the grantor retaining it in his own possession did not affect its validity.

In *Fletcher v. Fletcher* (4 Hare, 67) a testator had entered into a voluntary covenant with trustees to pay a large sum of money, to be held in trust for his sons. He retained it in his possession down to his death, without having communicated its contents either to the trustees or the *cestuis que trust*, yet the Court held that it was a perfectly valid deed.

I am disposed to think that the most favorable view for the Plaintiffs would be to assume that it was an escrow, to be acted on by his friend at his death for the protection of the annuitant, according to desire expressed on the envelope. If that were the true construction, what would be the effect of it? It is obvious that the deed would speak from the day of his death, and if so, the acts which were to put an end to the annuity must be acts to be done after the settlor's death, in which case it is obvious that this lady has done no act since that time which would forfeit the annuity.

[220] This is a more favorable view of the case than the one I take, which is, that the deed was operative from the 5th of October 1852. I next come to consider whether her marriage after that period was an act by which the annuity "became vested or liable to be vested in any other person," that is the only question of importance. Now one thing is obvious, that the settlor did not so consider it, because he continued to pay the annuity for two and a half years after her marriage, for he paid it down to Michaelmas 1861, so that for two and a half years he treated the marriage as no forfeiture of the annuity. That, however, would not affect the construction to be put upon the words of this deed.

This is admitted:—That the annuity does not, by the act of marriage alone, become vested in the husband. Nor is it liable to become vested in any other person, though it is possible that the growing payments may be paid to the husband, who is capable of giving valid discharges for them. But I am of opinion that the deed ought to be construed most strongly against the grantor, and in this instance the annuity has not as yet become vested or become liable to be vested in any other person. The usufruct, for a period of uncertain duration, may become vested in the husband, that is to say, he may give a valid discharge for the payment. But I think that the Court would, on the application of the wife, deprive the husband of the greater portion of it, and if he assented, would settle the whole of the annuity on the wife independently of him.

I cannot take into my consideration acts hereafter to be done, but only regard those already done, and, as yet, I have no evidence of this lady having hitherto committed any act which has terminated the annuity. With respect to what has

already taken place, I find [221] nothing by which the annuity vests or is made liable to vest in any other person.

I am of opinion that this lady is entitled to have a declaration that she is entitled to the annuity, notwithstanding her marriage in 1859, and I will, with the assent of her husband, settle the whole annuity to her separate use without power of anticipation.

[221] HODGSON v. BIBBY. Feb. 19, 1863.

[S. C. 11 W. R. 529.]

A. B., a trustee, misapplied a trust fund of which he was tenant for life, and he died in 1834. C. D., who then became entitled to it, died in 1858, having taken no proceeding to recover it. A bill, filed in 1863 by the representatives of C. D. against the representatives of the representative of A. B., to recover the fund, was dismissed with costs, on the ground of the lapse of time.

The testator, Henry Borrowdale, died in Jamaica in 1814, having, by his will, given his real and personal estate to his father, Joseph Borrowdale, and four other persons, in trust for his father, Joseph Borrowdale, for life, with remainder to his mother, Jane Borrowdale, for life, and after her decease, in trust to pay a legacy of £500 to Elizabeth Crowdsen, and he devised and bequeathed the residue of his real and personal estate to Ann Hodgson. The testator appointed his father and the four other trustees his executors.

The testator's estate was realized in Jamaica, and a sum of £1600 was, in 1818, remitted to Joseph Borrowdale in England; but who never appeared to have invested it.

Joseph Borrowdale, in the same year (1818), gave a bond for securing the payment of the legacy of £500 to Crowdsen when due. The defeazance recited the fact that £1600 had been paid to Joseph Borrowdale, with the consent of the other executors, "for the whole of [222] the property of Henry Borrowdale in the island of Jamaica."

Joseph Borrowdale survived Jane Borrowdale, and he died in 1834, and in 1835 William Hodgson, the son of Ann Hodgson (the residuary legatee), who was his executor, paid the legacy of £500.

Ann Hodgson died in 1858, having, for thirty years previously, resided with and been maintained by her son William Hodgson.

William Hodgson died in 1860, and in 1863 the Plaintiffs (who were the legal personal representatives of Ann Hodgson) filed this bill against the executors of William Hodgson, alleging "that William Hodgson possessed himself of the personal estate of Joseph Borrowdale, that he did not pay to Ann Hodgson the trust fund to which she was so entitled, or any part thereof, and that the same still remained wholly unpaid. In fact, she was not aware of her right thereto, of which ignorance the said William Hodgson was aware."

The bill prayed a declaration that the estate of William Hodgson was (to the extent of personal estate of Joseph Borrowdale received by William Hodgson) liable to pay to the Plaintiffs, as the administrators of Ann Hodgson, the amount of residuary estate of Henry Borrowdale received by Joseph Borrowdale, after deducting therefrom the £500 with interest from the death of Ann Hodgson. It also prayed an account, for payment out of the assets of William Hodgson, and that the estates of William Hodgson and Joseph Borrowdale might, so far as was necessary, be administered.

The Defendants, who knew little or nothing of the [223] matter, claimed the benefit of the statute, and relied on the *laches* of the Plaintiffs and of the person they represented.

Mr. Selwyn and Mr. C. Hall, for the Plaintiff. This claim is not affected by the 3 & 4 Will. 4, c. 27, s. 40, for this is the case of a specific fund held on trust, and time is no bar to a trust; *Phillipo v. Munnings* (2 Myl. & Cr. 309). There can be no presumption of payment in this case, for the same person who was to receive the

interest from William Hodgson was liable to pay him for her maintenance, and therefore one must have been annually set off against the other; *Burrell v. The Earl of Egremont* (7 Beav. 205). *Laches* cannot be objected to a person while ignorant of her rights.

Mr. W. M. James and Mr. Rowcliffe, for the Defendants. This case goes much farther than any previous one. The claim is against the representatives of William Hodgson, who was the representative of Joseph Borrowdale, who was the representative of a testator who died in 1814.

The money claimed was never a trust fund; it was assets in the hands of one of several executors who was bound to apply it, *quid executor*, in a due course of administration, and an executor is not a trustee.

But, on the death of Joseph Borrowdale, Ann Hodgson's claim consisted of a simple demand as a debt against his assets, due in respect of an alleged breach of trust. William Hodgson, therefore, was never a trustee for her, for it is not shewn that he ever received any part of the assets of the first testator or any portion [224] of the £1600. He, and those representing him, are therefore entitled to set up the Statute of Limitations against this claim. The Plaintiffs are also barred by *laches*, for the title accrued in 1834, or twenty-eight years ago. There is no pretence for saying that Mrs. Ann Hodgson was not aware of her rights; the evidence is clear on that point.

Mr. Selwyn, in reply, argued that the Statute of Limitations did not apply to a debt in respect of a breach of trust. He referred to *Ober v. Bishop* (1 De G. F. & J. 137); *Downes v. Bullock* (25 Beav. 54, and 9 H. of L. Cas. 1), to shew that the Statute of Limitations was inapplicable.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the case of the Plaintiffs fails, and that it would be a very dangerous thing if the Court made a decree in such a case.

A man dies in Jamaica in 1814, he leaves the whole of his property to his father for life, and then to his mother for life, and after the death of the survivor he gives a legacy of £500 to one and the residue absolutely to Ann Hodgson.

In 1818 £1600 is remitted to the executor in London, and I concur with the argument on behalf of the Plaintiffs, in considering that Joseph Borrowdale, the executor, received this money in the character of trustee, and that when he received it, the character of trustee was impressed on him respecting it, and no time bars a trust. He ought to have invested it in consols and held it upon [225] the trusts affecting it; but he did not do so, and died without having invested it. I assume that he was a trustee of this fund down to his death in 1834, and that then it became a debt due from his estate. The trust fund not having been invested, it cannot be put in the same category as those cases where the specific fund is still in existence and can be traced. If it could be traced into the hands of William Hodgson, his executor, a very different question would be raised, and time could not be a bar to the person entitled to that trust fund. But here the only claim was against the estate of the father, to make good the trust fund which he had received and had not invested. I must assume that Ann Hodgson was aware of the fact, she makes no claim against William Hodgson, and continues to live with him for twenty-four years after the death of Joseph Borrowdale, without taking any step to recover the money.

If the matter had rested there, it would be impossible for the Court to assume that there were assets of Joseph Borrowdale, and direct an account of his estate, and charge the Defendant with the amount of that estate. But it does not rest there: William Hodgson survived his mother two years, and the Plaintiffs took no steps until after her death, when everybody who knew anything about the matter was dead. Nothing is more certain than this:—that the legal personal representative of a person is affected with the *laches* of the person whom he represents. I must therefore treat the Plaintiffs as having from 1834 to the present time, that is for twenty-eight years, taken no steps to enforce payment of their demand, and as having waited until the only person who could explain the matter was dead. The Court will, under such circumstances, make every presumption in favor of the person sought to be charged.

[226] In this state of circumstances, I am of opinion that the Plaintiffs are bound by the lapse of time, and I believe that Ann Hodgson was perfectly aware of the circumstances, and that she knew either that the assets were not sufficient, or, if they were, that she never intended to make any claim against her son.

I must dismiss the bill with costs.

[226] *In re* THE WEST SILVER BANK MINING COMPANY (LIMITED). Feb. 21, 1863.

Prior to "The Companies Act, 1862" (26 & 27 Vict. c. 89), a limited company, which was liable to be wound up in the Bankruptcy Court, passed a resolution for winding up voluntarily; but after the Companies Act, 1862, had come into operation, a petition was presented for winding it up compulsorily. Held, that under the 26 & 27 Vict. c. 89, s. 207, the jurisdiction was in bankruptcy, and not in Chancery.

This company was duly registered as a limited company for working mines in Cardiganshire, and its principal office was in London.

On the 12th of August 1862 it was resolved, at a special general meeting, "That the West Silver Bank Mining Company (Limited) be wound up voluntarily under the provisions of the Joint Stock Companies Winding-up Acts, 1856 and 1857." A liquidator was at the same time appointed.

A petition was now presented by the shareholders to wind up the company compulsorily, and the question was, whether the winding up ought to take place in this Court or in the Court of Bankruptcy.

By the 19 & 20 Vict. c. 47, s. 60, "the Court" to wind up a limited company like the present is defined to be "the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate."

[227] But this Act was repealed by "The Companies Act, 1862" (25 & 26 Vict. c. 89), which came into operation on the 2d of November 1862. By the 207th section of that Act it is enacted as follows:—

"Where, previously to the commencement of this Act, an order has been made for winding up a company under any Acts or Act hereby repealed, or a resolution has been passed for winding up a company voluntarily, such company shall be wound up in the same manner and with the same incidents as if this Act were not passed, and for the purposes of such winding up, such repealed Acts or Act shall be deemed to remain in full force."

Mr. Roxburgh, in support of the petition, asked for the common winding-up order.

Mr. F. J. Wood, *contra*. This Court has no jurisdiction, for the winding up must be in bankruptcy. There having been a resolution to wind up voluntarily, any compulsory winding up must take place "in the same manner and with the same incidents as if the last Act had not passed," that is, in the Court of Bankruptcy.

Mr. Swanston, for the official liquidator.

Mr. Roxburgh, in reply. The "manner and incidents" have reference to matters of form and procedure, and they do not affect the jurisdiction. He referred to the 81st section.

THE MASTER OF THE ROLLS [Sir John Romilly] held the objection to be fatal, for that if the Act of 1862 be considered as not having passed, it was clear that the winding up must be in the Court of Bankruptcy and not in Chancery. He dismissed the petition with costs.

[228] BUSH *v.* COWAN. Feb. 21, 1863.

[S. C. 9 L. T. 161; 9 Jur. (N. S.) 429; 11 W. R. 395.]

A., having a power to appoint £1000 by will, and which in default of appointment was given over to B., duly appointed it to C., who died in the testator's life. He afterwards made a codicil, giving his residue, and the dividends due at his death on the

£1000, to his wife. Held, that under the Wills Act, the £1000 passed to the wife under the residuary gift.

The testator, James Lomax, bequeathed £1300 on trust for his son Marsden William Lomax, upon whose death he "declared that £1000, part thereof, should be paid to such person or persons, at such time or times and in such manner, as his son M. W. Lomax should, by his last will and testament, appoint; and as to the residue thereof, and also as to the said sum of £1000, in default of or subject to such appointment as aforesaid," he gave it over to other persons.

The testator died in 1848, and the £1300 were set apart and invested in £1308, 3s. 6d. consols.

M. W. Lomax, the testator's son, by his will dated in 1857, duly appointed the £1000 to John Pearse; but John Pearse, the legatee, died in 1858.

In 1860 M. W. Lomax made a codicil to his will, whereby he bequeathed as follows:—"I bequeath to Louisa my wife *all my personal estate* and effects whatsoever and wheresoever, subject to the payment of my just debts, funeral and testamentary expenses, also my interest or dividends that may be due, on my decease, from the Bank of England on £1300 sterling £3 per cent. consols, at present under the control of the Court of Chancery." He appointed an executor.

M. W. Lomax died in 1861, and his widow, by this petition, claimed £1000, part of £1308, 3s. 6d. which was in Court, on the ground that the gift of it to John Pearse [229] lapsed by his death in the life of the testator, M. W. Lomax, and that it passed to her under the general residuary bequest.

Mr. Lewis, for the widow, contended that the general bequest in the codicil operated as an execution of the power of appointment under the 1 Vict. c. 26, s. 27, and that there was no contrary intention appearing on the will. That the residuary gift passed not only all that which a testator attempted ineffectually to *bequeath*, but that also which he attempted ineffectually to *appoint*; *Spooner's Trust* (2 Sim. (N. S.) 129).

Mr. Nash, for the executor.

Mr. Selwyn and Mr. C. M. Roupell, for the parties entitled in default of appointment. The £1000 goes as in default of appointment, for there is an intention, apparent on the will, that it shall not go to the residuary legatee. The testator gives his wife only the dividends on that sum due at his decease; this excludes the notion that he intended to give her the capital; *Moss v. Harter* (2 Smale & Giff. 458).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the widow is entitled to the £1000. In *Moss v. Harter* (*Ibid.*) a settlor had a power to appoint a debt by instrument in writing, which, in default of appointment, was given to certain specified persons. He appointed part by deed, and afterwards made his will, and thereby gave all his personal estate "not otherwise effectually disposed of." The Vice-Chancellor observed that the testator did not intend to deal with any property "otherwise effectually disposed of."

[230] That case does not apply to the present, for here the will and codicil are but one instrument and one testamentary disposition, which takes effect on the testator's death. By it he appoints the £1000 to Pearse, and he gives his general residue to his wife, and this includes everything which did not pass under the previous appointment. It appears indifferent whether the residuary gift is made by the same will as the appointment or afterwards by a codicil. I cannot accede to the argument of Mr. Charles Roupell, who suggested that there was an absence of any intention that this should pass by the residuary clause. If that were really so, it would not make the slightest difference, for the statute says that a contrary intention must appear. Suppose a man, having a power to appoint by will, appointed a sum of money to be laid out on land for the benefit of a charity, which would be void by Statute of Mortmain, and gave his residue to A. B., it is clear that A. B. would take the whole residue including that sum, although the testator did not intend that it should pass to him under the residuary gift, for he clearly intended to give it to charity, and thought that his intention would take effect, and that the residue only, after deducting that sum, would pass to A. B. It is a constant rule that a residuary gift includes everything that is undisposed of, whether the gift fails at the date of the will or by subsequent acts.

But I think that there is, on the face of the codicil, an intention to deal with this fund, for the testator seems to doubt whether the residuary gift affected the dividends on it which were due at his decease.

I am of opinion that the Petitioner is beneficially entitled to the whole of the £1000.

[231] HART v. ROBERTS. April 25, 1863.

By the General Orders evidence in a cause is to close within eight weeks after issue joined, but a witness who has made an affidavit may be cross-examined within one month after such eight weeks. A Defendant may move to dismiss, if the Plaintiff does not set down the cause "within four weeks after the evidence closed." Held, in a case where there was no cross-examination, that the evidence closed at the end of eight weeks, and not of twelve weeks.

By the 19th Consolidated Order, rule 13 (Consol. Ord. 64), the evidence on both sides shall be closed within eight weeks after issue joined therein, "except that any witness who has made an affidavit, intended to be used by any party to such cause at the hearing thereof, shall be subject to cross-examination within one month after the expiration of such period of eight weeks."

By the 33d Consolidated Order, rule 10, art. 3 (Consol. Ord. 100, and see p. 65), a Defendant may move to dismiss for want of prosecution, if the Plaintiff "does not set down the cause to be heard, and obtain and serve a *subpoena* to hear judgment within four weeks after the evidence is closed."

What occurred in the present case was this:—

The eight weeks after issue joined occurred on the 20th of March; affidavits had been filed, but no cross-examination had taken place. The Plaintiff not having set down the cause for hearing or served a *subpoena* to hear judgment, the Defendant on the 22d of April gave notice to dismiss for want of prosecution.

Mr. G. Osborne Morgan, in support of the motion. "The time for closing the evidence is not at the end of the period fixed for cross-examination of witnesses, but at the end of the prior period now fixed, of eight weeks from the time when issue is joined." This was ex-[232]-pressly decided by Vice-Chancellor Kindersley in *Dowson v. Solomon* (4 Drew. 647). It was thought that he had taken a different view in *Jenkyn v. Vaughan* (3 Week. Rep. 151), but that is an error, for in that case the motion to dismiss was made before the expiration of the period for cross-examination, and the Vice-Chancellor "thought it monstrous that the Defendant should dismiss for want of prosecution, that time (the period for cross-examination) not having elapsed."

Mr. Rowcliffe, for the Plaintiff. The time for moving to dismiss runs from the expiration of the time allowed for cross-examination. It is impossible that the evidence can properly be said to have closed, while it may be added to by the *viva voce* cross-examination and the re-examination of the witnesses. That was distinctly the view taken in *Jenkyn v. Vaughan*, where the Vice-Chancellor Kindersley said, "The Defendant, therefore, was not at liberty to dismiss for want of prosecution until the expiration of the four weeks from the time when the first four weeks should have expired, within which there might be cross-examination and re-examination of an affidavit witness of the Plaintiff."

THE MASTER OF THE ROLLS [Sir John Romilly]. I agree with the view of the Plaintiff. I think, as the Vice-Chancellor Kindersley stated, that both of his decisions are reconcileable. His view appears to have been that you cannot move to dismiss while there is a right to cross-examine the witness.

In this case, I understand that it is not intended to [233] cross-examine the witnesses, and it is therefore clear that the evidence closed on the 20th of March, and the four weeks having expired, during which you are entitled to cross-examine, I must make the usual order, not to dismiss, but that the Plaintiff should undertake to proceed in the usual form.

[233] WINKWORTH v. WINKWORTH. Nov. 8, 1863.

Liberty given to apply at Chambers in respect of the shares of infants amounting to £379 each, in an undivided fund.

A petition was presented by one of eleven children for payment out of Court of £379, 19s. 1d., her one-eleventh share of the fund in Court.

Mr. Higgins, for the Petitioner, in addition to the order for payment of money out of Court, asked that all future applications on behalf of the remaining children might be made to the Judge in Chambers (see 35th Consol. Order, and 15 & 16 Vict. c. 86, s. 26), as the parties desired to avoid the expense of a petition. He said that orders in this form had been made by Vice-Chancellor Wood.

THE MASTER OF THE ROLLS [Sir John Romilly] doubted whether he had jurisdiction to make such order, but he said that as such orders had been made in another branch of the Court, he could not object to follow them.

ORDER.—“And it is ordered that any of the parties be at liberty to apply at Chambers in respect of either the capital or income of the remaining shares of the infant Plaintiffs.”—Reg. Lib. 1862, B. fol. 2103.

[234] PROUD v. PROUD.(1) Nov. 19, 1862.

[S. C. 32 L. J. Ch. 125 ; 7 L. T. 553 ; 11 W. R. 101. See *Cunningham v. Foot*, 1878, 3 App. Cas. 1002.]

A devise of real estate, subject and charged with legacies, does not create an express trust in favor of the legatees, and therefore such legacies are barred by the 3 & 4 Will. 4, c. 27, after twenty years, unless there has been some payment or signed acknowledgment.

The testator John Teasdale, by his will dated in 1811, devised unto his nephew Henry Proud and his heirs part of his real estate at Farlam, subject nevertheless to the payment of the several annuities, legacies and bequests thereafter given and bequeathed ; and after bequeathing certain other annuities and legacies, the testator charged the above part of the premises with payment of half his just debts and funeral expenses, in case his personal estate should fall short, and with the payment of one-half the mortgage money and interest then charged upon the whole of his real property.

And he gave and bequeathed unto each and every of the children of his sister Sarah Proud the yearly sum of £10 apiece, when and as they should severally attain the age of twenty-one years, to be paid until the youngest of such children as might be living should have attained the said age, and then he gave and bequeathed to each of such children the sum of £300 in lieu of the said annuity or yearly sum. And the testator bequeathed all his personal estate equally between John Teasdale and Henry Proud, subject to the payment of the testator's just debts and funeral expenses and the probate of his will ; and in case the same should be found insufficient for that purpose, then the testator charged all his real estate whatsoever with the payment thereof, and directed his executors thereafter named to raise such sum as might be sufficient, by mortgage or other-[235]-wise of his real estate. And he appointed Sarah Proud and two others executrix and executors of his will.

The testator died in 1811, seised of the above real estate. His personal estate was insufficient to pay his funeral and testamentary expenses. Sarah Proud alone proved the will. She had four daughters, Elizabeth, Margaret, Isabella and Anne, and they were all living at the testator's death.

Henry Proud took possession of the estate, and his mother and four sisters con-

(1) *Ex relatione.*

tinued to reside with him as part of his family, and they assisted in the management of the farm.

Anne Proud, the youngest daughter, attained the age of twenty-one on the 18th of July 1832, and thereupon the several legacies became payable.

Isabella Proud continued to reside with the family until about 1833, when she went into service and only occasionally visited her mother in the intervals between her hirings; and on the 3d of August 1841 she married William Little.

Sarah Proud died on the 28th of October 1848, intestate.

Elizabeth, Margaret and Anne Proud continued, for some time, to live with their brother as before, but in July 1860 they filed this bill, alleging that an arrangement had been made between them and their brother Henry Proud that, in consideration of their residing with and being maintained by him, they should forego not only the annuities of £10 severally given to them, but also the interest of their several legacies of £300, and they [236] asked for the payment of their several legacies. Henry Proud by his answer denied the arrangement and claimed the benefit of the Statute of Limitations; but, ultimately, the Plaintiffs agreed to accept £400 and the costs of the suit in satisfaction of their legacies; and on the 18th of January 1862 a decree was, by consent, made for the sale of the estate; it also directed inquiries to be made whether the estate was subject to any and what incumbrances (other than the Plaintiffs' charges), and what was due and owing in respect thereof.

Under this decree, William Little, in right of Isabella his wife, claimed the benefit of the same arrangement, and carried in his claim. On the 30th of July 1862 the Chief Clerk found that the estate was charged with the legacy of £300 given to Little's wife, and that there was an arrear of interest thereon amounting to £335, 18s. 4d.

A summons was then taken out by the Defendants to vary the certificate, and it was adjourned into Court.

Mr. M. A. Shee, for the Plaintiffs.

Mr. Hobhouse and Mr. Brodrick, for the Defendant Henry Proud. No trust was created by the testator affecting his real estate, either for the payment of debts or legacies. The estate was certainly devised, subject to their payment; but this did not create an express trust within the 3 & 4 Will. 4, c. 27, and therefore it was barred by the 40th section as a charge or legacy; *Jacquet v. Jacquet* (27 Beav. 332); *Francis v. Grover* (5 Hare, 39); *Greenway v. Bromfield* (9 Hare, 201); *Wilkinson v. Wilkinson* (9 Hare, 204).

[237] Mr. Rendall, for Mr. and Mrs. Little. The arrangement between the parties clearly took the case out of the 3 & 4 Will. 4, c. 27. The estate was also subject to incumbrances of the testator, and until they had been satisfied, no present right to the legacies could arise; assuming that it did, the legatee might have to file a bill to redeem; so long, however, as the estate was in the hands of mortgagees the statute could not begin to run, especially in a case where the devisee took the estate subject to the legacies, and consequently to a trust which pledged the estate for payment; *Hunt v. Bateman* (10 Ir. Eq. Rep. 360); *Ravenscroft v. Frisby* (1 Coll. C. C. 16); *Faulkner v. Daniel* (3 Hare, 199, 212).

THE MASTER OF THE ROLLS [Sir John Romilly]. The right to receive and give a discharge for the legacy arose in 1832, on the youngest daughter attaining twenty-one, that is a fact which must be admitted for the purpose of the 3 & 4 Will. 4, c. 27. It is also clear that a charge only was made upon the estate for the payment of the legacy, and that no trust was created for that purpose. This was decided by me in *Jacquet v. Jacquet* (27 Beav. 332) and again in *Dickinson v. Teasdale* (*ante*, p. 511). What is and what is not to be considered a trust depends occasionally upon minute considerations; but between a devise subject to debts or legacies and a mere charge, no such distinction exists. The arrangement which is said to have taken place certainly affords no ground for giving the relief asked upon the present claim; but assuming such an arrangement to have been made, yet, after twenty years, it is most undoubtedly barred by lapse of time.

The certificate of the Chief Clerk must be varied.

[238] WATKINS v. WESTON. Dec. 4, 1862.

[Affirmed, 3 De G. J. & S. 434; 46 E. R. 703; 32 L. J. Ch. 609; 8 L. T. 406; 11 W. R. 408. See *Gatenby v. Morgan*, 1876, 1 Q. B. D. 692.]

A testator bequeathed leaseholds to trustees, upon trust to pay the rents to his daughter for her separate use [without limit], but in case she should die before the expiration of the lease, then upon trust to accumulate the rents for her children. She never had any children. Held, that she took the whole interest in the leaseholds.

The testator devised his real and personal estate to two trustees, upon trusts which, as to three leasehold houses at Walworth, he declared in the following terms:—

“Upon trust to receive the rents and profits thereof, subject to the payment of the rent and performance of the covenants contained in the lease under which I hold the same, and to pay the same unto and for the sole and separate use and benefit of my daughter Emma, now the wife of Thomas Wheeler. And I do hereby declare that the same shall not be subject or liable to the debts, order, control or management of her present or any future husband, and that her receipts alone shall be sufficient discharges to my executors for the same; but in case my said daughter shall depart this life before the expiration of the lease under which I hold the said premises, then upon trust to invest such rents and profits in the public securities of Great Britain, and to allow the same to accumulate, for the benefit of all and every the child or children of my said daughter who shall be living at her decease, the same to become payable to them upon their attaining their respective ages of twenty-one years, share and share alike.”

The testator died in 1850; his daughter died in 1861, never having had any child.

The leaseholds produced £112 a year, and would not expire until 1869. They were claimed by the legal personal representatives of the daughter on the one hand, and [239] by the residuary legatees on the other; and this bill was filed by one of the trustees to have the rights declared.

Mr. Druce, for the Plaintiff.

Mr. Selwyn and Mr. Kay, for the legal personal representatives of the daughter, argued that there was an absolute unrestricted gift to the daughter in the first instance, which was afterwards cut down merely in favor of any children she might have, and this having failed, that the first unrestricted bequest to the daughter remained unimpaired. That there was an indefinite gift of the rents to the daughter, and no words which restricted the bequest to her for life. That therefore she took the leaseholds absolutely, and that they passed to her representatives; *In re Corbell's Trusts* (Johns. 591); *Norman v. Kynaston* (29 Beav. 96); *Salmon v. Salmon* (29 Beav. 27); *Newland v. Shephard* (2 Peere Wms. 194); *Knight v. Selby* (2 Mac. & Gor. 92; 3 Scott (N. S.), 400); *Jackson v. Noble* (2 Keen, 590); *Whittell v. Dudin* (2 Jac. & W. 279).

Mr. Baggallay and Mr. Nalder, for Joseph Kay. There was no absolute gift to the daughter, but only to the trustees, and she had a mere right to receive the rents from the trustees as long as she was capable of giving a receipt for them. Her personal enjoyment was alone contemplated, and as there was a failure of children, the leaseholds at her decease were undisposed of and fall into the residue.

Mr. Cotton and Mr. Welford, for other parties.

[240] THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the daughter took an absolute interest in the leaseholds. There is an absolute gift in the first instance to trustees, in trust to pay her the rents, and I cannot doubt that if the will had stopped here she would have taken an absolute interest in the leaseholds, and that it would have been impossible to say that any interest in the leaseholds was left undisposed of. If the testator had given her the leaseholds without the interposition of trustees: thus, if he had said, I give all my estate and interest in this property to my daughter Emma, no one could have doubted that she would have taken the whole interest, and it is the same thing when the whole is vested in the trustees and the trust of the whole is for her. The directions which secured the property to her for her separate use were evidently inserted for the mere purpose of

excluding the marital right of the husband. If it were held to be a gift for life only, the words "for life" must necessarily be introduced. As it stands, however, the absolute gift is only to be cut down in the event of Emma having children, it was a benefit intended exclusively for them. She had none, the event, therefore, has not happened, and the gift for her remains unaffected and absolute, and the property passed to her legal personal representative.

[241] *Re DEVONSHIRE. Dec. 18, 19, 1862.*

The Petitioner having refused to file the original petition, it was ordered that the Respondent be at liberty to file a copy, and that the Petitioner do pay the Respondent his costs of the application.

Mr. Fooka, for Mr. Devonshire, the Respondent on a petition heard some time ago, moved that a copy of the petition might be filed in lieu of the original, the Petitioner having refused to file the original.

THE MASTER OF THE ROLLS [Sir John Romilly]. I find that the case of *Andrews v. Walton* (1 Myl. & Cr. 360), is precisely in point and the order may be made.

Mr. Fooks then asked that Mr. Devonshire's costs of the application might be paid by the Petitioner.

THE MASTER OF THE ROLLS. You must have the costs.

DECREE.—Order that a copy may be filed, and "that the Petitioner, W. M. M., do pay to Mr. Devonshire his costs of this application and incident thereto," to be taxed, &c.—Reg. Lib. 1862, A. fol. 2342.

[242] *IZOD v. IZOD. Feb. 20, 21, 23, 1863.*

[S. C. 9 L. T. 191; 9 Jur. (N. S.) 1216; 11 W. R. 452; 1 N. R. 462.]

Bequest to trustees to apply the income or principal for the benefit of S. J., widow, and of her three children, in such proportions, &c., as the trustees, in their absolute discretion, should think proper; but in case S. J. married again, her interest to cease. The trustees declined to act. Held, that the fund must be divided equally between S. J. and her three children.

By her will, the testatrix bequeathed as follows:—

"I hereby direct William Izod and George Izod (her executors) to invest the sum of £600 (subject to reduction as hereinafter mentioned) in the names of the said Henry Izod and of my son-in-law Charles Heaton, in the purchase of Government stock or funds, which I hereby give to the said Henry Izod and Charles Heaton, and the survivor of them and the executors or administrators of such survivor, upon trust to pay and apply the dividends, interest and annual income of the said Bank annuities, and also all or any portion of the principal thereof, to or for the benefit of Mrs. Sarah Izod, the widow of my son Joseph Izod, and of his three children Thomas Izod, William Henry Izod and Elizabeth Maria Izod, in such manner, shares and proportions, at such time or times, under such conditions and for such purposes, as they the said Henry Izod and Charles Heaton, or the survivor of them, or the executors or administrators of such survivor, shall, in their or his absolute and uncontrolled discretion, think proper; but if the said Sarah Izod shall marry again, then I direct that her interest under this my will shall cease and determine. And I hereby declare that the said Henry Izod and Charles Heaton shall not be accountable to the said Sarah Izod, or to any of the children of my said son Joseph Izod, or to any person claiming by, under or in trust for her, them or any of them, for the manner in which they shall exercise the discretionary powers hereby vested in them."

[243] The testatrix died in 1856, and the trustees of the legacy declined to act.

The question was, as to the relative rights of Mrs. Izod and her three children in the fund.

Mr. Hobhouse and Mr. T. A. Roberts, for the Plaintiff Mrs. Sarah Izod, argued that as the trustees had refused to exercise their discretion, the fund was divisible between Mrs. Izod and her three children; *Crockett v. Crockett* (2 Phill. 553); *Penny v. Turner* (2 Phill. 493).

Mr. Lloyd and Mr. Prendergast, for the Defendants, argued that as Mrs. Izod's interest was to cease on her second marriage, it was impossible to hold that she took an absolute interest in the *corpus*; and that, therefore, she had only a life interest.

[THE MASTER OF THE ROLLS referred to *Brown v. Higgs* (4 Ves. 708; 5 Ves. 498, and 8 Ves. 561).]

Mr. Hobhouse, in reply.

Feb. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. I think the fund is divisible in fourths. I hesitated at first on account of the direction that if Sarah Izod married again her interest was to cease and determine; but I think this was a discretionary power to appoint the income or principal between four persons "in such manner, shares and proportions" as the trustees should in their discretion think proper. Under this, they might have given her any portion of the capital they thought fit, [244] and if so, I must hold that *Brown v. Higgs* applies, and that where this Court has to administer a fund, the distribution of which is intrusted to the discretion of one who refuses to exercise it, the only distribution the Court can make is to divide it, equally, (1) between the objects of the testatrix's bounty, it being impossible to divide it in such a manner as the donee of the power should think fit.

I must make a declaration to that effect.

[244] TYRWHITT v. TYRWHITT. Feb. 11, 23, 1863.

[S. C. 32 L. J. Ch. 553; 8 L. T. 140; 9 Jur. (N. S.) 346; 11 W. R. 409; 1 N. R. 458.]

Where a charge on an estate becomes vested absolutely in the owner of the inheritance of the estate, the three tests usually applied for ascertaining whether the charge has merged are:—First, whether there has been an actual expression of intention to that effect; secondly, whether the acts done by the owner of the estate are only consistent with the charge being kept on foot; and thirdly, whether it is for the interest of the owner that the charge should not merge in the inheritance.

As to the effect of an expression of intention, on the part of the owner of the inheritance of an estate, as to the merger of a charge thereon, made previous to his becoming absolute owner of the charge.

A fund, which was held in trust for A. for life, with remainder to B. absolutely, was lent by the trustees (B. and C.) to B., on mortgage of his fee-simple estates. By the mortgage deed, the trustees declared that they would hold the fund, after the decease of A., for "B., his executors, administrators and assigns, for his and their absolute benefit." B. survived A. and died. Held, that this was not a sufficient indication of a contrary intention to prevent the merger of the charge in the inheritance.

The question in this case was, whether a sum of £4200 charged on fee-simple estates of Sir Tyrwhitt Jones had become merged, in consequence of Sir Tyrwhitt Jones having become the absolute owner of that sum. It arose under the following circumstances:—

In 1818 Harriet Emma Jones married Mr. Mytton. She was entitled to a portion of £10,000, part of which was settled on her marriage by a deed dated the 20th of May 1818. By this deed, the sum of £9200 (part of the £10,000) was assigned to her brother Sir Tyrwhitt Jones and John Arthur Lloyd, upon trust for Harriet [245] Emma Jones for life, with remainder to Mr. Mytton for life, and after the death of

(1) *Penny v. Turner*, 2 Phill. 493; *Fordyce v. Bridges*, 2 Phill. 512; *Prendergast v. Prendergast*, 3 H. of L. Cas. 223; *Re White's Trusts*, John. 656.

the survivor, as to £5000 (part of it) on certain trusts for the children of the marriage ; and as to the residue (£4200), in case Harriet Emma Jones should predecease Mr. Mytton (which happened), upon such trusts as she should by deed or will appoint.

There was issue of the marriage one child only, viz., Harriet Emma Charlotte Mytton.

Mrs. Mytton by her will appointed the £4200 to her brother Sir Tyrwhitt Jones absolutely, and she died in July 1820.

In 1827 the £9200 was realised and lent to Sir Tyrwhitt Jones upon a mortgage of his fee-simple estate at Atcham in the county of Salop. Accordingly, by an indenture dated the 2d of August 1827, and made between Sir Tyrwhitt Jones of the first part, Mr. Mytton of the second part, and J. A. Lloyd and Sir Tyrwhitt Jones (as trustees) of the third part, Sir Tyrwhitt Jones conveyed the estate at Atcham in the county of Salop to J. A. Lloyd and his heirs, subject to redemption on payment by Sir Tyrwhitt Jones to J. A. Lloyd and Sir Tyrwhitt Jones of the sum of £9200 and interest, and Sir Tyrwhitt Jones covenanted to pay that sum. By this deed, it was declared that this sum should be held upon the trusts of the settlement of 1818. The deed then recited that there being only one child of the marriage, doubts had arisen whether she was entitled to the £5000, but that Sir Tyrwhitt Jones was desirous that such doubts should be obviated and H. E. C. Mytton should take the £5000, and that, for effectuating such purpose, Sir Tyrwhitt Jones and, at his request, J. A. Lloyd had agreed to make the declaration thereafter mentioned. [246] It then witnessed that J. A. Lloyd, *at the request of Sir Tyrwhitt Jones*, and also Sir Tyrwhitt Jones, and each of them, did thereby agree and declare that they, J. A. Lloyd and Sir Tyrwhitt Jones, their executors, administrators and assigns, would stand possessed of the sum of £9200 (subject to the life interest therein of John Mytton) upon and for the trusts, intents and purposes following, that is to say, as to the sum of £5000 part thereof upon certain trusts for the benefit of H. E. C. Mytton ; "and as to the sum of £4200 (the residue of the said sum of £9200 thereby secured, after deducting therefrom the said sum of £5000), immediately from and after the decease of John Mytton, and as to the whole of the same sum of £9200 in case H. E. C. Mytton should die under the age of twenty-one years and without having been married, and the interest, dividends and proceeds thereof respectively, *in trust for Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their absolute benefit.*"

Sir Tyrwhitt Jones made his will in 1826, but in 1830 he became a lunatic and so continued until his death in 1839.

Mr. Mytton predeceased him and died in 1834.

Under the will of Sir Tyrwhitt Jones, the Plaintiff, his widow, was absolutely entitled to his personal estate, and she was tenant for life of his real estates, subject (as was stated in the will) as to those in the county of Salop, "to the charges to which they were then at present liable," with remainder to the Defendant Sir Henry T. Tyrwhitt for life, with remainder to the Defendant Harry T. Tyrwhitt his infant son in tail.

The £9200 still remained charged upon the estate, [247] and the question raised by this suit was, whether £4200, the part of it which belonged absolutely to Sir Tyrwhitt Jones, had sunk into the inheritance or still formed part of his personal estate. By this bill, it was claimed by his widow absolutely, as part of the personal estate bequeathed to her.

Mr. Kenyon and Mr. Rodwell, for the Plaintiff. The merger of the charge in the ownership in fee is a matter of intention, but if no intention is either expressed or to be implied, it depends on which is most for the benefit of the owner of the estate ; *Wigzell v. Wigzell* (2 Sim. & S. 364) ; *Forbes v. Moffatt* (18 Ves. 384). Here there is an expression of intention contained in the deed of 1827, whereby Mr. Lloyd, "at the request of Sir Tyrwhitt Jones," declares that he will hold the £4200 "in trust for Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their own absolute benefit." The burden of proof "is therefore shifted, in consequence of this presumption of an intention to keep the charge on foot ;" *Gunter v. Gunter* (23 Beav. 573). Again, the devise of the Shropshire estate, "subject to the charges to which it was then at present liable," is another indication of intention to keep the

charge on foot; *Swinfen v. Swinfen* (29 Beav. 199); *Grice v. Shaw* (10 Hare, 76). The lunacy in 1830 put an end to all further or contrary indication of intention.

Mr. Selwyn and Mr. Karslake, for Sir H. T. Tyrwhitt and H. T. Tyrwhitt. The same person having become the absolute owner of the estate and of the charge, the charge *prima facie* merged in the inheritance. Here no expression of intention could avail during the life of Mr. Mytton, for until his death Sir Tyrwhitt Jones [248] never became absolute owner of the charge. The deed of 1827 and the will only expressed the existing trusts on which the charge was held, and this made no variation in them, or expressed any intention as to keeping it on foot after the decease of the tenant for life; it was executed with other objects. There being no expression of a different intention, and there being no reason for saying that it was for the interest of Sir Tyrwhitt Jones to keep the charge on foot, it must be held to have merged in the inheritance; *Astley v. Miles* (1 Sim. 298, 337, 338); *Tyler v. Lake* (4 Sim. 351); *Pitt v. Pitt* (22 Beav. 294); *Hood v. Phillips* (3 Beav. 513); *Swabey v. Swabey* (15 Sim. 106).

Mr. Tudor, for J. A. Lloyd.

Feb. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether, on the death of Mr. Mytton, the tenant for life of this fund, the £4200 merged in the fee-simple of the estate at Atcham in the county of Salop, which was vested in Sir Tyrwhitt Jones, or whether the reservation in the mortgage deed of 1827 of this fund, "in trust for Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their absolute benefit," kept it severed from the freehold and made it part of his personal estate.

Mr. Mytton died in March 1834; Sir Tyrwhitt Jones survived him about five and a half years; but as he had, in 1830, in consequence of an accident, become incapable of managing himself and his affairs, no expression of intention by him relative to this matter is to be found on [249] the death of Mr. Mytton, or indeed at any other time, except what is to be gathered from the trusts of the mortgage deed of 1827.

The rule is this:—*Prima facie* the charge merges in the inheritance, but the presumption may be rebutted if it be shewn that the intention of the owner of the charge was that it should not merge. Three tests are usually applied for the purpose of ascertaining whether the owner of the charge intended that it should merge in the inheritance, at the time when he became entitled to the absolute interest of the charge. First, any actual expression of that intention; secondly, where the form and character of the acts done are only consistent with the keeping the charge on foot; and thirdly, such an intention may be presumed, when, though a total silence in all other respects pervades the matter, it appears that it is for the interest of the owner of the charge that it should not merge in the inheritance. This last point does not assist the case of the Plaintiff on the present occasion. Sir Tyrwhitt Jones was owner in fee-simple of the land on which the £4200 was charged, and in such cases it is the presumption of law, which is also in accordance with the ordinary custom of the world, that it is for the interest of the owner of the estate that the charge should not be kept on foot.

If, therefore, the presumption of merger is to be rebutted in the present case, it must be by reason of the intention of Sir Tyrwhitt Jones, expressed or to be implied from the form of the transaction. Except from the form of the deed of August 1827 and the declaration therein contained, no such intention can be gathered from any words or acts of Sir Tyrwhitt Jones. The question is therefore confined to the construction and fair inference to be drawn from that deed.

[250] After carefully considering this case, I am of opinion that no sufficient evidence of such intention, on the part of Sir Tyrwhitt Jones, is to be gathered from that deed. In the first place, the declaration that the £4200 should, immediately after the death of Mr. Mytton, be "in trust for Sir Tyrwhitt Jones, his executors, administrators and assigns, for his and their absolute benefit," is merely the statement of the trust which already affected the fund, and cannot properly be taken to be an expression of his intention that the fund should not merge. The observation pressed upon me that, if Sir Tyrwhitt Jones had intended that the charge should merge, he would so have expressed it in the deed, does not meet with my assent. It might

well have happened that Sir Tyrwhitt Jones might have predeceased Mr. Mytton, in which case the charge must necessarily have been kept on foot, and the expression of an intention that the £4200 should merge could only have been properly applied to the case of Sir Tyrwhitt Jones surviving Mr. Mytton, and not to his dying before him, in which case, in the event of intestacy, the land would necessarily have gone to his heir and the charge to his legal personal representatives and next of kin. Without adopting or expressing any opinion as to whether the previously-expressed intention of Sir Tyrwhitt Jones would be sufficient to create a present merger, this I apprehend to be clear:—That no previous expression of such intention would have any effect, unless Sir Tyrwhitt Jones lived to the time when such two interests became united; in any other event, the only way in which Sir Tyrwhitt Jones could operate upon the fund would have been by direct dealing with the charge either by deed or will.

If Sir Tyrwhitt Jones had thought specifically to dispose of this property by will, either in favor of his [251] heir or any other relation, he might have done so, and in such case, the question would never have arisen, and I entertain considerable doubts whether any expression of intention of Sir Tyrwhitt Jones, previously to the time of the union of the interests, could settle the matter, as it is clear that he could alter his intention at any time up to the time of merger.

But what principally influences my judgment is, that I do not find here any expression of intention that the charge shall not merge, but that it shall remain in force. It must be the expression of the owner of the charge; but is there any such expression here? it is no more the expression of intention of Sir Tyrwhitt Jones than it is of the intention of Mr. Lloyd. They were both trustees, and they both, in the character of trustees, declare the trusts of the fund; but, except as trustees, they declare nothing. In order to have satisfied the contention of the Plaintiff, assuming that the declaration of intention may anticipate the period when the charge falls in (on which point I have already stated I express no positive opinion), there ought to have been the expression of the intention of Sir Tyrwhitt Jones alone, in his character of *cestui que trust*, and not one made jointly with Mr. Lloyd, in his character of trustee. It is, in truth, nothing more than a statement of the trusts affecting the fund, and that by the two trustees in whom the fund was vested.

If Sir Tyrwhitt Jones had so intended, he might have expressed his wish that the fund, on the death of Mr. Mytton, should go to his legal personal representative, on the one hand, or merge in his estate in the other, and then make the trusts accordingly follow that intention. But in the absence of any such recital, or any such intention appearing by the deed other than by [252] the trust here expressed, I can only treat it as a formal expression by the trustees of the trusts on which they held the money. In this respect, it differs from the cases to which I have referred and which I have consulted. In all these, the declarations of trust were by a stranger and not merely in accordance with the original trusts; and usually the charge is expressly kept on foot by an assignment to some person in trust for the benefit of the owner of the estate, his executors, administrators and assigns. If, on the death of Mr. Mytton, Sir Tyrwhitt Jones had thought fit to cause this mortgage debt of £4200 to be assigned to a third person, "in trust for him, his executors, administrators and assigns," it would have kept it on foot, but the previous declaration of the existing trusts by two trustees, of whom he happened to be one, does not, in my opinion, prevent the subsequent merger, which I must declare accordingly.

[252] *Re HATFIELD'S ESTATE* (No. 2). Feb. 21, 1863.

[See *In re Artizans' and Labourers' Dwellings Improvement Act*, 1875, 1880, 14 Ch. D. 625.]

Upon an application by a tenant for life to pay to a mortgagee the amount of compensation money which was in Court: Held, that the company was not bound to pay the mortgagee's costs of appearing.

In this case, which is reported *ante* (See *Re Hatfield's Estate*, 29 Beav. 370), the

tenant for life had, in 1862, entered into a further contract with the Leeds Waterworks Company, enabling them to take a further supply of water from the river Wharfe, and for which the company was to pay a compensation of £6000. This sum had been paid into Court.

This was a petition of the tenant for life, asking that the £6000 might be paid to S. Lushington in part discharge of his mortgage on the estate.

The question was again agitated whether the mort-[253]-gagee's costs were payable by the company; 8 & 9 Vict. c. 18, s. 80.

Mr. Currey, in support of the petition; *Re Brooke* (30 Beav. 233).

Mr. Rasch, for the company. The distinction is now settled. Upon a petition to invest, the company are liable to pay a mortgagee's costs; but on a petition to pay the fund to the mortgagee, they are not.

THE MASTER OF THE ROLLS. The mortgagee cannot have his costs as against the company.

[253] *Re KENNETH MACKENZIE'S SETTLEMENT.* Feb. 21, 23, 1863.

A sum of £5 per cents. was held on trust to pay a number of annuities which originally exactly exhausted the income, and the capital was given over. The fund was converted into £3 per cents., and, under a proviso, the annuities abated in proportion. Afterwards, by the death of an annuitant, the income again became sufficient to pay the existing annuities in full. Held, on the construction of the deed, that the existing annuitants were entitled to be paid in full their annuities.

In 1817 Kenneth Mackenzie settled two sums of £20,000 consols and £16,000 Navy £5 per cents., which were vested in trustees, and which together produced an income of £1400 a year, upon trust for himself for life, and afterwards, out of the dividends, to pay to his wife, to his daughters Mary, Louisa, Elizabeth, to the children of his son Charles and to his son Frederick, life annuities, which altogether amounted to the dividends, viz., £1400 a year. Some of these annuities were to be increased on the death of the widow and in other events.

The settlement then contained the following proviso:—

"Provided nevertheless, that if, by any means of the [254] redemption or paying off the aforesaid Bank annuities or any of them, or by means of any tax or duty to be imposed thereon, or from any other cause whatsoever, the dividends or annual proceeds of the aforesaid Bank annuities shall not be sufficient to pay and satisfy all the said annuities or yearly sums of money hereinbefore directed to be paid, then such said several annuities or yearly sums of money *shall abate and be diminished rateably* and in proportion to the amount of such deficiency."

The settlement provided, that if Mary or Louisa left children, they were respectively to have the capital producing their mothers' annuities, which, in default of children, was to "sink into and again become and form part of the" £20,000 consols and £16,000 £5 per cents. In the same way Elizabeth's children were to have a provision. And the children of the three children of Charles and the children of Frederick were to have the principal producing their parents' annuities, which, in default, was to sink into the two funds.

The settlement then contained the following gift over:—

It was thereby declared "that (subject and without prejudice to the several trusts and directions thereinbefore declared and contained of and concerning the sums of Bank annuities, and the dividends and annual proceeds thereof, and to the raising and payment of the said several annuities or yearly sums, whilst they or any of them should be subsisting), the trustees should stand possessed of the £20,000 consols and £16,000 £5 per cents., or so much and such part or parts, respectively, as should not be otherwise disposed of, pursuant to the trusts or directions aforesaid, and in the dividends or annual proceeds, or *surplus* dividends or annual proceeds thereof, respectively, in trust for and for the benefit of [255] Charles Mackenzie and Frederick Mackenzie for life, with remainder to their respective children."

The events which happened were as follows:—The testator died in 1822, having survived his wife. In 1822 the £5 per cents. were reduced to £4 per cents. In 1829 Frederick died without issue. In 1840 the £4 per cents. were reduced to £3, 10s. per cents. Mary died in 1831, leaving a son, who received his share of the capital. In 1844 the £3, 10s. per cents. were reduced to £3, 5s. per cents., and in 1854 they were further reduced to £3 per cents.

Down to 1862 the income had thus become insufficient to pay the annuities in full, and they had been diminished rateably. In July 1862 Louisa died, and the income then became sufficient to pay the existing annuities.

The fund having been paid into Court, the question was, whether the existing annuitants were entitled to be paid their annuities in full.

Mr. Selwyn and Mr. C. Roupell, for the Petitioner, cited *Farmer v. Mills* (4 Russ. 86); *Scott v. Salmond* (1 Myl. & K. 363).

Mr. Baggallay and Mr. Freeling, for an annuitant, did not claim the arrears of annuity, but merely the full amount for the future.

Mr. Haddan, Mr. Waller, Mr. Wright, Mr. L. Mackeson and Mr. Rowcliffe, for other Respondents, cited *Earle v. Bellingham* (24 Beav. 447); *Mills v. Drewitt* (20 Beav. 638).

Mr. Selwyn, in reply.

[256] THE MASTER OF THE ROLLS [Sir John Romilly]. The question raised upon this settlement is not whether, in consequence of the reduction of the £5 per cents. into New £3 per cents. the annuities which originally exhausted the whole income are to abate in proportion, but whether, in consequence of some of the annuitants having died without children, the existing annuitants are afterwards to be again increased, the income being now sufficient to pay them in full. This question depends solely on the construction to be placed on the settlement.

I am of opinion that the cases which have been referred to, which are undoubtedly good law, have no reference to the circumstances of this case, under the peculiar frame and words of the settlement. It is quite true that where a fund is set apart to answer an annuity, and the capital is given over after the death of the annuitant, if the income become diminished, the annuitant cannot resort to the capital to make up the deficiency, nor can he resort to another fund set apart to provide for another and distinct annuity. But I think that this is not the construction of this settlement. Here the testator intended to provide one common fund out of the income of which certain annuities were to be paid, and he provided that if, by any means, the dividends should not be sufficient to satisfy all the annuities, then that they should abate and be diminished, rateably and in proportion to the amount of such deficiency. Without that, and if there had been no gift over, it is most probable that the capital would have been liable to make good the deficiency of the annuities. Then there is a proviso giving to the children of annuitants the proportionate capital producing their annuities. The effect of which is clearly that if the annuities should become [257] diminished by reason of the conversion of the funds, the children of an annuitant, on his death during that period, could only take the capital corresponding to the abated annuity. But if such annuitant had no children, the part of capital intended for them was to sink into and again become and form part of the £20,000 £3 per cent. consolidated Bank annuities, and £16,000 Navy £5 per cent. Bank annuities, or one of them, and was to be applied and disposed of accordingly, that is, in the payment of the several annuities mentioned; and the payment over of the residue does not take place until after that has been in full operation: that means, shall be applied and disposed of as mentioned in this settlement. These words, together with the particular manner in which the residue is given over, in my opinion, govern the construction of this settlement.

Some of the annuities have ceased, but I think that it is inconsistent with what I have previously read, that any arrears should now be paid, not only is there no direction to that effect, but, in truth, there are no arrears, for the annuities abated when the income abated; but there is a direction that the whole of the subsisting annuities shall be paid while the fund is sufficient for that purpose. The fund is sufficient, and the abatement consequent on the diminution of the fund has ceased. That is the only way in which, in my opinion, I can read this settlement.

I am further confirmed in that view by the gift over of the residue, which is only to take effect, subject to the trusts before declared, and without prejudice to the raising and payment of the said several annuities or yearly sums whilst they or any of them should be subsisting. It would, in my opinion, be a straining of the words of this settlement, to say that because an an-[258]-nuitant had been compelled to abate and to receive £250 a year instead of £300 a year, by reason of the reduction in the funds, and when the income afterwards recovered by the death of an annuitant without children, and became sufficient to pay the annuities in full, that the gift over could take effect while any of those annuities remained unpaid. The gift over is only after payment of all the annuities or of those which should be subsisting, and there is one mixed fund created for this purpose.

Then the trustees are to hold this mixed fund, or so much and such part or parts respectively as should not be otherwise disposed of, pursuant to the trusts or directions aforesaid, and the dividends or annual proceeds or *surplus* dividends or annual proceeds thereof, respectively, in trust for the residuary legatees. It is only the surplus dividends that is to go over. Surplus after what? After payment of all the annuities in full.

The result is that there was a large fluctuating fund, which, when the testator died, was sufficient to pay the annuities in full, but it afterwards ceased to be sufficient for that purpose, and it afterwards recovered and became sufficient to pay them in full. I am of opinion that the existing annuitants are now entitled to receive those annuities in full. I look at the case in the same way as if, after the reduction of the £5 per cent. Bank annuities by Act of Parliament, they had been restored to £5 per cent. annuities. The annuities would then have revived in full. I am therefore of opinion that no residue is given over until these annuities have been fully paid, and I will make a declaration to that effect.

[259] DOBSON v. BANKS. Feb. 23, 1863.

The testator gave all his real and personal estate to trustees, upon trust, except as to money due to him from A. E., to convert by sale and invest in the funds, "and pay the interest thereof unto his wife" for life, with remainder over. Held, that the widow was entitled to the interest arising from the debt from A. E.

As to all his real and personal estate, the testator gave the same to the Defendant Harry Banks and Alfred Emmins, upon trust, except as to any money due to him from the said Alfred Emmins, to convert the same, by sale or disposal, in such manner as they might deem fit, into money, and invest the net produce thereof in the Parliamentary stocks or funds of Great Britain in their joint names, and pay the interest thereof unto his wife Mary Ann Rebbeck for her life, and upon her decease, to divide the principal or capital sum unto his daughter-in-law, his three daughters, and his son.

The testator died in 1851.

At the death of the testator, there was due to him from Alfred Emmins the principal sum of £290 (which had been advanced by the testator upon a mortgage of certain leasehold property of Alfred Emmins), together with a considerable arrear of interest.

The widow contended that, according to the true construction of the testator's will, the money due to him from Alfred Emmins was excepted only from the trusts for conversion and investment, and not from the beneficial trusts declared of his residuary estate. The Plaintiffs, on the contrary, insisted that it was undisposed of and belonged to the next of kin.

Mr. Ward, for the Plaintiffs.

[260] Mr. F. Sims Williams, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Plaintiffs' case fails, and that the construction put upon this will by Mr. Williams is the correct one. The question is, whether the Plaintiffs are entitled, as next of kin

to the debt which was due from Emmins to the testator at his death. The Plaintiffs contend that it is not disposed of by the will, but I am of opinion that it is.

The Court always leans against an intestacy, and here I think the expressions used by the testator amount to a gift of all his property. He gives "all his real and personal estate to his executors." This is plainly a gift of the whole, and that which follows is a declaration of the trusts on which it is to be held, namely, to pay the interest to his wife for life; but there is also a trust for the conversion of the whole of the property other than Emmins' debt.

I think, from the whole scope and purpose of the will, the testator did not intend the debt to be given beneficially to the executors, and it is not claimed by them; and I am of opinion that the trust for the investment does not relate to the debt, which they cannot call in but must leave as it was bearing interest; but that the trust in favor of the widow affects the whole estate. I will make a declaration to that effect.

[261] LOCKE v. PRESCOTT. Feb. 24, 26, 1863.

Bankers advanced to customers £300 to redeem some railway stock which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to a third party, A. B. Held, that after the receipt of this letter, the bankers had constructive notice of A. B.'s right to the stock, and that no subsequent advances made by the bankers to the customers could affect the stock.

In 1859 the Plaintiff Captain Locke applied to Messrs. Bowes & Bellingham, auctioneers, to lend him £300, on the security of £1200 preference £6 per cent. stock in the Waterford and Kilkenny Railway Company. This they agreed to do, but they obtained the money from their bankers, the Bank of London, on the security of the stock. The Plaintiff thereupon executed a legal transfer to Marshall and Boore, two of the officers of the bank, and the certificates were delivered to them.

In November 1859 Messrs. Bowes & Bellingham transferred their banking account to Messrs. Prescott & Co., who, at their request, thereupon advanced the £300 necessary for redeeming the stock. They paid the amount to the Bank of London, and, upon a written authority of the Plaintiff, Marshall and Boore executed a transfer of the preference stock *in blank*, that is, as regarded the date and the name of the transferee; the certificates and transfers were handed over by Messrs. Bowes & Bellingham to Messrs. Prescott, their bankers, as a security for their advance. At this time, Messrs. Prescott clearly had no notice of the Plaintiff having any interest in the stock; but subsequently, on the 31st of May 1860, the following letter was written by Messrs. Bowes & Bellingham to Messrs. Prescott:—

"We observe that Saturday next, the 2d proximo, is the day upon which the term of the loan upon the Waterford and Kilkenny £6 per cent. preference stock expires. We have been requested by *our principal* to extend the term to the 2d day of September ensuing, [262] which we have consented to do. We beg, therefore, if convenient, you will oblige us in a similar manner."

In July 1860 the partnership between Bowes & Bellingham was dissolved, and in the following year Bowes left England in difficulties, and Bellingham became bankrupt. There being a balance beyond the £300 due from Messrs. Bowes & Bellingham to Messrs. Prescott, on their general banking account, Messrs. Prescott sold the railway stock, and insisted on retaining the produce in repayment, not only of the £300, but also of their general balance.

By this bill, the Plaintiff insisted that Messrs. Prescott, at the time of the delivery of the blank transfer, had notice of the Plaintiff's title, which, however, they distinctly denied. The Plaintiff also charged that the transfers in blank, executed by Marshall, Boore and the Plaintiff, were void, and that neither Messrs. Prescott nor the purchaser from them ever acquired any interest whatever, either legal or equitable, in

the preference stock under the transfers; and that if such transfers were not absolutely void, and any interest passed to Messrs. Prescott, then that they accepted the transfers by way of mortgage only, and with full notice of the Plaintiff's interest in the stock as the mortgagor thereof.

The bill prayed a declaration that the transfers in blank and the sale of the stock were null and void; that Messrs. Prescott might account for the moneys received, and that, after retaining the £300 and interest, they might pay the balance of the moneys received by them to the Plaintiff.

Mr. Baggallay and Mr. Ward, for the Plaintiff, [263] argued that the transfer in blank was void. *Taylor v. The Great Indian, &c., Company* (4 De G. & J. 559); *Hibblewhite v. M'Morine* (6 Mee. & Wels. 200); and see *Swan v. The North British Australasian Company* (32 L. J. (Exch.) 273). And, secondly, that Messrs. Prescott took with notice of the Plaintiff's rights, and could only claim to the extent of the mortgage which he had authorized and made.

Mr. Southgate and Mr. Wolstenholme, for the Defendants Messrs. Prescott, contended that the transfer in blank was in accordance with the usual course of dealing with bankers and others, and that the Plaintiff, who executed it, was estopped from contending that it was invalid. They pressed strongly on the Court the alarming result of questioning a custom of dealing amongst mercantile men and bankers, which was universally prevalent in the city, and that to almost an unlimited extent. That if the transfer were really void, still the stock would remain vested in Marshall and Boore as trustees for Messrs. Prescott. Secondly, they argued that Messrs. Prescott dealt only with their customers, and had no notice of the Plaintiff's title, and therefore that, by contract and the usual course of dealing, they had a charge for their general balance.

THE MASTER OF THE ROLLS [Sir John Romilly]. Nothing that I may say in this case will, in the slightest degree, affect the power of bankers, in the City of London, safely to advance money upon the security of stock or shares deposited with them by anyone, where the banker has not notice or reasonable cause to [264] believe that the stock or shares belong to another, or that that other person has merely pledged them to him who proposes to pledge them with the bank.

But the power so expressed does not exonerate Messrs. Prescott & Co. from liability in this case. And upon the evidence, I am of opinion that they are not entitled to any claim upon the preference stock beyond the amount advanced by them upon the transfer of the securities.

The facts of the case are not material so far as relate to the advances by the Bank of London, who it appears advanced £300 upon the security of £1200 preference stock, and this security was transferred to Messrs. Prescott & Co., when they, at the request of Messrs. Bowes & Bellingham, advanced £300 for the purpose of paying off the Bank of London. I see no trace of Messrs. Prescott having had, at that time, any evidence or notice given to them, so as to make them think that this stock belonged to the Plaintiff or that he was interested therein. If the matter had rested there, I should have held them entitled, as against Messrs. Bowes & Bellingham, to hold the stock as a security for the amount of the balance due to them. (*Brandao v. Barnett*, 12 Cl. & Fin. 787.)

But the difficulty I have, which I think is insuperable, is this:—As soon as they received distinct notice that the stock belonged to another person, and in my opinion it is immaterial when that was done, the stock can then only be a security for the balance due to them at that period. They had no right, after they had received notice of that fact, to advance any further money to Bowes & [265] Bellingham on the security of that stock, which they knew belonged to another person, or to hold it as a security for the general balance due to them from Messrs. Bowes & Bellingham. The stock will always be a security for the amount first advanced upon it, and there will be a specific lien for that sum, but beyond that, I am of opinion they are not entitled.

I find that on the 30th of May 1860 Messrs. Bowes & Bellingham wrote Messrs. Prescott, Grote & Co. this letter. [See *ante*, p. 261.]

Here, therefore, is a distinct notice that there was a "*principal*" who had advanced that stock to or deposited it with Messrs. Bowes & Bellingham, and it is not

ambiguous, for it refers to "the loan upon the Waterford and Kilkenny £6 per cent. preference stock," which was the £300 advanced upon the £1200 stock, and they say "we have been requested by our principal to extend the term," pointing out therefore that there was a principal who had advanced that stock to Bowes & Bellingham.

My opinion is that, after that period, Messrs. Prescott were not entitled to consider that stock as a security for anything more than the £300 advanced upon it, and that they could not, after that notice, hold it as a security for any floating balance.

It appears that, at this time, nothing was due beyond that amount; though, at a subsequent period, about £200 was due to them from Bowes & Bellingham on the balance of their account, and they have taken the whole of this stock as a security for that balance. This, in my opinion, they were not entitled to do.

[266] The result is, that the prayer of the bill must be complied with. The Defendants must account for the proceeds of the stock after deducting the £300 and interest which was due upon it.

[266] CATTON v. WYLD. Feb. 26, 1863.

[See *Davenport v. Rylands*, 1865, L. R. 1 Eq. 306; *Betts v. Neilson*, 1868, L. R. 3 Ch. 441; *Serrao v. Noel*, 1885, 15 Q. B. D. 553.]

In a case for an injunction, which, from circumstances arising after the bill was filed, could not be granted, the Court, under Sir H. Cairns' Act (21 & 22 Vict. c. 27, s. 2) awarded damages, though not specifically prayed for by the bill.

The Plaintiff was lessee of No. 10 Charing Cross, and the Defendant was tenant of the adjoining house, No. 11.

The Defendant was desirous of rebuilding his premises, and of pulling down the wall which separated the Defendant's from the Plaintiff's premises. Accordingly, the Defendant, on the 27th of November 1861, served the Plaintiff with a notice, under the Metropolitan Building Act (18 & 19 Vict. c. 122, s. 85), that, after the lapse of three months, he intended to pull down and rebuild the wall and the chimney shafts, &c., &c.

The Defendant, before the expiration of the three months, and after being warned not to interfere with the wall, commenced pulling it down. On the 12th of February 1862 the Plaintiff filed his bill against the Defendant, praying as follows:—

"1. That the Defendant might be restrained from pulling down the wall on the south side of the messuage and premises No. 10 Charing Cross, and from committing any further damage or destruction thereto, and from trespassing thereon, and on any other part of the messuage and premises No. 10 Charing Cross aforesaid.

"2. That the Defendant might pay the costs of this suit.

[267] "3. That the Plaintiff might have such further or other relief as the nature of his case shall require."

After the institution of the suit, the wall was built up, by arrangement between the parties, and the cause having subsequently been brought on,

Mr. Selwyn and Mr. Cottrell, for the Plaintiff, asked for a reference as to damages, under Sir Hugh Cairns' Act (21 & 22 Vict. c. 27, s. 2), and that the Defendant might pay the costs of the suit. They cited *Wedmore v. The Mayor of Bristol* (11 W. R. 136).

Mr. Lloyd, jun., for the Defendant, argued that no relief could now be given, and as to the Defendant paying damages, that they were not prayed by the bill, and could not therefore be recovered in this suit.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am prevented going into the merits of the case, but the course I must take is obvious. The Plaintiff prays an injunction to restrain the Defendant pulling down a wall, but by arrangement it has since been built up; therefore an injunction is out of the question, for nobody now thinks of pulling the wall down. It remains, therefore, for the Court to adjudicate on two things—first, whether the costs are to be paid by the Defendant, and secondly,

whether the Plaintiff is entitled to any other relief. The Defendant has been in the wrong from the beginning. He ought not to have pulled down the wall. He must therefore pay the costs of the suit.

With respect to damages, Sir Hugh Cairns' Act (21 & 22 Vict. c. 27, s. 2) [268] says that the Court shall have jurisdiction to give damages in cases of this description. Formerly, the Court used to make the decree without prejudice to any action which might be brought at law. This was a very inconvenient course to adopt, but now the Court deals with the whole matter. I concur with Vice-Chancellor Stuart, that the words of the Act do not require that damages should be specifically prayed. The bill prays for such further or other relief as the nature of the case shall require. This includes the relief which, under the altered circumstances, the Plaintiff is entitled to, and which spring out of what he was entitled to when the bill was filed. It may be, that in ascertaining the amount of damages the evidence now excluded may be used in mitigation of damages.

I must make a decree to ascertain what damages the Plaintiff has sustained by reason of the Defendant having pulled down the wall of No. 10 Charing Cross, and the Plaintiff must have his costs of suit up to this time. Reserve further consideration and subsequent costs.

[269] MOSSE v. SALT.(1) Nov. 6, 10, 1863.

[S. C. 32 L. J. Ch. 756. See *Goslings v. Blake*, 1888, 22 Q. B. D. 156. Followed, *Stewart v. Stewart*, 1891, 27 L. R. Ir. 351.]

When the accounts between banker and customer have been carried on for a series of years on a particular principle, the Court will assume there is an agreement to that effect; but acquiescence in it does not amount to a settlement of account.

When a mortgage is given by a customer to his bankers for a fixed sum, and not for the running balance, the banker cannot include that sum in the banking account and charge compound interest on it.

Bankers had a mortgage and a banking account with their customer: Held, that in ascertaining the amount due between them, the accounts must, in the first instance, be taken separately and on different principles.

Though in dealings between merchants, in discounting bills and the like, and in loans made for short periods, the income tax is not deducted, yet, in a mortgage transaction, the mortgagor is entitled to deduct it.

The Defendants, Messrs. Salt & Co., were the Plaintiff's bankers, and he, being indebted to them on an account stated, executed a mortgage to them of some property, which was dated the 5th of November 1846, for securing the payment, at the end of six months, of the sum of £2678, 8s. 1d. and interest at £5 per cent. In 1853 Messrs. Salt obtained a transfer to them of a prior mortgage for £1600.

Messrs. Salt made a further advance of £1059 to the Plaintiff, and in March 1853 obtained an additional security. They continued to act as bankers for the Plaintiff and received moneys on their securities. The bill stated that they sent to the Plaintiff accounts, sometimes yearly and sometimes for shorter periods. These accounts treated the mortgage debts as sums due to the bankers on overdrawn accounts, and after setting off the annual income and other moneys received by them against the mortgage debts and disbursements on the other side, they charged interest on the balance and added that interest to the principal in the succeeding account. It also alleged that the Defendants never allowed income tax on their charge for interest on their debt, though it had been deducted from the several sources of income. That the income of the property [270] mortgaged was sufficient to keep down the interest, and to satisfy all other payments in respect of the principal, and that it left a balance which the bankers impounded and applied in reduction of their debt.

That the account between them had always been an open and running account, and that from the last account rendered it appeared that the Defendants claimed a balance

(1) *Ex relatione.*

of £2040, 12s. 5d., but that it would have been much smaller, if proper allowances had been made.

The Plaintiff prayed that proper accounts might be taken of the mortgages and of the moneys received on account of the property comprised in the securities, and that the Plaintiff might be allowed the income tax charged against him. It asked a declaration that, after the 1st January 1853, the Defendants were only entitled to charge interest on the principal sum for the time being at the rate of £4 per cent. only. It was also asked that the accounts might be taken as between debtor and creditor, on the footing of mortgage transactions, and a declaration that the Defendants were not entitled to compound interest.

The Defendants said that the Plaintiff opened a banking account with them, without any special agreement as to terms, and that it was opened and throughout carried on according to the usual recognized mercantile custom adopted in dealings between London bankers and their customers.

They then stated, in substance, that the custom was, when a customer overdraw his account, that the bankers charged interest due from him from day to day, and when making the periodical rests in the accounts, thenceforth [271] to turn such interest into principal and carry it forward as principal carrying interest. That another part of such custom was, to send a pass-book to the customer, which became and was deemed and taken to be, according to the custom, a stated and settled account, unless objected to within a reasonable time.

That such custom of bankers had been adopted and acted on in their dealings with Mr. Mosse, and that they, throughout, on the faith and reliance thereof, made advances and payments to and for him and on his account, and abstained from compelling him to pay, and gave him time for repayment of the debt, from time to time, due from him on their dealings. That in 1845 they, as bankers, advanced Mr. Mosse £2150 to pay for railway shares, upon a written promise to repay it in one month, that this fact led to his overdrawing his account; that further sums had since been paid to his order, which increased the debt, and that, in making up his account at the end of the year, they charged, according to the custom, interest on the daily overdrawn balances, and made the accustomed annual rest in his account, and that they stated, at the foot, in one sum, the amount due from him for principal and interest, as the sum or balance standing to his debit, on or as on the last day of the year 1845, and that they sent a copy of such account to Mr. Mosse on the 6th January 1846.

That a similar account was made out, immediately previous to the securities given for the sum of £2678, 8s. 1d., without any objection having been, at any time, made to them and that the securities of the 5th November 1846 and the 29th December 1847 proceeded on the footing of such accounts, and contained a covenant to pay not only interest at £5 per cent., but also the premiums on the policies.

[272] They also said that the moneys comprised in the securities were not loans upon mortgage, but advances made by them, in a course of business between banker and customer, to be dealt with according to the custom between banker and customer.

The Defendants then said that the accounts were bankers' accounts between them and Mr. Mosse, that they were sent in yearly, and occasionally at shorter periods, but always once a year, without any objection being made to them, and that they were always in the usual form according to the custom of bankers with their customers, and that the moneys for which they had security were treated as sums due on an overdrawn account, and that the Plaintiff was charged with interest, computed on the balances as overdrawn and due, from time to time, on his banking account. And they submitted that such a course of dealing was proper and that the accounts so settled prior to 1859 were settled accounts.

They also said that it was the custom of bankers not to make any deductions or allowance in the customers' accounts for income tax, in respect of interest on overdrawn accounts of customers; that it would add to the labour and embarrassment of bankers in their business; that the customer was not damnified in the end, as, if otherwise, the business with the customer would be arranged to meet the objection, and the Government was not damnified, as the banker, in his return of profits, paid the income tax on the interest he charged against the customer. They further said that the retention of the accounts by Mr. Mosse prevented this objection from being

now made; that the income of the Plaintiff came into their hands as bankers; that the Plaintiff had a drawing account which was more [273] frequently overdrawn than otherwise; that the annual income of the property in the securities was not sufficient to keep down the interest on the money advanced and satisfy the other payments to which it was liable. That the Plaintiffs were justified in charging the bank rate of interest on the overdrawn banking account, and that they were not bound to apply any small temporary balance in discharge of their debt, and if they were to be treated as mortgagees, they were not bound to take their debt in dribblets. They claimed the benefit of the customary mode of dealing between banker and customer.

The cause came on upon a motion for a decree.

Mr. Selwyn and Mr. Loudon, for the Plaintiffs.

Mr. Lloyd and Mr. Pole, for Messrs. Salt.

The cases cited were *Lord Clancarty v. Latouche* (1 Ball & Beat. 428); *Rufford v. Bishop* (5 Russ. 346); *Henniker v. Wigg* (4 Q. B. Rep. 792); and see *Bate v. Robins* (*ante*, p. 73); *Crosskill v. Bower* (*ante*, p. 86); *Boddam v. Ryley* (1 Bro. C. C. 239; 2 Bro. C. C. 2, and 4 Bro. P. C. 561); *Fergusson v. Fyffe* (8 Cl. & Fin. 121).

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. It is necessary, in all these cases, to distinguish between what is a banking account, as between banker and customer, and what is an account as between mortgagor and mortgagee. There can be no question [274] that when a banker and customer carry on a banking account for a series of years, upon a certain specified system, then (assuming it to contain nothing illegal) the Court will assume that there is an agreement between the customer and the banker, and that the account shall be kept upon that principle. In *Lord Clancarty v. Latouche* (1 Ball & B. 428) it is distinctly stated that acquiescence does not amount to a settlement of account, though it regulates the principle on which the accounts shall be taken. Where it is simply a banker's account, it amounts to an agreement as to the mode in which that account should be kept, but it does not at all amount to a settlement of account; after it, the customer would be at liberty to dispute and contest the items though not the principle upon which the bank account is kept. Is this then a question as to the mode of keeping the banking account or is it a question between the mortgagor and the mortgagee? My opinion is that this mortgage is not a security for the balance of a banker's account; to come to that conclusion I must alter the deed, which I cannot do, but it is a security for the sum of £2678, 8s. 1d., which was the balance of an account settled down to the 1st of October 1846. It is quite immaterial what was due before, as both parties agreed upon the amount then due, and they have executed a deed upon that basis, and the proof is that Messrs. Salt treat it as a sum secured by the deed, on which interest was to be paid.

The mode in which they have kept the subsequent account is therefore one that cannot be sustained. Not only, by the deed, is it expressly stated that the whole property shall be redeemable on the 5th of May following, if the principal and interest up to that time is paid, [275], but in fact, in keeping the accounts, Messrs. Salt charge interest upon that mortgage sum on the 1st of January following, in making up the balance of their banking account. So that, on the 5th of May, although the amount would be very small, yet it is clear that interest would be charged as due on the 1st of January, although by the deed it was not payable until the 5th of May, and there would be interest running upon that interest until the following year.

I am of opinion that none of these deeds are a security for the balances of the banking account which may become due from time to time, but they are all securities for a fixed and definite sum. In the absence then of express contract, it is not open to the Defendants to charge compound interest upon them, and they cannot, in keeping these accounts, charge the interest due upon a particular day, and then say that interest runs upon that interest from time to time, bringing it all into one general banking account. That would be to contradict a deed under their hand and seal, which expressly states that this property is given as a security for a fixed sum, and not as a security for the balances due on a running account.

The consequence is that I must first eliminate from the accounts to be taken

between the Plaintiffs and the Defendants the total amount of that mortgage debt and the interest upon it, and I shall treat that mortgage debt as a fixed sum, with a certain arrear of interest due upon it (I was informed it was between £1600 and £1700), and accordingly, I shall calculate the amount due for principal, interest and the costs relating to the mortgage. In so doing, I shall certainly not allow the retention by the mortgagee of any sum of money in respect of income tax; it is said to be a small sum, [276] £60 or £70 for the whole period, but for that period I shall deduct the amount of the income tax from the interest: I entertain no hesitation or doubt upon that subject. It is very true that in dealings between merchants, such as in the discounting of bills and the like, and on loans made for short periods, the income tax is not deducted; but it is equally clear that in the mode of taking the accounts (whatever it may be) in the City of London, and the mode of taking the accounts in Chancery, in all cases of mortgagor and mortgagee, when the Court has once arrived at the conclusion that it is a case of mortgagor and mortgagee, the mortgagor is entitled to deduct the income tax from the interest paid to the mortgagee, which he necessarily has paid on the property mortgaged, either in the shape of deduction from his rents, or from his dividends prior to that period, and, accordingly, this is so provided by the Act. (5 & 6 Vict. c. 35, s. 60, No. 4, rule 10.)

Upon what principle then is the account to be taken? There is an account between the parties on the mortgage, and looking at the cheques which were handed up to me there is also a banking account. Assuming that to be so, I ought to take the banking account separately and distinctly from the mortgage account. I must take the mortgage account as an item by itself; there will be a sum of £2678, 8s. 1d., and interest upon it, less the amount of the income tax; that is one item. There are also the dealings and transactions between the same periods to be taken upon the principle of a banking account, and with interest on rests, according as the custom of merchants might apply, but upon that, I should require evidence to shew what the account was when it was taken in that form.

[277] As far as I can judge from looking at the accounts, I should be of opinion that, in taking the account in that form, there would be a balance due to the Plaintiff nearly up to the end of 1853 and the beginning of 1854; then a balance against him to an amount of something like £1500 to £2000 for the five following years, and then a balance again in his favour. It is not material for my purpose whether I am right or wrong in that view, but this would be the way in which the account would be taken, and what was due on the balance of that account would be added to or set off against the amount of principal and interest due on the mortgage debt.

It is clear that, in this state of the case, I cannot treat this as a mere mortgage suit for redemption, as I thought at one time that I must; but I am clear there were dealings and transactions between these parties other than and distinct from the mortgage: I cannot treat it as a simple mortgage account. I must reserve further consideration, and I must necessarily reserve the costs until the hearing on further consideration. I must, however, take the whole of that account, and it will be open to the parties, in Chambers, to give any evidence respecting the custom of merchants or the custom of bankers in regard to the mode in which this particular account ought to be taken, assuming the whole of the mortgage transactions to be eliminated and taken out of it. There will be a balance on the mortgage account due to the Defendants. That there will be a balance due to the Plaintiff on the other account is obvious, this will have to be set off against the other; should there be any disputed items, they must be gone into upon taking the account.

The cases which have been referred to lead to the [278] same conclusion. Not only in *Lord Clancarty v. Latouche* (1 Ball & B. 428), but in *Rufford v. Bishop* (5 Russ. 346), the Court expressly stated that when a deed was given to secure the balance of a bankers' account, as it might vary from time to time, the account would then be taken on that basis; but not if it were a mere mortgage security. In *Henniker v. Wigg* (4 Q. B. 792), the security was a bond which was silent on the subject of accounts, it expressed no purpose further than that it was to secure a certain sum, and

there the Court was of opinion, upon the dealings of the parties, that the bond was given to secure the balances of the account as they might arise from time to time. All these cases concur as to the principle on which the account should be taken.

I must, therefore, take an account of what is due for principal, interest and costs on the several mortgage securities, and I must also take an account of all other dealings and transactions between the Plaintiffs and Defendants, and in taking such accounts I must ascertain what, if anything, is due on account of Mr. Bowker's bill of costs, then ascertain the balance due on each of such accounts and set off the one against the other. Reserve further consideration and costs.

[279] HART v. TRIBE (No. 4). Jan. 17, 1863.

[S. C. on appeal, 1 De G. J. & S. 418; 46 E. R. 166.]

A testator bequeathed a legacy to his widow, "to be used for her own and the children's benefit, as she shall in her judgment and conscience think fit, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned, recommending her not to diminish the principal." The widow appointed the capital between the children very unequally. The Court (one child opposing) refused to part with the fund or to declare the right during the life of the widow.

The testator, by his fifth codicil, bequeathed to his wife Maria £4000 "*to be used for her own and the children's benefit* as she shall, in her judgment and conscience, think fit, being convinced that it will be *disposed of conscientiously and properly by her for the purposes mentioned, at the same time recommending her not to diminish the principal*, but to vest it in Government or freehold securities."

The testator died on the 12th of October 1851.

The Court on a former occasion (16 Beav. 510) had decided that "the children" referred to in this fifth codicil were Emily, who was the testator's daughter by his wife Maria, and Frederick who was not.

The Court, on a subsequent occasion (18 Beav. 219), said, "This, in substance, is a gift to her for life, to be employed in such a manner as she shall think fit for the benefit of herself and the children, fairly and honestly exercising that discretion, and subject to that, the children take an interest in the capital. Accordingly, what I propose to do is, to direct that this sum shall be invested, and that the dividends shall be paid to her from time to time, with liberty to apply, and then if it shall turn out that any one of the children is really neglected, and that she ought, according to the directions contained in the will, properly to do something for the benefit of that child, [280] an application may be made to me and I shall know how to deal with it. At all events, there will be liberty to apply during the life of the widow or after her death, but I am of opinion that, in the meantime, the interest arising from the fund must be paid to her, to be disposed of by her, as she in her judgment and conscience thinks best for the benefit of herself and the children."

The widow married again and appointed £500 after her decease to Frederick (who was not her child), and the remaining £3500 to her own daughter Emily.

On a subsequent occasion (19 Beav. 149), the Court directed £30 a year to be allowed for Frederick B. Hart's maintenance.

The two children having now attained twenty-one, a petition was presented for payment of the £3500 out of Court.

Mr. Hobhouse and Mr. Cookson, in support of the petition. The widow claims a power of exclusive appointment by deed or will. It is put at her "disposal" as she shall think fit. As in *Crockett v. Crockett* (2 Phil. 561), she is "either a trustee with a large discretion as to the application of the fund, or she has a power in favor of her children, subject to a life-estate in herself." In *Ward v. Grey* (26 Beav. 494), a gift to a lady and her family or children was held to give her a life interest, with a power to appoint to the children. [THE MASTER OF THE ROLLS. I do not know how I arrived at that conclusion. I doubt whether she has any power of appointment

except [281] by will.] If she has power by will she has power by deed; *Burrell v. Burrell* (Ambl. 660).

Mr. F. White and Mr. T. E. Lloyd, *contra*, for Frederick, opposed the application. They said that the case had been decided on a former occasion, *Hart v. Tribe* (18 Beav. 215), and that, by the order then made, the fund was carried over and the dividends were ordered to be paid to the widow for life with liberty to apply at her death. They argued that the discretionary trust could not be destroyed; they contested the validity of the appointment, and submitted that this application was therefore premature. They cited *Pride v. Fooks* (2 Beav. 430); *Longmore v. Elcum* (2 Yo. & C. (C. C.) 363); *Shovelton v. Shovelton* (*ante*, p. 143); *Barnes v. Grant* (26 L. J. (Ch.) 92).

Mr. Martindale, for John Dyke the husband.

Mr. Hobhouse, in reply.

July 19. THE MASTER OF THE ROLLS [Sir John Romilly]. I have looked at the cases on the subject, and consider they are not in a satisfactory state, and that must be admitted. In the view I take, I think that the meaning of the testator was this: That this lady should have no power to dispose of any part of the capital during her life, and that the words "recommending her not to diminish the principal" have a controlling effect and prohibit her dealing with it; but the interest must be used for her own and the children's benefit *bonâ fide* [282] during her lifetime. I shall not express any opinion as to whether she has power to appoint the fund between them, or whether it is to be divided between them equally. I am of opinion it is premature to express any opinion on the subject, and I cannot therefore allow any part of the capital of the fund to be taken out of Court.

[282] NESBITT v. BERRIDGE. BUTLER v. BERRIDGE. Jan. 28, 29, 1863.

[S. C. on appeal, 4 De G. J. & S. 45; 46 E. R. 831; 9 L. T. 588; 10 Jur. (N. S.) 53; 12 W. R. 283; 3 N. R. 53.]

A. B. sold to C. D. a life interest in possession (subject to a mortgage for £800) and a reversionary interest in two sums of money. The price paid for the whole was £75, and within a month C. D. sold it for £125 to E. F., who within three months afterwards sold it to G. H. for £550. The value of the property in possession (free from the mortgage) was £1331, and of the property in reversion £312. The purchase was set aside as against G. H. (who was held to have notice), on the ground of its being a purchase of a reversion at an undervalue.

General Nesbitt by his will, dated in 1844, appointed Mr. Blake and Mr. Blacklock "trustees to the undermentioned property, to be held by them in trust for his son, Ray Nesbitt." He proceeds thus:—"My son is to receive, by quarterly instalments, £90 per annum, until he becomes thirty-five years of age, and from thence £100 per annum till he is forty years of age, and from thence £150 per annum till he is forty-five years of age, and from thence £200 per annum till he is fifty years of age, and on his arrival at the age of sixty he is to receive the whole of the interest arising from my property. I make this arrangement in consequence of his propensity to extravagance, and to prevent his falling into debt and ruin. . . . Should he die before his brothers the property is then to be divided between them," &c. "A part of my property is in India stock, which, at my death, is to be sold out and placed in their joint names in the £3 per cent. consols, together with any other property I may die possessed [283] of. I have also some reversionary property due to me on the death of Mrs. Sambrooke and Samuel Wooley: from the former (who is forty-seven years of age), £1666, and from the latter (now forty-eight years of age), £700," &c., &c. "Should my son Ray marry and have children, my property is then, at his death, to be divided amongst them. But in default of his children it is to go to his brothers."

The testator died in 1844, and his will was proved by his widow and sole executrix. She got in the personal estate, and thereout purchased the sum of

£3978, 4s. consols, in the names of the two trustees; but the two reversionary sums still remained outstanding.

At the testator's death his son (the Plaintiff) was between thirty-four and thirty-five years of age. In 1854 and 1855 he effected policies in the Clerical, &c., Society for £700, and in the Medical, &c., Society for £200. By indentures of the 1st of January and the 19th of November 1855 he assigned his interest in the £3978, 4s., together with the two policies, to Miss Jackson, by way of mortgage for securing £800, and he covenanted to keep up the policies.

The Plaintiff afterwards got into embarrassed circumstances. He was introduced to Mr. Daniel, a solicitor, who undertook to obtain a loan for him. Mr. Daniel introduced him to Simon Abraham Kisch, his articled clerk, who made him small advances, and ultimately, on the 10th of December 1856, Kisch agreed to purchase from the Plaintiff his interest in the annuity of £113, 13s. 6d. (subject to the mortgages to Miss Jackson) and his expectant interest in the two reversions, together with his interest in the two policies, for the sum of £75.

[284] Two months afterwards Kisch sold the property to Mr. Bunyard for £125, and by a deed, dated the 7th of January 1857, in consideration of £75 paid to the Plaintiff by Bunyard, and of £50 paid by him to Kisch, the Plaintiff and Kisch assigned the property to Bunyard.

Bunyard allowed the two policies of £800 and £200 to drop, and on the 5th of January 1859 he effected a policy in the Anchor Company, on the Plaintiff's life, for £1200, which Miss Jackson agreed to accept in lieu of the two other policies.

Afterwards Miss Rogers (now Mrs. Berridge) purchased the annuity, the reversionary interest and the new policy (subject to the mortgage) for £550, and the same were conveyed to her by Bunyard, by an indenture dated the 21st of March 1857, and she thereby covenanted to pay Miss Jackson's mortgage.

Miss Rogers afterwards paid off Miss Jackson's mortgage and obtained a transfer of the security and of the policy for £1200.

The testator's son filed this bill in 1860 to set aside the purchase as against all parties. The bill was amended several times; but ultimately the Defendants were Berridge and wife, Kisch, Bunyard and Cave (who had negotiated the purchase from Bunyard, and had received one-half the profit). Nesbitt's bill did not claim the policy of £1200.

In September 1861 the Plaintiff died, and the amount due on the policy was received, after which the executor of the original Plaintiff filed a supplemental bill claiming the produce of the policy for £1200.

[285] The two causes now came on for hearing.

The Defendants gave no evidence as to the value; but the Plaintiff produced the affidavit of Mr. Browne, the actuary of an insurance company, who valued the annuity from the £3978 consols at £1331, and the reversionary interest in the £1666 and £700 at £312.

Mr. Lloyd and Mr. Birkbeck, for the Plaintiff. A substantial part of the property purchased was a reversionary interest, and therefore the purchaser is bound to shew that he gave full value for it; *Edwards v. Burt* (2 De G. M. & G. 56); *Bromley v. Smith* (26 Beav. 644). Far from doing so it is shewn that the purchase was made at a gross undervalue, even if the whole purchase-money be attributed to the reversionary interest. The purchase, therefore, cannot stand.

Secondly, the purchase was made by Kisch, a clerk of the Plaintiff's solicitor, who stood in such a fiduciary relation towards the vendor as to preclude his purchasing; *Ex parte James* (8 Ves. 345); *Hobday v. Peters* (28 Beav. 349); and the transaction was tainted with fraud.

Thirdly, the purchasers from Kisch had notice either absolute or constructive, and, as purchasers of a chose in action, they took only the interest of their assignors and stood in their place; *Cockell v. Taylor* (15 Beav. 118); *Parker v. Clarke* (30 Beav. 54). They were bound to make due inquiries; *Mangles v. Dixon* (3 H. of L. Cas. 702); and are affected with the notice which they would certainly have received if they had made due inquiries.

[286] Mr. Hobhouse and Mr. Dickinson, for Mr. and Mrs. Berridge. This was substantially a purchase of a life interest in possession, and nothing was ever received

from the reversionary life interest which failed upon the death of Mr. Nesbitt. This is not such an interest as comes within the doctrine applicable to purchases of reversionary interests; *Wardle v. Carter* (7 Sim. 490), and see *The Earl of Portmore v. Taylor* (4 Sim. 182). Secondly, Daniel was not the Plaintiff's solicitor, but his real adviser was a Mr. Daly. Thirdly, these Defendants are purchasers of this property for valuable consideration without notice.

Mr. Jessell and Mr. Hardinge, for Kisch, argued that he had improperly been made a party. That the bill was demurrable as to him, but that the charges of fraud had rendered it necessary for him to answer the bill and to displace them; *Le Texier v. The Margravine of Anspach* (15 Ves. 164); *Bowles v. Stewart* (1 Sch. & Lef. 227); *Marshall v. Sladden* (7 Hare, 441).

Mr. J. W. De L. Giffard, for Bunyard.

Mr. Martin, for Cave.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this transaction is really a purchase of a reversionary interest, and that it cannot stand. It is true that it is a purchase of a reversionary interest mixed up with the purchase of something else [287] in possession, but it is a distinct purchase of Nesbitt's reversionary interest in two sums, one of £1666, another of £700, one expectant on the decease of Mr. Sambrooke and the other of Samuel Woolley. It is true, also, that it was a purchase of a life interest only in these sums; but it would be a new doctrine to me to hold that the rule as to purchases of reversions is not equally applicable to the purchase of a reversionary life interest as to the reversion of the capital sum. I apprehend that it is the duty of a purchaser of a reversionary life interest in a fund to shew that he gave the full value for it, that is, the burden of proof is on such purchaser. It is unnecessary to go into the question of whether this Court would set aside a deed partially and not wholly, that question does not arise where the purchase-money is not apportioned between the reversion and the annuity in possession, but consists of one gross sum paid for the whole.

The question which I have therefore to consider is, whether £75 was a full and adequate sum for the purchase, and the burden of proof being on the Defendants, they have gone into no evidence on the subject. But there is the evidence of Mr. Brown, who values the reversion alone at £312. It is true that the reversion has produced nothing, because Mr. Nesbitt, although eleven or twelve years younger than the tenants for life in possession, died before them. But subsequent events cannot substantially affect the case; the Court must look at the value at the time of the purchase, and I have only to consider the value at that time.

My experience in all cases of experts, surveyors and actuaries certainly is that they always, and probably unavoidably, give the evidence favourably to the parties [288] who employ them, and therefore I must assume that Mr. Brown's is a high valuation. But I have the strongest possible proof, in this case, that the property was sold at an undervalue, for a few days after Mr. Kisch gets an advance of £50 on his bargain, which was £75. It is true that £50 is not a large sum, but relative to the price given it is a considerable increase, being two-thirds of the price. I have also the fact that Mrs. Berridge was induced to give £550 for the very same thing within the space of three months afterwards; whether she did or did not give much more than it was worth is another question which I do not now go into; nevertheless I must admit, from the whole of the evidence before me, that she gave a very high price for it. But it is obvious it was worth more than £75, and there is no possible mode of treating it, by which it does not appear to be worth more, nay, much more than the £75 given for it. Miss Rogers, I allow, knew very little about the law relating to transactions of this kind; but *ignorantia legis neminem excusat* is a maxim of law essential to the due administration of justice. She had her solicitor and counsel to advise her, and she must be bound. She knew from the deed of the 10th of December 1856 that the Plaintiff had sold this reversion and the annuity for £75, that Mr. Bunyard had given £125 for it on the 7th of January 1857, and that she herself was about to give £550 in the month of March following. It is obvious that this was distinct notice that it had been sold at an undervalue, the value being what it would fetch in the market. This lady thought that its value was £550 and she was willing

to give that sum for it. She was bound to know what the law was, and that the agreement for the assignment by the Plaintiff was worth nothing except as a security for the money advanced. The result is that she bought this property with her eyes [289] open, knowing that an inadequate price had been originally given for it, and therefore she can only hold it as a security.

If the matter rested there I should follow the case of *Foster v. Roberts* (29 Beav. 467), and give no costs on either side; but considering the offer before suit, which was refused, I think that the costs up to the hearing must follow the event. The Defendants, Berridge and wife, must pay the costs of this suit up to and including the hearing; but they must have their costs of the suit, as far as such costs have been increased by making Kisch, Bunyard and Cave parties.

His Honor next considered the case of Kisch, Bunyard and Cave, and he held that the bill must be dismissed as against them, but without costs.

The supplemental bill appears to me to be wholly unnecessary, and I think it must be dismissed with costs against all the Defendants.

NOTE.—Another important question was, whether the Plaintiff was entitled to the produce of the policy for £1200. The Master of the Rolls thought that the rights were correlative, and that a person could have no right to the produce of a policy who was under no obligation to pay the premiums. Upon appeal, the Lord Chancellor (Lord Westbury) took a different view of the case, as to this point. See 10 Jur. 53.

[290] DOWNES v. JENNINGS. Feb. 11, 12, March 17, 1863.

[S. C. 32 L. J. Ch. 643; 8 L. T. 341; 9 Jur. (N. S.) 1264; 11 W. R. 522.]

A settlement, made by a woman pending an engagement and seven weeks before her marriage, without the knowledge of her intended husband, and in favor of persons for whom she was under no legal or moral tie to provide, was set aside as a fraud on the husband's marital right.

A delay of two years and a half after knowledge in taking proceedings to set aside a deed as a fraud on the marital rights, held not sufficient to deprive the husband of his right to relief.

Assuming that in *Hunt v. Matthews* (1 Vern. 408) the settlement was made after the treaty for marriage, it is difficult to reconcile it with Lord Thurlow's observations in *Strathmore v. Bowes* (1 Ves. jun. 28).

This suit was instituted by Mr. Downes to set aside a deed executed by his wife shortly before her marriage with the Plaintiff, on the ground that it was a fraud on his marital rights.

The facts were these:—In June 1849 Thomas Bygrave, by his will, gave an annuity of £70 to Fanny Marshall, the widow of an adopted son, for her separate use for life, without power of anticipation, with a proviso, by which the testator reduced the annuity to £40, in case Fanny Marshall should marry during the life of the testator's wife.

The testator died in 1852.

Fanny Marshall and the Plaintiff had previously become attached to each other, but, as their means were not large, they determined to live together as husband and wife, and to delay the solemnization of their marriage until after the death of Mrs. Bygrave, the testator's widow.

The widow died on the 26th October 1857.

For upwards of a year and a half the Plaintiff and Mrs. Marshall did not think fit to marry, and during the greater part of that time they lived apart. However, on the 8th of May 1859 their marriage was solemnized. [291] Previously to this marriage Mrs. Marshall was possessed of a leasehold house in Bloomsbury Square, having, in the month of March 1859, seventy-seven years and four months unexpired. The ground rent was £34 per annum, and the improved rent, in March 1859, was £140 per annum; leaving a net rent of £106 per annum.

On the 22d of March 1859 (about seven weeks before her marriage), Mrs. Marshall executed a settlement of this house, which was to the following effect:—By it, Mrs. Marshall assigned the premises, with the appurtenances, for the residue of the lease, to the Defendants, Mr. Jennings (her son-in-law) and Mr. Wheatly (her brother), their executors, administrators and assigns, in trust to pay the ground rent, keep the premises in repair and insured against fire, and observe the covenants in the lease, and subject thereto, to pay the surplus rents to Mrs. Marshall for her life, for her separate use, without powers of anticipation; and after her decease, to pay £20 per annum to Mrs. Wheatly (the mother of Mrs. Marshall); then to pay an annuity of £50 per annum for the maintenance and education of Jane Marshall (the putative daughter of Mrs. Marshall and the Plaintiff); to be increased to £70 per annum on the decease of Mrs. Wheatly, and on her attaining twenty-one or marrying, for her sole and separate use, without power of anticipation, with a power to her to appoint it by will; and after this to pay and apply the residue of the rents of the house towards the maintenance and education of the son of Mr. Jennings by Kezia his wife (who was the daughter of Mrs. Marshall), notwithstanding his father should be of full ability to maintain and educate him; and if the son died under twenty-one, then in trust for all and every other the children of Mrs. Jennings, to vest absolutely in the sons at twenty-one, [292] and the daughters at twenty-one or marriage, with power to the trustees to apply the surplus rents, during their minority, for their maintenance and education, notwithstanding their father should be of ability to maintain and educate them. And in case there should be no child of Mrs. Jennings who should attain a vested interest, then (together with the annuity of £70) for Jane Marshall, and in case that annuity or any portion of it should fail, then in trust for Mrs. Jennings, for her absolute use and benefit. But if she should be dead, then in trust to sell the premises and to divide the proceeds equally among the seven brothers and sisters of Mrs. Marshall, by name.

The Court was of opinion, on the evidence, that the Plaintiff was ignorant, until after his marriage, of the fact that any such settlement had been executed; he knew it, however, in August 1859. This bill was filed in January 1862 against Mrs. Downes and the parties interested under the settlement of March 1859, and it prayed a declaration that the settlement was a fraud on the Plaintiff's marital right, and that it might be delivered up to be cancelled.

Mr. Selwyn and Mr. Elderton, for the Plaintiff, argued that, as the settlement had been made pending an existing engagement to marry, and without the knowledge of the intended husband, it was a fraud on his marital rights and could not stand; *Carleton v. The Earl of Dorset* (2 Vern. 17); *The Countess of Strathmore v. Bowes* (2 Bro. C. C. 345; 1 Ves. 22; 2 Cox, 28, and 6 Bro. P. C. 427); *England v. Downs* (2 Beav. 522); *Goddard v. Snow* (1 Russ. 485); *Taylor v. Pugh* (1 Hare, 608).

[293] Mr. Baggallay and Mr. Nugent, for Mrs. Downes.

Mr. Lloyd and Mr. Shebbeare, for the other Defendants who claimed interests in the property under the settlement, argued, first, that no engagement of marriage existed between Mr. and Mrs. Downes at the date of the settlement, it having been previously broken off, and that therefore there could be no fraud on the Plaintiff's marital right. Secondly, that fraud, as applied to cases of this nature, consisted in the wife's falsely holding out that her estate was unfettered, and that this Court would not interfere with a proper settlement made prior to the marriage. Thirdly, that the delay in instituting the suit constituted a bar to equitable relief; *St. George v. Wake* (1 Myl. & K. 610); *De Manneville v. Crompton* (1 Ves. & B. 354).

Mr. Elderton, in reply.

March 17. THE MASTER OF THE ROLLS [Sir John Romilly]. The first question is one of fact, viz., whether this settlement was executed in contemplation of the marriage, which was solemnized seven weeks afterwards? If this be answered in the affirmative, then arises the second question, which is one of law, viz., whether, having regard to the contents of this settlement, it can properly be considered to be one in fraud of the marital right. If this also should be decided in favor of the Plaintiff, then the time suffered by him to elapse before filing the bill remains to be considered.

The first question depends, in my opinion, on whether [294] the evidence

establishes, first, that the Plaintiff and Mrs. Marshall were ever engaged to marry previous to their actual marriage; secondly, whether, if they were, this engagement, or rather an active intention on their part to marry, was subsisting at the time when this settlement was executed; and, thirdly, whether, when this settlement was executed, the intended marriage was then settled to take place immediately or within some short space from that time.

That they were originally engaged in 1852 and intended to marry at some subsequent time is, I think, conclusively established by the evidence, and indeed is hardly contested on the other side. Whether that engagement was subsisting in March 1859, or had been broken off by mutual consent, is a question of more doubt. I think the result of the evidence is that they continued to live together till the end of 1856; that they then separated, and that, though the Plaintiff occasionally visited Mrs. Marshall, she was, in October 1857, when Mrs. Bygrave died, living alone, and that she continued to do so till the end of 1858, but that the Plaintiff frequently visited her.

I think, on the whole of the evidence, that the engagement was never broken off, and that at the time of the settlement in March 1859, Mrs. Downes, then Mrs. Marshall, was aware that she could induce the Plaintiff to perform his engagement, and that she intended to do so when the settlement was executed. I have looked in vain, in the evidence, for any reason to explain why this settlement was prepared and executed at that time (just seven weeks before the marriage) beyond the belief and expectation, on the part of herself and entertained by her relations, that the marriage was about to take place; and I think also, on the evidence, [295] that she was induced to execute the settlement by her relations, in order to protect her against the possibility of her husband, the Plaintiff, disposing of her property.

If I am right in this conclusion of fact, then the question of law arises whether, having regard to the contents of the settlement, it is one which can be allowed to stand, and I am of opinion that it cannot.

The greatest length any case has gone, that I am aware of, is the case of *Hunt v. Matthews* (1 Vern. 408), where a widow, before her second marriage, assigned the greatest part of her estate as a provision for her children by the first marriage. In that case, the Court held that she was justified in providing for such children before she placed herself under the power of a second husband. Assuming that, in that case, the settlement was made after the treaty for marriage, it is difficult to reconcile it with Lord Thurlow's observations in *Strathmore v. Bowes* (1 Ves. jun. 28, and see *Cotton v. King*, 2 P. W. 360). But, even in that case, the settlement was confined to the children of the first marriage, who were unprovided for.

But the settlement before me cannot be treated in so favorable a light. By this deed, present and contingent benefits are given to persons whom she was not bound to benefit by any legal or moral tie. As far as it appears, Mrs. Marshall had only one child by her first marriage, who was already provided for by marriage with the Defendant Jennings; the settlement in favor of her mother and of her putative daughter, though proper to be done under ordinary circumstances, could not be supported as against her second husband if [296] done without his knowledge. But what is still less favorable to the Defendant is that, under the provisions of this settlement, Mr. Jennings derives a considerable personal advantage that is not considerable in itself, being only £25 per annum, but considerable having regard to the property settled, inasmuch as it amounts to one-third of the net income of the whole property settled, and which one-third is to be paid to him, on the death of Mrs. Downes, for the support of his children, whether he be or be not of ability to maintain them; and if they should all fail, he takes it absolutely, for it is given to his wife unfettered by any restraint. It is to be observed also that the settlement does not give any control over her property to Mrs. Downes herself, so that she could not, by will, dispose of any portion of it. If the paragraph 11 in the Plaintiff's affidavit be correct, and the Court should give credence to it, and it is not contradicted by the only person who could contradict it, viz., Mrs. Downes herself, it is impossible that this settlement can be maintained against the husband, unless he had been informed of it previously to his marriage. It is true that two witnesses declare that he told them that he knew of it before his marriage; but this he expressly denies.

I have frequently expressed my sense of the danger which the Court would incur if it trusted to the bare representation of one or more witnesses, who allege the Plaintiff told them that he was not entitled to the relief he seeks to enforce, such representation not being supported by any corroborative evidence or circumstance.

In this case, I am obliged to follow the rule I have laid down in such cases, for here, not only is there no corroborative testimony, but the probabilities are strongly [297] against the evidence. If the Plaintiff knew of the settlement, it must have been because someone had informed him of it; who that person was is not suggested, the only persons who could have done so were the Defendants, the solicitors employed in preparing the instrument, or one of his clerks, but no one is brought forward to say that he gave him any information on the subject, and the whole transaction bears the impress of having been made in order to guard against his power over the property of Mrs. Marshall, which makes it improbable that it should have been communicated to him.

I must therefore, on the evidence, come to the conclusion that he was wholly ignorant of the settlement until after the marriage had been solemnized.

I am also of opinion that the engagement for the marriage had never been broken off, and that the Plaintiff believed that, when he became her husband, this property of his intended wife would enable him to support her, and that both the Plaintiff and his present wife, in March 1859, at the time when the settlement was executed, contemplated a speedy realisation of that engagement. If this be correct, then the settlement was, in my opinion, a fraud on his marital rights, and one which could not be sustained if speedy steps had been taken to set it aside.

The Plaintiff, however, knew of it in August 1859, and did not file his bill until January 1862, nearly two years and a half afterwards. But, without adverting to the circumstances which are alleged in order to excuse this delay, I think that, in the present case, this delay will not disentitle the Plaintiff to the relief he asks. It is not suggested that any loss of evidence, material for [298] the decision of this case, has occurred by reason of this delay, and in my opinion this Court would be pushing to an extreme length the principle on which it acts, where delay is held to deprive a Plaintiff of the relief he would otherwise be entitled to, if, in a case of this character and where time does not place the parties in a different position, it were to refuse to aid the husband, who had not instituted proceedings until January 1862, to set aside the deed known first in 1859.

Upon the whole of this case, I am of opinion that the Plaintiff is entitled to the relief he asks; but I understand both the husband and the wife desire that a settlement should be made by the Court of this property. If this be so, I can save them the expense of a deed by declaring the trusts of it at once by this order.

The costs must follow the event.

NOTE.—See also *Griggs v. Staplee*, 2 De G. & Sm. 572; *Wrigley v. Swainson*, 3 De G. & Sm. 458; *Lewellin v. Cobbold*, 1 Sm. & Giff. 376; *Loader v. Clarke*, 2 Mac. & G. 382; *Grazebrook v. Percival*, 14 Jur. (O. S.) 1103.

[299] ELLICE v. ROUPELL (No. 1). Feb. 26, 27, 1863.

[S. C. 32 L. J. Ch. 563; 8 L. T. 191; 9 Jur. (N. S.) 530; 11 W. R. 579.]

Principles and practice as to bills to perpetuate testimony stated.

The Plaintiffs filed a bill to perpetuate testimony, on the ground that the matters in dispute with the Defendants could not then be made the subject of judicial investigation. The Defendants answered, and the Plaintiffs then amended the bill in immaterial matters. The Defendants then pleaded that, since the answer, the Plaintiffs had themselves filed another bill, raising the point in dispute, and shewing that the matters in question could now be made the subject of judicial investigation. Held, that the plea could not be sustained, and that, if at all, it ought to have been pleaded in the first instance.

The 9th rule of the 14th Consolidated Order does not enable a Defendant who has answered the original bill to plead to it after amendment, where it still raises the same issue.

This was a bill to perpetuate testimony, filed by two gentlemen named Ellice and Manners Sutton against Richard Roupell and Sarah Roupell.

The bill alleged that Richard Palmer Roupell (deceased) was seised in fee of the Roupell Park estate, and that by an indenture of the 26th of September 1853, and made between R. P. Roupell and Sarah his wife of the one part and William Roupell their son of the other part, R. P. Roupell and his wife, in consideration of natural love, conveyed the Roupell Park estate to William Roupell in fee. It alleged that this deed was executed by R. P. Roupell and his wife, and was attested by Alfred Douglas Harwood, and that it was duly acknowledged by Mrs. Roupell before Mr. Justice Talfourd.

William Roupell afterwards mortgaged the estate for £100,000, and the mortgages became vested in the Plaintiffs, who, in February 1862, entered into possession of the estate, except a stable and coach-house.

Richard Palmer Roupell died in September 1856.

In April 1862, the interest being in arrear, the Plaintiffs advertised the estate for sale by auction, but [300] they were prevented selling it by a notice of Richard Roupell (another son of R. P. Roupell), who claimed the estate as heir at law or devisee of R. P. Roupell. The Plaintiffs thereupon brought an action of ejectment to recover the stable and coach-house, which Richard Roupell at first defended, but he withdrew before the trial and the Plaintiffs obtained judgment.

The bill stated that the Defendants alleged that R. P. Roupell did not execute the conveyance of 1853, and that the Plaintiffs had no right or title to the estate, and that, upon the father's death, his son Richard Roupell became entitled to the whole estate. It also stated that Sarah Roupell alleged that, on the death of her husband, she, as devisee under his will, became entitled to the estate. The Plaintiffs charged that there were several other persons besides A. D. Harwood (and one of whom was old and infirm), who could prove the validity of the indenture and the right of the Plaintiffs, and that R. P. Roupell admitted his son's title under the indenture. The Plaintiffs charged that the matters aforesaid, and in particular the validity of the said indenture, *could not be made the subject of judicial investigation*, and inasmuch as the Defendants might delay to dispute the validity of the indenture and to prosecute their claim, until such time as they might think proper, the Plaintiffs were in danger of losing the testimony of A. D. Harwood and the other witnesses.

The bill prayed, "that the Plaintiffs might be at liberty to examine A. D. Harwood and other their witnesses who could prove any matters or things tending to shew and establish the due execution, by R. P. Roupell and Sarah his wife, of the indenture of the 26th day of September 1853, and the right and title of the Plaintiffs thereunder, upon the several matters [301] thereinbefore mentioned or any matters connected therewith, and that the testimony of A. D. Harwood and of other the Plaintiffs' witnesses might be recorded and preserved, in and by this honorable Court, in order to the perpetuity thereof, and that, if necessary, the Plaintiffs might have a commission for the examination of the said witnesses or any of them."

The Plaintiffs filed interrogatories, and Mrs. Roupell in December 1862 put in a full answer thereto.

The then Plaintiffs amended their bill, and the only new statements were as follows:—That R. P. Roupell knew that he (William Roupell) entered into possession by virtue of the said indenture, and that from the time when William Roupell entered into possession, R. P. Roupell treated him as owner of the said estate. That they (the Defendants) admit that in the year 1854 William Roupell entered into possession of part of the Roupell Park estate, and that they ought to set forth under what title he did so. That the Defendant Sarah Roupell admits that she executed the indenture of the 26th of September 1853, and acknowledged it before a Judge, and she ought to set forth the full particulars as to the said indenture and her execution and acknowledgment thereof, and as to R. P. Roupell's knowledge of the said indenture.

To the amended bill Sarah Roupell, on the 16th of February 1863, put in the following plea to all the discovery, relief and order sought by the bill :—

"Saith, that since the answer of this Defendant Sarah Roupell filed in this cause on the 17th December 1862, the Plaintiffs have, on the 2d February 1863, filed a bill in this honorable Court against this Defendant Sarah Roupell, and also against Richard Roupell, and [302] also against Frederick Chinnoek" and other parties [naming them], "and thereby the Plaintiffs state the contention of this Defendant Sarah Roupell and the said Defendant Richard Roupell, that the indenture dated 26th September 1853, in the said re-amended bill stated, was a forgery, and deny the truth of such contention, and raise the issue, whether the said indenture was or was not a forgery, and pray that this Defendant, Sarah Roupell, and the said Defendant Richard Roupell may be restrained, by the order and injunction of this honorable Court, from commencing or prosecuting any action or actions to recover from the Plaintiffs the hereditaments which are comprised in the said indenture of the 20th of January 1854, in the said re-amended bill mentioned. And, by the said secondly-filed bill, the Plaintiffs have made the several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th September 1853, the subject of judicial investigation. And this Defendant saith that she has, since the filing of her said answer, ascertained, by the means aforesaid, that it is not true, and she saith that it is not true, that the said several matters in the said re-amended bill mentioned, and in particular the validity of the said indenture dated the 26th September 1853, cannot be made, by the Plaintiffs, the subject of judicial investigation. All which matters and things in this plea stated this Defendant avers to be true, and pleads the same."

The plea now came on for argument.

Mr. Selwyn and Mr. C. Swanston, in support of the plea, argued that the equity of the present bill depended on the statement of the inability of the Plaintiffs to make the matters in dispute the subject of judicial investigation at the present time; but that the contrary [303] now appeared from the second bill filed by the Plaintiffs themselves. That this fact, being introduced into the record by plea, displaced the equity on which the bill was founded. That the fact pleaded having occurred since the filing of the answer, it might properly be made the subject of a plea. That as to the technical difficulty in pleading, the General Orders (14th Consolidated Order, rule 9), provided against the old objection that a plea was overruled by an answer.

Mr. Hobhouse and Mr. Cotton, for the Plaintiffs, argued that the objection raised by the plea, if valid, ought to have been pleaded at first to the bill, and that by answering the Defendant had waived the objection. That the Defendant could not plead and answer to the same bill, such a course being inconsistent; and that the objection was not removed by the 14th Consolidated Order, rule 9, which only removed the technical difficulty, in cases where part of the subject covered by a plea was also answered; *Attorney-General v. Cooper* (8 Hare, 166).

Feb. 27. THE MASTER OF THE ROLLS [Sir John Romilly]. The plea comes on in a very unusual form. Two gentlemen named Ellice and Manners Sutton, who have advanced £100,000 on the security of this estate, have filed this bill in *perpetuam rei memoriam*, to prove the validity of a deed which is impeached by the Defendants and is alleged to be a forgery. The course which this Court always adopts, in bills to perpetuate testimony, is very simple and straightforward. Where a person files such a bill raising an issue which can be tried at once at law, this Court holds that it is not a [304] proper case for a bill to perpetuate testimony; on the contrary, as the evidence when taken cannot be used, if the witnesses are alive, and as the depositions are sealed up and can only be used when the case arises hereafter, it would be idle for this Court, when the question might be tried at once, and the witnesses themselves might be examined, to perpetuate their testimony.

If the case depend solely upon the testimony of one witness, or of witnesses who were very old, then the Court allows that person to be examined *de bene esse* without the necessity of a bill to perpetuate testimony.

But where a person in possession of an estate hears that another intends to impeach his title, upon the ground that the title-deed by which he holds the estate is a forgery, then, as the person in possession can take no step to establish his title, and

as the person out of possession will not bring an ejectment against him until his witnesses are dead, it has always been held that the person in possession may file a bill to perpetuate the testimony of his own witnesses, in order to frustrate the design of the person who delays bringing forward his case until the witnesses who can speak to the truth of the defence are no longer in existence.

In this case, the Plaintiffs are mortgagees and have entered into possession, claiming, not the absolute title to the estate, but as mortgagees only. They are accordingly liable to account hereafter to the rightful owner of the equity of redemption, in that strict and severe form in which this Court always directs the accounts to be taken as against mortgagees in possession. If this plea to the bill had been filed in the first instance, I should have had to consider whether the ordinary rule of the Court, which would un-[305]doubtedly apply if the Plaintiffs were in possession as purchasers of this estate, applied to the case of a mortgagee. A mortgagee can file a bill to foreclose and realize his security, and there are various other modes by which he might bring before the cognizance of the Court the question of the validity of this deed. If a mortgagee obtained a decree of foreclosure against the persons who alleged that the deed was a forgery, it would be impossible for them to contest the validity of that decree, after it had been enrolled and the time for appealing to the House of Lords had expired.

I am much disposed to think, though I have not been able to find any authority on the subject, that if this plea had been filed in the first instance, it would have been a good plea, or perhaps upon the statement in the bill itself a demurrer might have been successfully filed to it. But the peculiarity of the present case is this:—The Defendant's pleader seems to have thought, upon the authority of the cases, that as the Plaintiffs, the mortgagees, were in possession of the estate, their case was analogous to that of purchasers of the inheritance; which they were at law though not in equity; and thereupon he answers the bill. The matter is carried on in a very peculiar form, for, by filing interrogatories, it is sought to make the bill perform the double function of a bill to perpetuate testimony and a bill of discovery. I do not wish to prejudge the question, whether the answer can be used at any future time in any other proceeding, but this is clear:—that the depositions cannot be used so long as the witnesses are alive, and that, if living, they must be examined again. It is also clear that a Defendant may himself take advantage of a suit of this description. If the Plaintiff examine his witnesses and the Defendant merely cross-examines them, then the Plaintiff has to pay all the costs; but [306] if the Defendant think fit to take advantage of the suit, he may examine his own witnesses to establish his own case, and then the costs are divided; but even then, the depositions of a deceased witness only can be used against the Defendant with relation to the subject-matter stated in the bill.

Here the Defendant has thought fit to answer all the matters stated in the original bill; it is then re-amended, and the Defendant is called upon to answer all the various matters in the re-amended bill. This singularity then takes place:—in the Vice-Chancellor's Court another bill is filed by the Plaintiffs, and in which the validity of the mortgage deed is directly put in issue; that is to say, the validity of the conveyance to the mortgagor; and the Defendant then says, "If I had known this before, I would have pleaded it, because it depended upon you, the Plaintiffs, as you yourselves have shewn, to bring the question in dispute before a Court for immediate decision."

I am of opinion that the fact of the Plaintiffs having done so does not alter the law on the subject, and that it was just as competent for the Defendants to do this when the bill was first filed as it is now. The Defendant was bound to know it, or at least cannot plead ignorance of the law as a justification for his acts. That being so, I think that when the Defendant pleads that this matter can at once be tried in Court, and that the Plaintiff himself has shewn that it can, he is merely doing that which he might have done in the first instance, and which would have made it unnecessary for him to answer any part of the bill.

It is true that the rule of pleading now is, that a plea does not overrule an answer; but I concur with the [307] observation, that the object of the 9th rule of the 14th Consolidated Order was to prevent a *bond fide* plea from being overruled by

the mere technical objection, that the plea covered a part of the same matter as the answer, and that this was the sole meaning of that order.

There is, however, a great deal of substance in the old rule, that you must not answer a matter that is pleaded to. It is obvious that if you did, in a case where the bill asks for relief, the Plaintiff would not know what evidence he would have to adduce. But here this appears in a very striking form, for if the plea is allowed, the bill is out of Court, for the Plaintiffs can only take issue on the plea, and it is undoubtedly true that the other bill stated in the plea has been filed in another branch of this Court. Therefore, this bill is out of Court if the plea be allowed, and yet the Defendants have answered all the matters contained in the original bill, and have even cross-examined the Plaintiff's witnesses. I am of opinion that, having so done, this Defendant is not at liberty, afterwards, to file a plea, and that if she intended to plead at all, she ought to have pleaded in the first instance.

That being so, I shall not allow the plea, but direct it to stand for an answer, and give the Plaintiffs liberty to expect.

[308] ELLICE v. ROUPELL (No. 2). *March 20, 21, April 15, 1863.*

[S. C. 32 L. J. Ch. 624; 8 L. T. 191; 9 Jur. (N. S.) 530; 11 W. R. 579; 2 N. R. 3.]

Distinction between a bill to perpetuate testimony and a bill of discovery. The former is not a bill of discovery in the strict technical sense of the term. A bill of discovery must be in aid of proceedings pending or about to be instituted, but the existence of such proceedings would be fatal to a bill to perpetuate testimony. A bill to perpetuate testimony cannot, by amendment, be converted into a bill of discovery. Whether a prayer for the perpetuation of testimony and for discovery can be united in one bill, *quære*. The only discovery, which a Plaintiff in a bill to perpetuate testimony can require from a Defendant, is a sufficient admission of his title to examine such witnesses as he may think fit, on the various matters and issues stated in the bill. A bill for perpetuating testimony, if brought to a hearing, will be dismissed with costs.

This case, reported *ante*, p. 299, now came on for argument, on exceptions to the answer for insufficiency. The case was shortly this:—

The Plaintiffs filed a bill against Sarah Roupell and Richard Roupell to perpetuate the testimony of the due execution of a deed, which constituted the title of the property under which the Plaintiffs were mortgagees in possession, and which the Defendants alleged to be a forgery. The Defendant Sarah Roupell put in an answer to this bill, answering it fully. The Plaintiffs then amended their bill, to which they required an answer, and they filed seven interrogatories of a more searching character on the same subject. The Defendant, Sarah Roupell, pleaded to the amended bill, that the Plaintiffs had since commenced a suit in equity to determine the validity of that deed, and that, consequently, the Plaintiffs could not maintain a suit to perpetuate testimony. That plea was, on argument, disallowed, and was ordered to stand for an answer, with liberty to the Plaintiffs to except. (See *ante*, p. 307.) The Defendant filed no further answer, and the Plaintiffs having filed exceptions for insufficiency, they now come on for argument.

Mr. Rolt, Mr. Hobhouse, and Mr. Cotton, for the [309] Plaintiffs, in support of the exceptions, argued that the Defendant was bound to give the discovery required, in order to settle the points on which issue was to be taken, and that it had always been the practice to require a discovery in bills for perpetuating testimony. That the Defendant having answered must answer fully, and could only protect herself from discovery by plea or demurrer. They also argued that the new practice as to taking evidence prevailed in the case of a bill to perpetuate testimony; *Knight v. Knight* (4 Mod. 1); *King v. Allen* (*Ib.* 247); *Bevan v. Carpenter* (11 Sim. 22); *Thorpe v. Macauley* (5 Mad. 218); *The Earl of Belfast v. Chichester* (2 Jac. & W. 439); *Cardale v. Watkins* (5 Mad. 18); *Cresset v. Mitton* (1 Ves. jun. 449, and 3 Bro. C. C. 481); *Mitford's Pleading* (pp. 53, 54 (4th edit.)); General Orders of 5th of February 1861; 15 & 16 Vict. c. 86.

Mr. Selwyn and Mr. Swanston, for the Defendant Sarah Roupell, argued that, as the sole object of the bill was to perpetuate the testimony of witnesses, no further discovery could be required than what was necessary to obtain that object. That the Plaintiffs, having got an answer, might file a replication and join issue at once, and that no further discovery could aid them. That a Defendant was only bound to answer that which was material to the relief prayed or the order asked, and might object, by answer, to giving a discovery of anything which was immaterial for that purpose, and that the rule as to answering fully did not apply to immaterial matters; *Lord Dursley v. Fitzhardinge Berkeley* (6 Ves. 251, 263); *Scott v. Mackintosh* (1 Ves. & B. 504); *Agar v. The Regent's Canal Company* (Sir G. Cooper, p. 212); *Redesdale* (p. 306 (4th edit.)); *Hirst v. Peirse* (4 Price, 339); [310] *Story's Eq. Pl.* (ch. vii.); *Angell v. Angell* (1 Sim. & St. 83); *Moodaly v. Moreton* (2 Dick. 652); *Wyatt's Pr. Reg.* (p. 74); *Turner's Ch. Pr.* (vol. 1, pp. 218, 219 (6th edit.)).

Mr. Cotton, in reply.

April 15. THE MASTER OF THE ROLLS [Sir John Romilly]. The Defendants have contended that the Plaintiffs are not entitled to any further or better answer than they have already got. This involves the consideration of matters which, owing to the recent changes made in the practice and procedure of the Court, have in a great measure become obsolete.

The first question to be considered is whether this is a bill of discovery, in the proper and technical sense of that word? I speak of the technical sense of the word "discovery," because, as Lord Redesdale observes in his work on pleading, "Every bill is in reality a bill of discovery, but the species of bill usually distinguished by that title is a bill for discovery of facts resting in the knowledge of the Defendant, or of deeds or writings or other things in his custody or power, and seeking no relief in consequence of the discovery, though it may pray the stay of proceedings at law till the discovery should be made." (Mitford, Plead. p. 53 (4th edit.)).

The question here is, first, whether this is a bill of discovery in that limited and technical sense of a bill of discovery, as distinguished from other bills, as thus defined by Lord Redesdale; and I am of opinion that it [311] is not a bill of discovery, in this technical sense so defined by Lord Redesdale. A bill of discovery proper is filed to aid the jurisdiction of some other Court, and the better to enable the Plaintiff in equity to prosecute or defend such proceedings; and it usually, if not necessarily, states the existence of such proceedings, as the title of the Plaintiff to insist on such discovery. That is not so done in the present case. A bill to perpetuate testimony is treated by Lord Redesdale as a separate and distinct species of bill from a bill of discovery, properly so called. Accordingly, in the preceding page of his work (page 51) Lord Redesdale observes:—"Original bills not praying relief have been already mentioned to be of two kinds, 1st, bills to perpetuate the testimony of witnesses; and 2dly, bills of discovery." Here, by the words "bills of discovery," he means bills of discovery properly so called, according to the definition I have already read.

This view of the case is confirmed by Lord Eldon, who, in the case of *Lord Dursley v. Fitzhardinge Berkeley* (6 Ves. 263), expressly states, that a "bill to perpetuate testimony calls for no discovery from the Defendant, but merely prays to secure that testimony which might be had if the circumstances call for it."

Whether the two objects could be united in one bill, and pray the perpetuation of testimony, as to one matter which could not then be made the subject of legal proceedings, and also discovery as to another subject which was the subject of legal proceedings, I express no opinion. Whether any two matters could be so united in substance as to make it possible for one and the same bill to include both subjects in it, it is not necessary for me to decide, or indeed to inquire, for I am satisfied [312] that this is not the condition of the present bill; it is one and the same subject-matter respecting which it is sought to perpetuate testimony and to obtain discovery, and as no relief is prayed by it, the discovery, if at all, must be in aid of the jurisdiction of some Court other than the Court of Chancery, and to further the prosecution of some proceeding existing or possibly impending in that Court. If this be correct, and if the subject be the same respecting which both the discovery and the perpetuation of testimony is sought, then the bill is defective, so far as it asks for

the perpetuation of testimony, which cannot be afforded if the matter is ripe for decision in any Court, and the evidence could be given there. It follows from hence, that, as collateral to the perpetuation of testimony, the discovery, in the proper sense of that term, is wrong. This is, in truth, a bill to perpetuate testimony and nothing else, and it cannot be converted, at the option of the Plaintiffs, into a bill of discovery, in the sense so defined, as I have already stated, in Lord Redesdale's book.

The case of *The Earl of Suffolk v. Green* (1 Atk. 450), which was much relied upon in argument before me, does not, in my opinion, contradict or oppose the opinion of Lord Eldon and Lord Redesdale already cited. That was not properly a suit to perpetuate testimony, it was properly a bill of discovery in aid of proceedings relating to a bond then in force, with a prayer to be at liberty to examine *de bene esse* a witness who was alleged to be very old and infirm.

There is no doubt but that a bill of discovery may ask for the examination of a single witness, one on whom the whole case depends, and may, in so doing, ask [313] to perpetuate his testimony, and also, in like manner, for a commission to examine witnesses abroad; but it is essential to distinguish between a bill for the perpetuation of testimony, properly so called, and a bill of discovery, in which, as in a bill for relief in this Court, an order may be obtained to examine a witness *de bene esse*, and thus perpetuate the testimony of that particular witness. It is true that in both cases witnesses are or may be examined *de bene esse*, but in a bill to perpetuate testimony, it is because the matter cannot be tried in this or in any Court, and to have the evidence ready for a future time. In a bill of discovery proper, the witness may also be examined in like manner, but this is lest he should happen to die before the time comes for giving his evidence in Court, and then the latter proceeding is in aid of the jurisdiction of some Court other than the Court of Chancery, where proceedings are actually pending or are immediately about to be instituted; but in a suit to perpetuate testimony, properly so called, as in the case of *Lord Dursley v. Fitzhardinge Berkeley* (6 Ves. 251) and in the present case, the existence of such a suit in any Court would be a good ground of demurrer or plea.

So again, in an ordinary suit for relief in this Court, an order may be obtained to examine an aged and infirm witness *de bene esse*, for fear his evidence should be lost before the time arrives in which he might give it regularly; but this is quite distinct from the examination of witnesses under a bill to perpetuate testimony, where the evidence is or ought to be sealed up till the time arrives, when, if the witness deposing be dead, the evidence may be used.

[314] I am of opinion, therefore, that the case of *The Earl of Suffolk v. Green* does not decide this case in favor of the Plaintiff, and on consulting the record in that case, it appears that, in fact, no further answer was put in.

I have requested the gentlemen of the Record and Writ Office to assist me in examining the records of the Court, in the cases which have already occurred. For this purpose, I gave them a list of twenty-eight causes relating to the perpetuation of testimony which are to be found in the books.⁽¹⁾ In all those cases the records have been examined, and in one case and one only of them, viz., *Brandlyn v. Ord* (1 Atk. 571), a further answer was put in, but this does not appear to have been contested or

(1) [1682] *Sacknill v. Ayleworth*, 1 Vern. 105. [1683] *Somerset v. Fotherby*, 1 Vern. 185. [1684] *Gell v. Hayward*, 1 Vern. 312. [1720] *Dorset v. Girdler*, Prec. Chanc. 531. [1685] *Bechinall v. Arnold*, 1 Vern. 354. [1686] *Parry v. Rogers*, 1 Vern. 442; *Pawlet v. Ingrey*, 1 Vern. 308; *Philips v. Carew*, 1 Peere Wms. 116. [1723] *Hall v. Hoddesdon*, 2 Peere Wms. 162; *Bidulph v. Bidulph*, 2 Peere Wms. 285. [1730] *Shirley v. Ferrers*, 3 Peere Wms. 77. [1738] *Brandlyn v. Ord*, 1 Atk. 571. [1739] *Suffolk v. Green*, 1 Atk. 450; *Berney v. Eyre*, 3 Atk. 387. [1745] *Dalton v. Thomson*, 1 Dik. 97. [1746] *Burney v. Eyre*, 3 Atk. 387. [1754] *Anonymous*, 2 Vesey, junior, 487, and Amb. 237. [1777] *Smith v. Attorney-General*. [1792] *Cressett v. Mitton*, 3 Bro. 481, and 1 Ves. 449. [1794] *Jerrard v. Saunders*, 2 Ves. 458. [1801] *Dursley (Lord) v. Fitzhardinge*, 6 Ves. 251. [1805] *Bartlett v. Hawker*, cited 4 Mad. 9. [1808] *Allan v. Allan*, 15 Ves. 136. [1817] *Morrison v. Arnold*, 19 Ves. 670. [1819] *Knight v. Knight*, 4 Mad. 1. [1820] *Knight v. Knight*, 1 J. & W. 165. [1821] *Belfast, Earl of v. Chichester*, 2 J. & W. 439. [1822] *Angell v. Angell*, 1 Sim. & St. 83.

brought before the attention of the Court. I cannot consider it as governing this case, but I mention it as favorable to the contention of the Plaintiffs, as far as it goes.

Considering this case, therefore, as belonging to the class of bills to perpetuate testimony, properly so called, and not a bill of discovery, properly so called, I have [315] to consider whether, in that view of the case, the Plaintiff can insist on these interrogatories being answered. Lord Redesdale, in the passage I have cited, very properly observes, that "every bill is in reality a bill of discovery," and in this general sense, as contradistinguished from a bill of discovery properly and technically so called, a bill to perpetuate testimony is a bill for discovery; but in that general sense, so expressed by Lord Redesdale, the Plaintiff is only entitled to obtain such discovery as will be material for the relief asked, where the bill does seek relief, or as will be material for the order required, where the bill does not seek relief, but asks for an order not properly or technically called relief. This, if it required authority, is clearly and distinctly laid down in *Scott v. Mackintosh* (1 Ves. & B. 504), *Agar v. The Regent's Canal Company* (Sir G. Cooper, 212) and in *Hart v. Peirse* (4 Price, 339). It is also founded on commonsense, for if this were not the law, the Plaintiff, who had stated a case asking for no relief or assistance from the Court, might examine a Defendant in all the details of his past life and parentage, and gratify an idle and fruitless curiosity, which would in no respect assist him in his suit.

What is it then that a Plaintiff in a bill to perpetuate testimony requires? It is this, and only this:—that the Plaintiff shall admit his title to examine such witnesses as he may think fit, on the various matters and issues stated in his bill. Beyond this, the inquiry is idle and fruitless; the answer of the Defendant cannot be used against him in any further proceeding, and if the bill be brought to a hearing, it will be dismissed with costs. This is established in *Hall v. Hoddesdon* (2 P. Wms. 161); *Welby v. [316] The Duke of Portland* (6 B. P. C. 39); and *Anon.* (2 Ves. sen. 496). It is true that such dismissal does not prejudice the evidence already given; but all this shews that as soon as the first answer is put on the file, the Plaintiff has, on filing a replication, full power to examine what witnesses he may choose, on the various issues stated in his bill. Unless the right of the Plaintiff to compel an answer were confined to what he seeks by his bill, or, in other words, his right or title to examine witnesses respecting the points stated in the Plaintiff's bill, it is plain that the Court could never draw any line, or tell where to stop the Plaintiff in his examination of the Defendant on interrogatories. Everything, except what consists in an admission or denial of the Plaintiff's right to examine witnesses *in perpetuam rei memoriam*, would be equally material, or, rather, equally immaterial, and the whole birth, parentage, education, and early life of the Defendant might be inquired into by the Plaintiff, and the Court would be able to fix on no principle by which to stop the inquiry or curiosity of the Plaintiff.

It is said that, by the modern practice, the parties themselves can be examined, and that this is a mode of examining the Defendants; but the answer to that is obvious; the proper mode of examining a Defendant as a witness is the same as that of examining all the other witnesses, and as it is only by so examining them that their depositions can be made evidence at a future period, so it is only by examining a Defendant in like manner that his evidence can be perpetuated in common with that of the other witnesses.

Upon the fullest consideration I have been able to [317] give to this case, I am of opinion that it would be contrary to the principle of pleading, as laid down by Lord Redesdale and Lord Eldon, to convert a bill properly filed to perpetuate testimony into a bill for discovery, in the technical sense in which the words are used by Lord Redesdale, and that if it be not so converted, and if it be treated as a bill of discovery only, in the general sense of that term in which Lord Redesdale observes that "every bill is in reality a bill of discovery," then that the discovery sought is not material to the only order which can be obtained by the Plaintiff in this suit, and that consequently the answer to these interrogatories, which cannot be read for any legitimate purpose, either in this suit or in any other proceeding, is not material for the purpose of this suit, and cannot be required, and consequently, that these exceptions must be disallowed with costs.

NOTE.—See the 5th & 6th Vict. c. 69, and the statement in 10 Clark & Fin. 305.

[318] ELLICE v. ROUPELL (No. 3). May 7, 8, 1863.

The Plaintiffs filed a bill to perpetuate testimony as to the validity of a deed, which question, they alleged, could not at present be tried. After the Defendants had, by answer, admitted the Plaintiffs' right to perpetuate the testimony, the Plaintiffs filed another bill, raising the question of the validity of the same deed. A motion, by the Defendants, to stay proceedings in the suit to perpetuate testimony, on the ground of the existence of the second suit, was refused with costs.

The Plaintiffs filed a bill to perpetuate testimony in regard to the validity of a deed of the 26th of September 1853, which bill the Defendants answered. The Plaintiffs afterwards, in February 1863, filed a second bill in another branch of the Court, in which the question as to the validity of the same deed was also raised.

The Defendant pleaded the second suit in bar of the first, but her plea was overruled. (See *ante*, p. 307.)

Exceptions to the answer were then taken and overruled, and on the next day the Plaintiffs filed a replication in this suit.

The Defendants now moved to stay all proceedings in this suit with costs, to be paid by the Plaintiffs.

THE SOLICITOR-GENERAL (Sir R. Palmer), Mr. Selwyn and Mr. C. Swanston, in support of the motion. The statement in the first bill, that no proceedings could be taken to try the question, prevented the Defendants demurring to it; *Angell v. Angell* (1 Sim. & St. 83); but the Plaintiffs have since filed a second bill raising the same question, and which clearly shews that the first suit is unnecessary and useless. Though the Defendants failed, in consequence of mere technicalities, from availing themselves of this objection by plea, those technicalities do not exist on this motion. The two suits [319] which raise the same point ought not to be allowed to proceed, for if they do, the same witnesses will be examined twice over, while, if any special necessity exists for their immediate examination, it may take place *de bene esse* in the second suit. As this suit can never be brought to a hearing, the objection cannot, as in an ordinary case, be effectually taken by the answer, and it is, therefore, properly brought forward by motion. The proceedings in this suit ought therefore to be stayed.

As to the costs, the Defendants, who have examined no witness on their own behalf, are clearly entitled to them; *Blinkhorne v. Feast* (1 Dick. 153); ——— v. *Andrews* (Barnardiston (C. C.) 333).

Mr. Baggeallay, Mr. Hobhouse and Mr. Cotton were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. This case is very singular in its circumstances, but in addition, it seems destined to raise a number of peculiar points of pleading. This motion is, as I said during the argument, in substance, the reargument of the plea. This was not disputed; but it was said that, upon this motion, the Defendants are relieved from the technicalities to which they were subject in regard to the plea. But it is necessary that some rules of pleading should be preserved; here is a bill for perpetuating testimony, it is not demurred to, but an answer is put in which admits the Plaintiffs' right to examine witnesses *in perpetuum rei memoriam*, and a plea to it is afterwards overruled. It is open to the Defendants, after they have admitted the Plaintiffs' title to [320] what they ask by their bill, to come and say, that by reason of some other proceeding taken by the Plaintiffs in another Court, they are not entitled to what they ask, and that all the proceedings in this suit ought to be stayed? If the Plaintiffs had filed their bill to perpetuate testimony, and it appeared, upon the face of it, that they could at once bring the matter before a Court of law and try the question, the bill would have been open to a demurrer. But if the Defendant does not think fit to demur, but answers the bill, can he afterwards come and stay the proceedings, on the ground that this is a matter which may be at once tried at law? Would not this Court say, if you wished to avail yourself of this defence, you ought to have done so at the proper time by plea or demurrer? Does it make the thing more clear that a suit has since been instituted?

This, which is a distinct question of pleading, is, whether a Defendant, who has

admitted the title of the Plaintiffs to this species of order, can afterwards say he was wrong in making the admission, and ask that all the proceedings might be stayed. How can I tell under what circumstances the other bill has been filed?

Take this case, which actually happened: a man who was tenant for life with remainder to his first son in tail, married, first at Gretna Green, had a son born, and was afterwards married again at St. George's, Hanover Square. On his first son coming of age, he and his father cut off the entail and mortgaged the property to A. B., who, finding that the eldest son was born before the second marriage, filed a bill to perpetuate testimony as to the Scotch marriage, and proceeded to examine his witnesses. Now suppose this had happened: that when the eldest son had examined one-half his witnesses, the father had died, and that the second son [321] claimed the estate, would not the eldest son have been allowed to proceed in the examination of his witnesses, or would the question be made more clear by the second son's bringing an ejectment to recover the estate? I apprehend that the Court would, in such a case, allow the examination of the witnesses to proceed.

In this case, on a former occasion, I gave directions for the examination in the registrar's office of every reported case relating to this subject, but in none of them can such motion as the present be found. I do not say that this is conclusive, but such a case as I have stated must have arisen.

I am of opinion that this motion cannot be sustained.

The Plaintiffs have brought a bill claiming a right to examine witnesses *in perpetuum rei memoriam*, that right has been admitted, and they are entitled to the order peculiar to suits of this nature. I cannot go into circumstances of the other suit, the objects of the two suits not being identical. I must therefore refuse this motion with costs.

May 8. THE SOLICITOR-GENERAL stated that it had been agreed that proceedings in this suit should be stayed, on terms which had been arranged between the parties.

[322] ABSOLOM v. GETHING. Jan. 15, 16, 1863.

[S. C. 32 L. J. Ch. 786; 8 L. T. 132; 9 Jur. (N. S.) 1263; 11 W. R. 332.]

The Friendly Societies Act (18 & 19 Vict. c. 63, s. 23) requires the assignees, &c., of the officers of such societies "upon demand in writing" to pay the debts due from such officers in priority of his other creditors. Held, that a bill filed to recover the amount is a sufficient "demand in writing."

The priority over other creditors, which is given to friendly societies for debts due to them from their treasurer, &c., is not lost by their neglecting, for some time, to make him give the security required by their rules and by statute, nor by their neglect to audit his accounts.

In 1840 a friendly society, called "The Female Benefit Society," was established under the provisions of the 10 Geo. 4, c. 56, and the 4 & 5 Will. 4, c. 4. At the same time, William Conway James was appointed treasurer of this society, and he continued to hold that appointment until the 31st May 1861, when he assigned all his estate and effects to the Defendants for the benefit of his creditors.

On the 19th June 1861 Mary Absolom and Mary Rolanda, as "stewards and trustees" of the society, demanded, in writing, payment to them of the sum of £400, 13s. 2d., alleged to be due to the society from William Conway James, and they insisted on payment of that sum in priority of his other creditors. This being refused, they filed the present bill in 1862, asking for payment of that sum out of the estate and effects of William Conway James, and for an account thereof, if necessary.

They rested their claim for priority on the 23d sect. of the 18 & 19 Vict. c. 63, which is as follows:—

"If any person appointed or employed to any office in any friendly society, and having in his hands or possession, by virtue of his office, any moneys or property

whatsoever of such society," &c., "shall die or become bankrupt or insolvent," &c., "or shall make any assignment, disposition, assignation or other conveyance for the benefit of his creditors, the heirs, executors, administrators or assignees of every such officer," [323] &c., "shall, upon demand in writing made by the treasurer, or by the trustee, or any two of the trustees of such society, or any person appointed at some meeting of the society to make such demand, deliver and pay over all such moneys," &c., "to such person as such treasurer or trustees shall appoint, and shall pay, out of the estate, assets or effects, heritable or moveable, of such officer, all sums of money due which such officer shall have received, before any other of his debts are paid and before any other claims upon him shall be satisfied."

The defences raised by the Defendants were as follows:—First, that the Plaintiffs were not the trustees of the society. As to this, it appeared that the rules did not provide for the appointment of trustees, but that six days before the filing of the bill the Plaintiffs, who were then stewards only of the society, had been appointed trustees.

Secondly, it was said that there had been no valid demand in writing "by the treasurer or by the trustees," or by "any person appointed at some meeting of the society to make such demand." For although the Plaintiffs, by their notice of the 19th of June 1861, had claimed as "stewards and trustees," still that they did not then fill the character of trustees.

Thirdly, that although the rules of the society required it, William Conway James had not, until the 7th of January 1853, given any bond in the form prescribed by the 10 Geo. 4, c. 56, s. 11, and which that section required him to do, before he "should be admitted to take upon himself" the execution of the office of treasurer. That therefore he had not, until that time, been duly appointed treasurer.

[324] Fourthly, that William Conway James had drawn the money in question out of the savings bank with the assent of the secretary, who had verbally sanctioned his taking the money, on the terms of his paying interest thereon, and that therefore it was a loan to James and not a fund held by him as treasurer. But this statement the Court considered disproved.

Fifthly, that the society had omitted to audit William Conway James's accounts, and had therefore not taken proper steps to prevent his dealing improperly with the funds, and that by their *laches* they had deprived themselves of their priority.

Mr. Hobhouse and Mr. Jessel, for the Plaintiffs, relied on the express terms of the 18 & 19 Vict. c. 63, s. 23.

Mr. Baggallay and Mr. Gordon Whitbread, in support of the fourth objection, cited *Ex parte The Amicable Society of Lancaster* (6 Ves. 98); *Ex parte Ross* (6 Ves. 802); *Ex parte Fleet* (4 De G. & Sm. 52); and see *In the Matter of the Heanor Friendly Society* (1 Beav. 508).

They argued that the clause in question, giving priority to friendly societies over other *bona fide* creditors, was harsh and unequitable, and that it ought to be construed with the greatest strictness.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiffs are entitled to a decree, and that what is alleged by the Defendants is not sufficient [325] to deprive them of their rights. Assuming that £400, 13s. 2d. was due from William Conway James, at the time when he became insolvent and executed the deed of assignment of the 31st of May 1861, it is said that the Plaintiffs are not entitled to the benefit of the 23d section of the 18 & 19 Vict. c. 63, for these reasons:—

In the first place it is said there are no trustees of the society. This defence fails, the fact being that a document appointing them trustees previous to the filing of this bill has been produced.

In the next place, it is said that no demand in writing has been made. I do not go into the question whether any such demand was made previous to the filing of this bill, but of this I am satisfied, that the bill itself is a demand in writing, and there is therefore no necessity to go beyond that.

Next, it is said that the treasurer did not give any security until January 1853; but he might be treasurer before he gave security, although he could not properly act and his acts might be inofficious. However he gave security in 1853, and I am of opinion that from that time to 1861 he was the treasurer of this society.

It is then said that this money was in his hands, not in his character of treasurer, but as borrower. The evidence on that fails. When he took this money out of the savings bank he committed a breach of duty, and there is nothing in the statute to the effect that any misconduct of the treasurer can deprive a friendly society of the benefit of this clause of the Act. This clause assumes the fact that the treasurer has acted improperly; if he had allowed the investment to remain in the savings bank, it would not have been necessary to come against his estate.

[326] The Legislature has thought fit, in these cases, where a number of poor persons have made a provision against sickness or the like, that they shall have the benefit of the priority given by this clause, and everyone dealing with the treasurer of a friendly society knows that this is the law, and that his estate is mortgaged to the full amount for what he may owe to the society, in priority over every other claimant. I do not therefore feel the extreme iniquity of this clause, which the Defendants have attempted to impress on me; and though I admit that this clause must be construed strictly, still I have been unable to come to the conclusion that Plaintiffs are not entitled to the benefit of it.

It is then said that the society has not audited the accounts, and that it has been satisfied with the statement of the treasurer. But I do not see that they have thereby lost the benefit of the clause.

All the objections fail, and, the Defendants admitting sufficient assets, the Plaintiffs are entitled to a decree for the sum claimed, which, by the treasurer's account, appears to be the amount due from him.

[327] *FARMER v. DEAN. Feb. 10, 11, 1863.*

After an ineffectual attempt to sell by auction an estate devised in trust for sale, liberty was given to one of the trustees to purchase it at the price at which it had been bought in, upon its appearing beneficial to the parties interested.

The testator died in 1861. By his will, he devised his freeholds and copyholds to the Plaintiff (his son), James Farmer and E. H. Dean, upon trust to sell and hold one-third of the purchase-money for his daughter Sarah Griffiths for life, with remainder to her children, another one-third for his daughter Ann Dean absolutely, and the remaining one-third for the Plaintiff absolutely. The testator appointed Dean and the Plaintiff executors.

The trustees put part of the trust property, called the Brickhouse estate, up for sale by auction in June 1862. It was not sold, but was bought in for £3150. The trustees could not afterwards obtain a purchaser at that price.

The Plaintiff, being willing to give £3150 for the property, filed this bill against his co-trustee and against Ann Dean and her husband, and Sarah Griffiths and her husband and their three infant children, praying that he might be at liberty to purchase the Brickhouse estate. It appeared that it would be for the benefit of all parties interested that the Plaintiff should become the purchaser at that price.

Mr. W. Morris, for the Plaintiff. (See *Campbell v. Walker*, 5 Ves. 681.)

Mr. Babington, for the Defendants.

[328] *Feb. 11. THE MASTER OF THE ROLLS* [Sir John Romilly]. I have looked into this matter, and I think that the Plaintiff may take a decree giving him liberty to purchase.

ABSTRACT OF DECREE.—Let the Plaintiff be at liberty to purchase the Brickhouse estate for £3150. Order the trustees to convey and the Plaintiff to pay the costs of suit. Reg. Lib. 1863, A. fol. 236.

[328] HARMS v. PARSONS. Dec. 10, 11, 12, 17, 1862.

[S. C. 32 L. J. Ch. 247 ; 7 L. T. 815 ; 9 Jur. (N. S.) 145 ; 11 W. R. 250.]

A covenant not to carry on the trade of horse-hair manufacturer within 200 miles of Birmingham, held valid.

A covenant, on the purchase of horse-hair manufacturers not to carry on the trade of horse-hair manufacturer, construed to prevent the covenantor from the buying and selling manufactured horse-hair.

In August 1858 the Plaintiffs (Harms & List), who carried on the trade of horse-hair manufacturers in London, agreed with the Defendant (Parsons), who carried on the same business in Birmingham, to buy the goodwill of the Defendant's business of "horse-hair manufacturer" for £630, and the stock at a valuation.

By a deed dated the 28th of February 1859, and made between the Plaintiffs, described as *horse-hair manufacturers*, of the one part, and the Defendant of the other part, after reciting that the Defendant had agreed to sell to the Plaintiffs "all his interest and goodwill" in the trade of *horse-hair manufacturer*, it was witnessed that the Defendant assigned to the Plaintiffs "all and singular the beneficial interest and goodwill of him, the Defendant, in the said trade or business of a *horse-hair manufacturer*," and all implements, &c., and all right, title, &c.

[329] The Defendant thereby covenanted with the Plaintiffs as follows :—

"That he, Joseph Parsons, *shall not*, nor will, at any time hereafter, either by himself or in connection or by any other person or persons, directly or indirectly, carry on the said trade or business of a *horse-hair manufacturer*, at any town, city or other place in the United Kingdom, *within the distance of 200 miles from the town of Birmingham*, without the consent in writing of the Plaintiffs, from time to time, first had and obtained, except for their benefit and at their request, under a penalty of £1000 to be paid to the Plaintiffs, their executors, administrators and assigns. Provided always, that nothing herein contained shall extend or be construed to prevent Joseph Parsons buying and selling Mexican fibre, as a wholesale dealer, but he shall not, either directly or indirectly, be at liberty hereafter to manufacture the same."

The Plaintiffs alleged that the Defendant had violated this covenant, and they filed this bill for an injunction to restrain the Defendant from carrying on the trade or business of a horse-hair manufacturer *and dealer* at Birmingham, or within 200 miles thereof.

The Defendant admitted he had bought and sold hair, and he insisted on his right to act as a dealer, as distinguished from a manufacturer of horse-hair. He said as follows :—

"I say, and insist, that buying and selling hair is no part of the business of a hair manufacturer, and that my trade at Birmingham, which was bought by the Plaintiffs, was that of a horse-hair manufacturer only, and that of a dealer in the raw material. The business of buying and selling hair is a distinct business from [330] that of a hair manufacturer, and is followed by persons who are not manufacturers."

Mr. Baggallay, Mr. E. K. Karslake and Mr. F. Clifford, for the Plaintiffs, argued that the covenant was valid in law, that the Defendant had violated it by buying and selling horse hair, and that this was part of the business of horse-hair manufacture which the Plaintiffs had purchased from the Defendant. They cited *Bunn v. Guy* (4 East, 190); *Whittaker v. Howe* (3 Beav. 383); *Wallis v. Day* (2 Mee. & W. 273); *Tallis v. Tallis* (1 Ellis & Bl. 391); *Avery v. Langford* (K. 666).

[THE MASTER OF THE ROLLS referred to *Benwell v. Inns* (24 Beav. 307).]

Mr. Selwyn and Mr. Druce, for the Defendant, argued that 200 miles was an unreasonable limit; that the covenant was in restraint of trade, and was void. Secondly, they argued that the covenant had not been violated, for the two trades were distinct, and that the Defendant had only acted as a dealer and not as a manufacturer. They cited *Horner v. Graves* (7 Bing. 735); *Price v. Green* (16 Mee. & W. 346); *Mallan v. May* (11 Mee. & W. 653).

Mr. Baggallay, in reply.

Dec. 17. THE MASTER OF THE ROLLS [Sir John Romilly]. The Plaintiffs insist that the Defendant has broken the covenant; this he denies, and, in the first place, [331] says that the covenant is worth nothing, because it is in restraint of trade, and prohibits the Defendant from carrying it on in any part of England or Wales, except in a corner of Cornwall, and also in part of Scotland and Ireland. I do not assent to that view of the question; and on reading the cases, I do not think that this covenant is bad by reason of its extent. The cases lay down this principle:—That if the nature of the trade require it, the extent excluded may be very great indeed, as in the case of a solicitor and attorney, in which there are two cases which hold that such a covenant is good, though it prohibits the business being carried on throughout all England.

This covenant is not an absolute prohibition, it would allow the Defendant to carry on his business in Glasgow, and the trade seems confined to a very small number of persons. I am therefore of opinion, that the area of exception is not so excessive as to vitiate the covenant.

The next question is, whether the Defendant has broken the covenant? This is a question of fact, and as to this, the Defendant draws a distinction between a horse-hair manufacturer and a horse-hair dealer, and I think that this is clearly established by the evidence. The Defendant also points out that it is only the trade of horse-hair manufacturer, not that of dealer, which he has sold. I assent to the distinction between the two branches of trade, and the evidence establishes that the Defendant has done nothing as a horse-hair manufacturer, but there is distinct evidence of the Defendant having bought and sold manufactured horse-hair; indeed, to some extent he admits it in his answer. I am satisfied, on the evidence, that buying and selling manufactured horse-hair is part of the business of a horse-hair manufacturer, and that the trade of horse-hair dealer is not [332] confined to unmanufactured horse-hair. The sale is of the business of a horse-hair manufacturer, that is, of the whole of such a business; and when I look at the assignment, which must be construed most strongly against the grantor or vendor, I find that the Defendant has sold his business of horse-hair manufacturer and all that belongs to it, which must be held to mean everything which properly belongs to such a business, and therefore to include the selling of manufactured horse-hair.

The consequence is, that when the Defendant covenants that he will not “carry on the trade or business of a horse-hair manufacturer,” he has covenanted to the extent of the business he has sold, that is, that he will not sell manufactured horse-hair.

The result is, that I must grant an injunction to restrain the Defendant from buying and selling manufactured horse-hair, either directly or indirectly, within the 200 miles, and from or otherwise interfering with the trade of horse-hair manufacturer.

With respect to the other point, I must dismiss the bill, so far as it seeks to restrain the Defendant from carrying on the trade or business of horse-hair dealer, as distinct from the purchase and sale of manufactured horse-hair.

I shall give no costs on either side. The Plaintiffs have put their case too high.

[333] HARRIS v. HARRIS (No. 3). *July 16, 1862; Feb. 21, 1863.*

A leasehold for three lives was settled in the usual way, but there was no trust to renew. After two of the lives had dropped, the trustees renewed the lease by adding two new lives, and the tenant for life voluntarily advanced a portion of the fine. Held, that he was not entitled to repayment out of the other trust funds until the extent of his enjoyment could be ascertained. But the tenant for life having died in the life of the remaining *cestui que vie*: Held, that his estate was then entitled to be repaid out of the trust funds.

In 1848, on the marriage of Mr. and Mrs. Harris, a considerable sum of money and some copyholds, which were held on a lease for three lives, were settled on trusts

which gave a large portion of the income to Mrs. Harris for her separate use for life, and the remainder of the income to Mr. Harris for life, and after their deaths the property was settled on the children of the marriage. There was no trust for renewal. In 1850 two of the *cestuis que vie* had died, and the other (John Hill) was of an advanced age. The trustees thereupon renewed the lease by the addition of two lives, at an expense of £900, of which the sum of £403 was, by the Chief Clerk's certificate, found to have been paid by Mr. Harris. It was arranged by a deed of 1853, which, however, was inoperative as to Mrs. Harris and the children, that the £403 should be taken in satisfaction of so much of the trust funds as had been improperly paid to Mr. Harris.

This cause now came on for further consideration, and Mr. Harris asked to be paid or allowed the sum of £403 out of the other trust funds. John Hill the original *cestuis que vie* was still living.

Mr. Lloyd and Mr. Beavan, for Mrs. Harris, argued that Mr. Harris, the tenant for life, had no right to be repaid the £403 which he had voluntarily advanced. That Mr. Harris was clearly bound to pay some portion of it, and that his proportion could only be ascertained at his death, when the extent of his enjoyment would [334] be known. That it was consequently premature to ask for repayment.

Mr. Selwyn and Mr. Salmon, for the children, also argued that the whole fine ought to be borne by the tenant for life and the remainder-men in proportion to their interest. They cited *Carter v. Sebright* (26 Beav. 374); *Jones v. Jones* (5 Hare, 440); *Hudleston v. Whelpdale* (9 Hare, 775).

Mr. Follett and Mr. Lonsdale, for Mr. Harris, argued that there being no trust to renew and no obligation on the part of the tenant for life to renew, he was entitled to be paid the £403 advanced by him for that purpose out of the trust funds in Court. They cited *White v. White* (9 Ves. 554).

THE MASTER OF THE ROLLS was of opinion that Mr. Harris could not now require the repayment of the £403 which he had advanced voluntarily for the purpose of renewal, and he thought that the question of how the renewal fine ought to be borne, as between parties entitled, must remain undecided until after the death of tenant for life, when the amount to be borne by him could be properly ascertained.

Feb. 21, 1863. The decree on further consideration declared "that Mr. Harris was not entitled, during his life, to make any claim in respect of the £403, advanced by him for the purposes and under the circumstances in the Chief Clerk's certificate mentioned, but that, after the death [335] of the last-named Defendant, any of the persons interested in respect of the said sum of £403, or in the trust premises comprised in the settlement, were to be at liberty to apply, as they might be advised, as to the sum or sums of money to be paid to or by the estate of Mr. Harris, for or on account of the sum of £403, or for or on account of the moneys paid out of the *corpus* of the trust premises comprised in the settlement, in or about the renewal or renewals of the life or lives for which the copyhold estates in the certificate mentioned are held."

Mr. Harris died in December 1862, and John Hill, the last of the three original *cestuis que vie*, died in January following, so that Mr. Harris had received no benefit from the renewal.

The executors of Mr. Harris now presented a petition for the payment to them of the £403 out of the trust funds in Court. It appeared, by the evidence in the cause, that from the marriage in 1848 until the year 1854 Mr. and Mrs. Harris had lived together, and that Mr. Harris had received his wife's separate income, but that they had since lived separate.

Mr. Baggallay and Mr. Lonsdale, in support of the petition, argued that, as Mr. John Hill, one of the original *cestuis que vie*, had survived Mr. Harris, and as Mr. Harris had derived no benefit from the renewal in 1850, his estate was entitled to be repaid the £403 out of the capital of the settled property now in Court.

Mr. Lloyd and Mr. Beavan, for Mrs. Harris, argued that the £403 must be considered as having been paid out of the separate income of his wife, which her husband was in receipt of at the time of renewal.

[336] Mr. Selwyn and Mr. Druce, for the children, opposed the petition. They cited *Carter v. Sebright* (26 Beav. 374).

Mr. Parke, for the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the executors of the tenant for life are entitled to the whole £403. As the certificate finds that it was paid by Mr. Harris, I must treat it as paid out of his own pocket. If an application had been made to the Court to effect a renewal of the lease, the question would have been, out of what fund the fine ought to be paid, and I think it would have been paid out of the fund in Court, which would have diminished the income of the tenant for life to the extent of the interest on the amount paid for the renewal. The tenant for life by paying the amount has lost the interest thereon. In that view of the case, therefore, Mr. Harris would be entitled to be repaid.

If the Court adopt the principle of apportioning the fine between the persons entitled, according to their enjoyment, then Mr. Harris has received no benefit at all from the renewal. I am therefore of opinion Mr. Harris's estate is entitled to have £403 paid to him out of the funds in Court.

[337] COOPER v. JENKINS. Feb. 10, 11, 1863.

[S. C. 1 N. R. 383.]

A. was tenant for life of Lots 1 and 2, to which B. was entitled in remainder. B., and A. as his surety, mortgaged Lot 2, B. alone covenanting to pay. By a contemporaneous deed, B. conveyed his interest in the other lot on trusts to indemnify A. as his surety. A. paid large sums for interest on the mortgage. Held, that he was entitled to the benefit of the deed of indemnity only, but not to stand in the place of the mortgagee on Lot 1.

The Plaintiff Cooper was entitled, during the life of his wife, to some property designated as Lots 1 and 2. The Defendant, W. P. Jenkins, was entitled to an interest in reversion in the same property.

By an indenture, dated the 19th of March 1822, W. P. Jenkins, and Cooper as his surety, mortgaged Lot 2 for £250 and interest, but W. P. Jenkins alone received the money and alone covenanted to pay it.

By a contemporaneous deed, dated the 19th of March 1822, W. P. Jenkins conveyed his interest in Lot 1 to a trustee, upon trust to save harmless and keep indemnified Cooper, and his estate in Lot 2, from and against the payment of the sum of £250 and the interest thereof; and for that purpose, in case Cooper, or his life-estate, should become liable to pay or make good, and should actually pay or make good, any sum or sums of money on account or in respect of the £250 or the interest thereof, then, upon trust, out of the rents and profits of Lot 1, or by mortgage, sale or other disposition thereof, to raise and repay to Cooper such sum or sums, with interest thereof after the rate of £5 per cent. per annum.

Cooper paid the interest on the mortgage from 1822, amounting to £420, and the interest on the sums so paid by him amounted to £456.

In 1855 £100 (being the produce of part of Lot 2, [338] sold to a railway company) was applied in part discharge of the £250.

Mrs. Cooper died in 1856, and Mr. Cooper's life-estate thereupon ceased.

The property had been sold, and Lot 1 had produced £400, and Lot 2 had produced £991. Out of the latter sum, the amount remaining due on the mortgage (£171) was paid, under an order made in 1862 in other suits.

This bill, filed by Cooper in May 1862, prayed the execution of the trusts of the indemnity deed of the 19th of March 1822, and that the £400 (the produce of Lot 1) might be applied for the Plaintiff's indemnity, and that the deficiency of that sum might be paid out of Jenkins' share in the £991, the produce of Lot 2.

The question argued was, whether the produce of Lot 2 (the mortgaged property) was applicable to the Plaintiff's indemnity.

Mr. Hobhouse and Mr. Kay, for the Plaintiff, argued that as the produce of Lot 1 was insufficient to indemnify the Plaintiff, he was entitled to stand in the place of the mortgagee of Jenkins' interest on the produce of Lot 2 for the remainder. They

argued that a surety was entitled to the benefit of all the securities held by the creditor whom he paid off. They relied on the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5, by which a surety is entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security held by the creditor, whether it shall or not be deemed, at law, to have been satisfied by the payment of the debt, and he may sue at law or in equity.

[339] Mr. Lloyd, for Mr. Jenkins, and Mr. Baggallay and Mr. Rodwell, for other parties interested in the produce of the estate, were not heard.

THE MASTER OF THE ROLLS. The Plaintiff proceeds on the deed of indemnity, which provides, that if he should be compelled to pay (which could only be by the mortgagee's taking possession of the land), or if he should actually pay the interest, or any part of it, he shall be entitled to be repaid, with interest at £5 per cent., out of Lot 1. He has thought fit to take that indemnity, which he considers more profitable than his claim as surety on the mortgaged property. As he has paid off the interest on the mortgage, he is entitled to enforce the deed of indemnity against William Perkins Jenkins. But I do not, at present, think that the Plaintiff has any right to indemnity out of Lot 2.

Feb. 11. **THE MASTER OF THE ROLLS** [Sir John Romilly]. My opinion remains the same as I expressed yesterday. The Plaintiff cannot have the benefit of the mortgage on the principle of the Mercantile Law Amendment Act. He must proceed under one or other of the two rights which he claims. If he had bound himself to pay the mortgagee, and had done so, he would then have been entitled to the benefit of the mortgage. He has not done so, he has bargained, by a separate instrument, for an indemnity which is perfectly distinct. This payment of interest was perfectly voluntary, but that does not affect the deed of indemnity, which is precise, and entitles him to what he has paid, whether he was compelled to pay or not. If [340] a surety pay off the mortgage he is entitled to the benefit of all the securities. But here, the Plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity, if he pay off any part of the principal or interest of the mortgage. That indemnity he is entitled to, and not to the benefit of the mortgage paid off.

All I can do in this suit is, to make a decree for the enforcement of the indemnity deed.

[340] **WELD v. THE SOUTH-WESTERN RAILWAY COMPANY.** *Feb. 13, 14, 1862.*

[S. C. 33 L. J. Ch. 142; 8 L. T. 13; 9 Jur. (N. S.) 510; 11 W. R. 448;
1 N. R. 415.]

An existing railway company was authorized by an Act to make some extensions and new works on their line, and "for the purposes of the works by the Act authorized and the general purposes of their undertaking," the company might raise, by the creation of new shares, any sum not exceeding £100,000. The Lands Clauses Consolidation Act, 1845, was incorporated in the Special Act, "save so far as the clauses and provisions thereof respectively were expressly varied or excepted by this Act." Held, that the 16th section of the Lands Clauses Act (8 & 9 Vict. c. 18) which requires the whole capital to be subscribed before the compulsory powers of taking land is put in force, was inapplicable to the new Act.

In 1859 this company, which had long been incorporated, and had, by previous Acts, been authorised to raise, by stock and shares (exclusive of debenture stock) moneys to the extent of about £8,000,000, obtained a further Act enabling them to make new works and raise further funds.

By this Act (22 & 23 Vict. c. xlv.), after reciting that, for the purpose of affording better railway accommodation, it was expedient that the company should be authorised to make and maintain a new line of railway (called the Kingston Bridge Line) commencing by a junction with the Windsor Railway and terminating near the foot of Kingston Bridge, and after reciting the [341] expediency of making a great variety of other new works, it enacted as follows:—

"VIII. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845, *save so far as the clauses and provisions thereof respectively are expressly varied or excepted by this Act, are incorporated with this Act.*"

It then authorised the making of the several works, including the "Kingston Bridge Line," and the taking, compulsorily, of the necessary lands specified in the deposited plans, with certain limits of deviation.

The 34th section was as follows :—

"XXXIV. For the purposes of the works by this Act authorised and the general purposes of their undertaking, the company, from time to time, may raise, by the creation and issue of new shares, any sum not exceeding £100,000."

In May 1861 the company gave the Plaintiff notice of their intention of taking certain parts of his lands.

The Plaintiff resisted this, and the company thereupon gave him the usual bond for £250, and they deposited that sum, being the amount of the valuation of the land, in Court.

The Plaintiff filed this bill against the company to restrain them taking his land, on the ground (amongst others), that they had not complied with the 16th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 16), which requires that, before it shall be lawful for the company to put in force the compulsory powers of taking land, "the whole of the capital or estimated sum for defraying the expenses of the under-[342]-taking shall be subscribed under contract binding the parties thereto," &c.

The Plaintiff gave the company notice to produce a certificate of two Justices, under the 17th section, of their compliance with the requisitions of the 16th section, but they were unable to produce any.

The Defendants by their answer said as follows :—

"We submit that, according to the true construction of the said London and South-Western Railway Act, 1859, we were not at any time, and are not, bound to procure any such certificate as is required by the clause or section numbered 17 of the Lands Clauses Consolidation Act, 1845, in cases where such section applies; and we admit that we have not procured such certificate; and we are advised and we humbly insist and submit, that the clause or section 16 of the Lands Clauses Consolidation Act, 1845, is inapplicable to and inconsistent with the said London and South-Western Railway Act, 1859, in this behalf. And we say, that for the reasons and under the circumstances aforesaid, it is the fact, that we have not procured the certificate aforesaid. Previously to entering upon the Plaintiff's lands, we had, under powers duly enabling us in that behalf, created and issued preferential stock, for the purposes of the works by the said London and South-Western Railway Act, 1859, authorised, and for the general purposes of our undertaking, to the amount of £764,252, the whole of which sum has been actually paid up, of which sum a part, being the balance of £100,000 not already applied by us for the purposes of the said London and South-Western Railway Act, 1859, is applicable to and is intended to be applied, by us, in carrying out the works by the same Act authorised and not already carried out. And we say, that under the circumstances [343] aforesaid, it is the fact that no new shares in the said railway company to the amount of £100,000, or to any other amount, have been created and issued by us."

It appeared also, that by a subsequent Act (23 & 24 Vict. c. clxxxv.), the company had obtained powers to make further works, and to raise £400,000 "for the general purposes of the company," and special powers as to the preferential and other stock and shares.

Mr. Baggallay and Mr. Schomberg, for the Plaintiff. Before the Defendants took the Plaintiff's land, they were bound to shew that the whole capital had been subscribed, and it is admitted that it has not been. The company have raised preferential stock, but they could only raise it under this Act, or by "the creation and issue of new shares." The company, therefore, have not obtained a right of compulsorily taking the Plaintiff's property.

Mr. Selwyn and Mr. C. Roupell, for the company. The 16th section of the Lands Clauses Act is inapplicable to a case where an extension line of railway is to be made by an existing company, by means of funds to be raised by new shares in such

company. It is confined to cases where the undertaking is intended to be carried into effect by means of a capital to be subscribed for by the promoters of the undertaking; *The Queen v. The Great Western Railway Company* (1 Ell. & Bl. 253). Here the further capital is to be raised for the general purposes of the undertaking of the company. The Lands Clauses Act is in this respect inconsistent with the Special Act, and must be considered as "expressly varied" thereby, and therefore inapplicable.

[344] Mr. Baggallay, in reply. The case cited differs from the present in the terms of the exception.

Feb. 14. THE MASTER OF THE ROLLS [Sir John Romilly]. It is impossible to say that the 16th section of the Lands Clauses Consolidation Act applies to a case like the present. The clause was obviously intended to prevent mere bubble schemes from being set on foot, and to provide an ample security to the public that their land should not be taken and persons disturbed without a reasonable certainty of the undertaking being carried into effect. The reason, therefore, for the enactment does not apply to the case of an old-established company and one which has ample funds for the purpose. Originally this question might have been one of difficulty, but I am of opinion that *The Queen v. The Great Western Railway Company* (*Ibid.*) really decides the case. That it decides the question in all cases where the Lands Clauses Consolidation Act is incorporated with the Special Act by such words as are used in that case, viz., so far as they "are applicable to and not inconsistent with its provisions," must be admitted. It is a solemn decision of the Court of Queen's Bench in Banc by very eminent Judges, who shew, not only the reason why the section does not apply, but also that the words of the enactment are inapplicable. That decision has never been contested from that time to the present.

The difference between that case and this is simply this:—that, in the present case, the Lands Clauses Consolidation Act is re-enacted and united with the Special [345] Act, "save so far as the clauses and provisions thereof are expressly varied or excepted by this Act." That is the only difference. I do not consider that to make a distinction between the two cases. In my opinion, where the Lands Clauses Act is not applicable to and inconsistent with the Special Act, it is expressly varied by the Act. No consideration that I have been able to give to the words of that case in the Queen's Bench, and of this case, appear in any reasonable or just sense to make a distinction between them. In *The Queen v. The Great Western Railway Company* the Lands Clauses Consolidation Act was incorporated with the Special Act, except where it was not applicable and not consistent with the Act of that company; in all those cases, then, it must be varied by the Act. It is not necessary to say in express terms that it shall be varied; it is not necessary to say "we alter this clause or vary it in this respect;" but it is varied, in substance and in spirit, in every case in which it is inconsistent with and not applicable to the particular Act of the railway company.

I am of opinion, with respect to the words "save so far as the clauses and provisions thereof are expressly varied or excepted by this Act," that the word "expressly" does not mean in express terms, as by saying "this particular section of the Act is varied," because if that were so, there is no section that is in express words varied; but it is only varied in this respect:—Where it is not applicable to the particular clauses of the Special Act. I am therefore of opinion that *The Queen v. The Great Western Railway Company* governs the present case, and that the 16th section of the Lands Clauses Consolidation Act does not apply.

The bill must be dismissed with costs.

[346] BAINBRIDGE v. KINNAIRD. April 16, 17, 22, 1863.

[S. C. 8 L. T. 447; 9 Jur. (N. S.) 862; 11 W. R. 608; 2 N. R. 5.]

The tenant for life of a real estate, the trustees of which were empowered to sell it at his request and by his direction, entered into a contract to sell it. The estate was subject, with others, to a charge for younger children. The tenant for life died without issue, and the fee of the estate passed under his will. Held, that the purchaser, on waiving the objection as to the charge, was entitled to a specific

performance against the representatives of the vendor, but that he was not entitled either to an indemnity against the charge or to compensation.

The moiety of the Eastgate Farm, held for lives of the See of Durham, was vested in trustees for the Earl of Scarborough for life, with remainder to his first and other sons in tail, with remainder to the earl in fee. The trustees were empowered, "at the request and by the direction of" the tenant for life, to sell the property. The property was, together with the other Savile estates (which produced an income of more than £20,000 a year), subject to a charge of £15,000 to be raised for the benefit of the earl's sisters.

In April 1855 the Plaintiff (as he alleged), contracted with the Earl of Scarborough, by a correspondence with his solicitor, for the purchase of the earl's moiety of the Eastgate Farm for £4350.

The Earl of Scarborough died in October 1856, without having been married, having devised all his estates (including the Eastgate Farm) to trustees for Henry Savile for life, with remainders over. The trustees had a power of sale of the devised estates.

After long negotiations, this bill was filed in April 1862 against Kinnaird (the trustee of the earl's will), and against Henry Savile, the tenant for life, for the specific performance of the contract, or, in default, for damages.

Mr. Selwyn and Mr. M. A. Shee, for the Plaintiff, argued that there was a clear written contract, and they [347] asked for its specific performance, with an indemnity against the charge of £15,000 or for compensation. But if that relief could not be given, they then asked for a reference as to damages under Sir Hugh Cairns' Act (21 & 22 Vict. c. 27).

Mr. Baggallay and Mr. Chapman Barber, for Kinnaird, argued, first, that no binding contract had been entered into which could have been enforced against the earl in his lifetime or against the trustees; *Thomas v. Dering* (1 Keen, 729); *Graham v. Olive* (3 Beav. 124); and that it could not now be enforced. That the Court could not give the purchaser an indemnity against the charge or a compensation unless it had been contracted for; *Balmanno v. Lumley* (1 Ves. & B. 225); *Aylett v. Ashton* (1 Myl. & Cr. 105); *Paton v. Brebner* (1 Bli. (O. S.) 66). That the utmost relief would be, to direct a conveyance by the devisee in trust, without any compensation or indemnity.

Mr. Haynes, for the tenant for life, as to the Plaintiff's right to damages, cited *Sikes v. Wild* (1 Best & Smith (Q. B.), 587); *Walker v. Moore* (10 Barn. & C. 416); *Sugden's Vendors* (p. 358 (14th edit.)).

Mr. Shee, in reply, said the Plaintiff, if compelled, was willing to take a conveyance of such estate as he could get from the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. If the Plaintiff will give up the indemnity I am of opinion that he is entitled to a conveyance. I will look [348] into the question of indemnity, but I think it is not a case for compensation. A perfectly good contract is constituted by the letters, which bound the Earl of Scarborough and his estate, and consequently, the Plaintiff, being willing to take the property, is entitled to a specific performance of it, and to a conveyance from Mr. Kinnaird of all that he can convey as devisee in trust. I will consider the question of indemnity.

April 22. THE MASTER OF THE ROLLS [Sir John Romilly]. I can only give the Plaintiff a simple decree for specific performance, I cannot compel the Defendants to enter into any indemnity, for the cases cited are conclusive. It is clear that the trustee and the legal personal representatives cannot stand in any worse situation than the Earl of Scarborough, and if he were living and had received the whole purchase-money, I could not have compelled him to give an indemnity, and I cannot, therefore, make his trustee and the tenant for life give any.

I will make a decree for the specific performance of the contract, and direct a conveyance to be settled in Chambers, if the parties differ, and the Plaintiff must have his costs. However, in settling the conveyance, I shall not require the Defendant to give any indemnity or compensation. My impression is, that the Plaintiff will get a safe title and that the £15,000 will never be raised out of this property.

[349] COATES v. HART. March 14, 1863.

[S.C. on appeal, 3 De G. J. & S. 504 ; 46 E. R. 731. See *In re Hudson*, 1882, 20 Ch. D. 414.]

A testator gave to each of four persons, when and as they respectively attained twenty-one, one fourth of his residue for life, and in case either of them "should happen to die under the age of twenty-one years *and* without leaving lawful issue," then he gave his share to the survivors for life. And from and after the decease of either of the legatees leaving lawful issue surviving, he bequeathed his share to such issue. And if all four legatees should die without leaving lawful issue, there was a gift over. One of the legatees attained twenty-one and died without issue. Held, that her share was undisposed of, the Court being of opinion that "and" could not be read "or."

The testator directed his estate, property and effects to be converted and invested in the funds, "and when and as" Georgiana Legge, Emma Legge, John F. Pott and Frederick Pott severally attained their respective ages of twenty-one, he gave to each of them one-fourth of the interest of such funds, for their several lives. He proceeded thus :—

"And in case it shall happen, that either of them the said Georgiana Legge and Emma Legge, John F. Pott and Frederick W. Pott shall *happen to die under the age of twenty-one, and without leaving lawful issue*, then I give and bequeath the interest and dividends to which such deceased legatee was entitled to the survivors or survivor of them, for her, his and their several and respective lives, to be paid to her, him and them in manner aforesaid. And from and after the decease of either of the said four legatees, leaving lawful issue her or him surviving, then I give and bequeath the principal money in the said stocks or funds, to the interest whereof such deceased legatee had been entitled in her or his lifetime, unto, amongst and between such issue, in equal shares and proportions, share and share alike, if more than one, and if but one, then to such only child, for his or her absolute use and benefit. And I also give to such issue the share and interest of the principal money to the interest whereof their deceased parent would have been entitled in case he or she had [350] lived to survive any other of the said four legatees who shall afterwards die without issue."

"And in case it should happen that *all* the said four legatees Georgiana Legge, Emma Legge, John F. Pott and F. William Pott the younger shall *die without either of them leaving lawful issue*, then I give and bequeath the whole of my said residuary estate and property to Emma Coates and Frederick William Pott the elder in equal shares."

The events which happened were as follows :—

The testator died in 1830, and Emma Legge died in his lifetime, an infant and unmarried.

Georgiana Legge attained twenty-one in 1840, she married and afterwards died in 1862, without leaving lawful issue.

John F. Pott and Frederick W. Pott were still living and had children.

John F. and Frederick Pott claimed to be entitled, for their lives, to the share of Georgiana.

The next of kin of the testator contended, that Georgiana having attained twenty-one and died without issue, her share was undisposed of.

Mr. Bagallay, for the petitioners, the trustees.

Mr. Hobhouse and Mr. Forster, for the next of kin, contended for the literal construction of the words "shall happen to die under the age of twenty-one years *and* without leaving lawful issue." They argued that the modern authorities shewed that words of a will were [351] to be construed strictly ; *Brownsword v. Edwards* (2 Ves. sen. 249) ; *Grey v. Pearson* (6 H. of L. Cas. 61) ; *Seccombe v. Edwards* (28 Beav. 440) ; *Day v. Day* (Kay, 703). That here, if the word "and" was to be read "or," the effect would be to defeat the right of the issue of any of the four legatees who died at the age of twenty leaving issue. That far from effectuating the intention, the

conversion of the words of the will would defeat it. That you must either read the words strictly, or strike out "under the age of twenty-one years."

Mr. Wickens, for the Crown. There is a clear intestacy if the will be read in such a manner as to give to all the words their ordinary meaning, but no alteration will make the will consistent.

Mr. Southgate and Mr. H. Stevens, for John F. Pott and his two children. The share is given over in either of two events. The gift of the four was "as and when" they attained twenty-one, but if any of them died under that age, his share was (subject to the rights of the issue) to go to the survivors. So if any of them died without leaving issue, the survivors were to take his share. But this case does not depend on the change of the word "and" into "or," the expression *survivors* meant *others*, and there were cross-remainders between the families. The whole residue is to go over, in mass, if all four "shall die without either of them leaving lawful issue." This shews an intention to keep the fund together until the death of the last survivor, and strengthens the construction that the survivors should take the share of those who predecease them, leaving no issue. There is also a gift over to the issue of the share which their deceased parent would have been entitled to in case he had survived any other of the [352] four legatees who should afterwards die without issue. They referred to *Abbot v. Middleton* (21 Beav. 143, and 7 H. of L. Cas. 88); *In re Keep's Will* (*ante*, p. 122); *Wilmot v. Wilmot* (8 Ves. 10); *Douglas v. Andrews* (14 Beav. 347.)

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot get over the express words of this will, though I have no doubt that there is some omission in it. I cannot read the word "and" as "or," for the express purpose of meeting the case which has occurred, for, by so doing, I should put two parts of the will in direct opposition, and if so, when the two parts of a will wholly contradict each other, the Court follows the last; this is, however, a mere arbitrary rule.

If I held "and" to mean "or," then under a different state of circumstances, I should have to determine that "or" ought to be treated as "and," and thus make these two words convertible at the pleasure of the Court, according to the events which might have occurred. But *Grey v. Pearson* (6 H. of L. Cas. 61) decides that I must read words as I find them. I do not say that the words of a will can never be controlled by the obvious general intention, for I acted on the contrary principle in *Abbott v. Middleton* (21 Beav. 143), and should do so again, but this can only be done where the intention of the testator is clear, and where the alteration makes the whole will consistent and effective. Here I should get over one difficulty only to fall into another, and therefore, independently of the principle laid down in *Grey v. Pearson*, I cannot in this will turn the word "and" into "or."

I am of opinion that there is an intestacy in this case.

[353] LECHMERE v. BROTHERIDGE. May 1, 27, 29, 1863.

[S. C. 32 L. J. Ch. 577; 9 Jur. (N. S.) 705; 11 W. R. 814; 2 N. R. 219.
Overruled, *Taylor v. Meads*, 1865, 13 W. R. 394.]

Where a wife has an estate for life in freeholds for her separate use, she can alienate that estate without any acknowledgment under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74).

But a married woman cannot dispose of her fee-simple lands settled to her separate use, except by deed duly acknowledged under the Fines and Recoveries Act.

With respect to personal property, whether vested or contingent, settled to the separate use of a *feme covert*, she may deal with it as a *feme sole*, and either sell or encumber it.

Money settled to the separate use of a married woman is paid out of Court without any personal examination.

The question was, whether the real estate of a married woman, which was settled to her separate use, had been validly conveyed away by her by a deed executed by

her, but which she had not acknowledged according to the formalities required by the Statute for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74).

John Parker made his will in 1854, by which he devised his Ashchurch estate to three trustees, in trust for Mrs. Brotheridge for her separate use for life, and after her decease in trust for her husband for life, and after the decease of the survivor for their children as tenants in common in fee. There was no proviso preventing Mrs. Brotheridge from anticipating her income. In addition to this, the testator, by the same will, gave the residue of his real and personal estate to the same trustees and executors, upon trust to pay annuities of £10 each to Mrs. Brotheridge and certain other persons during the life of George Parker and Ann his wife and the life of the survivor, and after the decease of the survivor (with the exception of two messuages) upon trust for Mrs. Brotheridge and two other persons, their heirs, executors, &c., in equal shares. But if any one of them three died without leaving issue before the period of division, his or her share was to go to the survivors or survivor; and if the one died and left issue, then the issue were to take their parents' share. The testator directed that the share of Mrs. Brotheridge was to be for her sole and [354] separate use; but there was no clause against her anticipating the income.

The testator died in 1855.

In 1856 Mr. Brotheridge had become largely indebted to Messrs. Lechmere, his bankers, and he and his wife gave to them the following security.

By an indenture dated the 17th of December 1856, and made between Mr. and Mrs. Brotheridge of the first part, and Messrs. Lechmere, of the second part, the former granted and assigned to the latter, their heirs, executors, administrators and assigns—first, the life interest in the Ashchurch estate; secondly, the annuity of £10 to which Mrs. Brotheridge was entitled under the will, and, thirdly, all the undivided one-third part and all other the share, whether vested or contingent, of Mrs. Brotheridge, or of the Defendant her husband in her right, in the residue of the real and personal estate of the testator, in trust to sell and pay the expenses, and, out of the remainder, to pay the debt due to the Plaintiffs on the balance of their account, with a proviso that the principal sum to be recoverable by the security should not exceed £1000.

This deed had never been acknowledged by Mrs. Brotheridge under the Act for the Abolition of Fines and Recoveries (2 & 3 Will. 4, c. 74, ss. 77 to 91).

Ann Parker was still living.

This suit was instituted in 1862 by Messrs. Lechmere against Mr. and Mrs. Brotheridge and the three trustees, praying for a sale of the property and payment to them of the amount due on their security.

[355] Mrs. Brotheridge insisted, first, that the deed was invalid as against her, it not having been acknowledged by her under the statute (3 & 4 Will. 4, c. 74), and, secondly, that it had been executed by her under undue influence and by compulsion.

Mr. Selwyn and Mr. Wickens, for the Plaintiffs. That part of the Fines and Recoveries Act (3 & 4 Will. 4, c. 74, s. 77), which requires certain formalities in regard to married women, has no application to an estate settled to the separate use of a *feme covert*, who can dispose of her separate real estate without any acknowledgment of the deed. This must follow from the doctrine that a *feme covert* is, as regards her separate estate, in the position of a *feme sole*. She must, therefore, have all the incidents of an ownership as a *feme sole*, and amongst them the right of disposing of her separate estate in the same mode. If it be held that she is bound to acknowledge the deed under the 77th section, the concurrence of her husband in the deed would become necessary; so that the disposition by a wife of her separate estate would be dependent on his will, and thus property, over which the husband is to have no control, will be placed within his power. It was at one time doubted, whether a *feme covert* could devise her separate real estate; but Lord Justice Turner, in *Atchison v. Le Mann* (23 L. T. 302), expressed his clear opinion that she could. Having, in that case, decided that the wife had a legal power to devise, he says (p. 303), "It is not, therefore, as I think, necessary for us to decide the point, which was so much argued at the Bar, whether Jane Embleton Watkins could, by will, have devised the estate under a limitation in fee to her for her separate use without any superadded power of appointment; but I am very [356] strongly inclined to think

that she could have done so, and, as at present advised, I should so decide the point, if it were necessary to decide it. It being settled that an estate in fee may be limited to the separate use of a married woman, thus giving her an absolute ownership, she must, I think, have all the rights of disposition which are incident to the ownership. The agreement of a married woman cannot bind her personal, but can bind her real, estate settled to her separate use; according to the cases of *Stead v. Clay* (1 Sim. 294) and *Wainwright v. Hardesty* (2 Beav. 365), upon what principle is her real estate so settled to be bound by her agreement, and not to be bound by her testamentary disposition?"

If, therefore, she has the power of disinheriting her heir by testament, *a fortiori* can she do so by a deed *inter vivos*.

But the point now before the Court has been expressly decided in Ireland. In *Adams v. Gamble* (11 Irish Ch. Rep. 269, and 12 Irish Ch. Rep. 102), it was held that a married woman could dispose of freeholds settled to her separate use by a deed not acknowledged under the Fines and Recoveries Act.

Again, in *Minot v. Eaton* (4 L. J. (O. S.) Ch. 134), a married woman, having a contingent fee to her separate use, executed a deed, by which she mortgaged it, and the question was, whether the estate given to her could be conveyed by lease and release executed by her and her husband without fine. Sir John Leach held it could, saying, "This lady, having an equitable fee to her separate use, could make a good tenant to the *præcipe* by lease and release; and she could well dispose of her [357] equitable fee without fine. My present opinion, therefore, is, that Mrs. Prentis has well conveyed the equitable fee which she had to her separate use." He took time to consider the question, and, remaining of the same opinion, made a decree for the Plaintiffs.

On the second question, no improper influence was exercised, the Plaintiffs at least were not parties to any, and they cannot therefore be affected by it; *Bentley v. Mackay* (31 Beav. 143).

Mr. F. C. Miller, for the trustees.

Mr. W. Forster, for Mrs. Brotheridge. First, this deed was executed under undue influence and pressure, and effect ought not to be given to it.

Secondly, no valid conveyance of her real estate has been executed. To pass her real estate, the statute 3 & 4 Will. 4, c. 74, requires that a *feme covert* shall acknowledge every deed disposing of it (sect. 79) before a Judge, in the form and manner pointed out by the Act, and no disposition is to be "valid and effectual" unless the deed be so acknowledged. In the 77th section, which empowers a married woman to dispose of any estate in land "*which she alone* or she and her husband in her right may have," the words "*which she alone*" can only refer to her separate estate in lands. These, therefore, are included in the Act. The object of the limitation to her separate use is, to protect her from her husband, and not to extend her power of disposition; *Harris v. Mott* (14 Beav. 170). The separate examination and the acknowledgment that she freely and voluntarily con-[358]-sents to the deed, and the other formalities required by the Fines and Recoveries Act, were intended for the protection of a married woman, and the separate use has the same object; but if the Plaintiffs' contention were to prevail, the real protection intended by the Legislature will be wholly destroyed by the unavailing protection afforded by the Court under the separate use clause. He also relied on *Peacock v. Monk* (2 Ves. sen. 190); *Field v. Moore* (19 Beav. 176; 7 De G. M. & G. 691); *Churchill v. Dibben* (9 Sim. 447, n.); *Crofts v. Middleton* (8 De G. M. & G. 192; 2 Kay & J. 194); *Blachford v. Woolley* (32 L. J. (Ch.) 534); *Sanders on Uses* (vol. 1, p. 380 (5th edit.)); *Roper's Husband and Wife* (vol. 2, p. 183 (2d edit.), c. 19, s. 2).

May 27. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this cause was, whether the real estate of the wife settled to her separate use was conveyed away by her without any acknowledgment under the statute.

The property was derived by her under the will of John Parker, the effect of which is, that in the Ashchurch property Mrs. Brotheridge took an estate for life for her separate use, and she also took an absolute reversionary interest in one undivided third part of the residue, both real and personal, subject to the life-estate of Mr. Parker and his wife, and this interest the testator directed to be held for the separate

use of Mrs. Brotheridge; but the will contains no clause against her anticipating the income.

The testator died in 1855, and in 1856 Mr. and Mrs. Brotheridge executed a security to the Plaintiffs, who [359] now desire to realize it. The trustees, in whom the legal estate is vested, decline to take any step in the matter, except under the direction of the Court.

The defence set up on the part of Mrs. Brotheridge is, first, that the deed was not duly acknowledged by her under the 77th section of the statute 3 & 4 Will. 4, c. 74. Secondly, that the deed was executed by her under compulsion, and without the contents and effect of it being properly explained to her.

The second point of defence I deal with first. This may be disposed of very summarily; the evidence shews that the deed was properly explained to her, and although she states, I have no doubt correctly, that the deed was executed under the pressure put upon her by her husband, yet as no part of this pressure proceeded from the Plaintiffs, and as moreover no suit is brought to cancel or correct the deed, it is impossible that this defence can be sustained in this suit as against the Plaintiffs.

The other defence is, that the deed in question was not acknowledged by the wife. This is a very different matter and requires a much more careful consideration. The words of the section are these, "It shall be lawful for every married woman in every case, except that of being tenant in tail" . . . "to dispose of land of any tenure," . . . "and also to dispose of, release, surrender or extinguish any estate, which she alone or she and her husband in her right may have in any lands, of any tenure, as effectually as she could do if she were a *feme sole*." It then provides that no such disposition shall be valid unless her husband concurs in the deed, nor "unless the deed be acknowledged by her as hereinafter directed."

[360] It is argued that the words "*she alone*" must extend to all property of the wife, and that this section was intended merely to substitute the acknowledgment of a married woman for a fine, and that before the Act a fine would have been necessary. On the other side it is argued, very forcibly, that the estate for the separate use of a married woman, which (though a mere creation of equity) is a recognized and admitted estate, constitutes the married woman a *feme sole*, as regards that property to all intents and purposes, and that the right of alienation of it is necessarily incidental to that estate; and the cases of *Adams v. Gamble* (12 Irish Ch. Rep. 102) and *Atchison v. Le Mann* (23 L. T. 302), are cited for the purpose of establishing that the statute does not relate or apply to the separate property of the wife. It is undoubtedly true that the Courts of Equity, which require the consent in person of a married woman in order to enable a sum of money belonging to her to be paid out of Court to her husband, does not require such consent to be given when the money has been settled to the separate use of the wife, although it is obvious that, morally speaking, the consent is (in fact) as necessary in one case as in the other. (See *Sturgis v. Cook*, 13 Ves. 190; *Gullam v. Tourbey*, 2 Jac. & W. 457, n.; *Howard v. Damiani*, *ib.* 458, n.) Some obscurity, however, is produced, by assuming that if the principle applied to one species of property of the wife it applies to all, and I consider it, therefore, necessary to distinguish between the different species of property in this case, and to consider how the principles to be gathered from the reported decisions affect each of them.

In the first place I am of opinion, not only upon all the authorities, but also upon the principle on which the [361] estate for the separate use of the wife rests, that where the wife has an estate for life for her separate use in freehold hereditaments, she can alien that life-estate without any acknowledgment under the statute referred to, and that no fine was necessary for that purpose previously to the passing of that Act. I think that both the decided cases and the opinions of text-writers concur in this matter, and the principle to which I am about to refer, in considering the third question, explains the view I take. I am, therefore, of opinion that the Defendants, the trustees, will be bound to account for the rents of the Ashchurch estate to any person who may become the purchaser thereof under a sale to be made by the Plaintiffs. The legal estate is in the trustees, and although it is not their duty to convey the legal estate to a purchaser, it is the duty of the trustees, in my opinion, to give to the purchaser of such life-estate of Mrs. Brotheridge exactly the same facilities for taking

and receiving the rents of the Ashchurch property as they have given to her. The purchaser, in fact, will be exactly in her place, entitled to all the same rights and subject to the same liabilities.

The next property assigned is the annuity of £10 per annum during the joint lives of Mrs. Brotheridge and the survivor of the Defendant Mr. Parker and of his wife. This annuity is not given to the separate use of Mrs. Brotheridge, if the will be correctly set forth in the pleadings, consequently the deed does not bind the reversion in this property, and the trustees, therefore, are bound to pay this annuity to the purchaser under the deed of 1856, during the joint lives of Mr. and Mrs. Brotheridge only, liable, however, to its wholly ceasing on the death of the survivor of Mr. and Mrs. Parker before that period.

[362] The third property assigned is the one-third of the residue of the real and personal property, subject to a possible contingent accruer, by the death without leaving issue of either or both of the other residuary devisees before the decease of the survivor of Mr. and Mrs. Parker. This is given to the separate use of Mrs. Brotheridge, and this requires to be considered, first, as regards the real estate, and next as regards the personal estate.

First, as regards the real estate, this is given to Mrs. Brotheridge in fee for her separate use. It does not at present appear to me, for the purpose for which I am now considering this question, that it is a matter of much moment that the interest of Mrs. Brotheridge is reversionary, what I have to consider is, whether the words "separate use," as applied to a devise of freehold hereditaments to a married woman in fee-simple, have such an effect as to give her a different quality of estate, in the contemplation of equity, as to the manner in which she may alien the same, from that which she would take in the same lands if these words "to her separate use" were omitted.

Upon the best consideration I have been able to give to the subject, I think that, in such a devise, the words "separate use" have, as regards the alienation of the inheritance of the property, no such practical effect, and that if a married woman attempted before the statute to dispose of such lands, she must have levied a fine for that purpose, and that since the statute, an acknowledgment under the 77th sect. is equally necessary. When I endeavour to attach a meaning to the words "*separate use*" as applicable to the fee-simple estate of a married woman, I find much difficulty in doing so, if they go further than to bar the interest in the real estate of the wife, which, without such words, the husband would [363] have taken. These words, in other cases, are meant to bar the interest of the husband; that interest, in the cases of the fee-simple estate of a married woman, consists in the receipt by him of the rents of the property during their joint lives, and also during his life, as tenant by the curtesy, if they had a child.

It seems to be decided by the case of *Baggett v. Meux* (1 Colly. 138, and 1 Phil. 627), that the addition of the words "without power of anticipation" (which as applied to a life-estate of a married woman in lands are intelligible and pertinent) can be also applied to the absolute interest of married woman in land, so as to prevent her from selling or mortgaging the property. If this proposition be correct, which seems to be placed in some doubt by the late case of *Blachford v. Woolley* (11 W. R. 478), then it is obvious that a gift of land in fee-simple to a married woman, for her separate use, with a restraint against anticipation, is merely another way of giving her a life-estate for her separate use without power of anticipating the rents; for if she cannot alien, her interest would be confined to this, except that the words "*separate use*," according to *Atchison v. Le Mann* (23 L. T. 303), involve this:—That the wife is to be at liberty to dispose of the land by will in any way she may think proper, without the concurrence of her husband. But it seems strange that if the power to devise it is included, the power to alienate by deed is not also included; nor is it easy to understand how the restraint upon anticipation can be properly applicable to such an estate, except that the whole doctrine of separate estate and its union with a restraint against anticipation is altogether anomalous.

[364] It is laid down by Lord Justice Turner in *Atchison v. Le Mann*, that a married woman may dispose, by will, of land given to her for her separate use during coverture, though the devise or grant to her contained no power for that purpose.

This is undoubtedly an important decision, and was strongly relied upon before me, and if it be settled that where property is given absolutely to a married woman the mere addition of the words "*for her separate use*" will necessarily imply a power to dispose of it by will, it has a strong bearing on the case before me, although by no means decisive. It was not, however, necessary to decide that point in the case I have referred to; but, assuming it to be so decided, the contention here advanced goes far beyond this, for the contention here is, not only that she may dispose of the land by will, but that she may do so by sale or grant; and that, not only without the concurrence of her husband, but that she may also do so without the forms expressly imposed by the statute. In other words, the contention here is, that the words *separate use*, as regards the alienation *inter vivos*, have this and no other meaning than this: "I give my estate to A. and her heirs for ever, for her separate use; and I do so in order to enable her to dispose of it without any acknowledgment under the statute." But I think that it is not in the power of any testator to avoid this statute by the introduction of such words, any more than he could have done if he had expressed his meaning distinctly thus:—"I leave Whitesacre to A. and her heirs for ever, and I declare, that my intention is, that she may dispose of the same without fine or acknowledgment under the statute of 3 & 4 Will. 4, c. 74."

The common law of the land, in fact, independently of equity, treats the wife as the separate owner of the land, so far as the inheritance in it is concerned. This [365] does not pass to her husband, and the common law provides a mode by which she may dispose of this, which is her separate interest in her land, in the lifetime of her husband, viz.—by fine or recovery and not otherwise. For this common law conveyance, the statute substitutes an acknowledgment before a constituted officer. How can a testator or grantor repeal this Act, and also stay the operation of the common law, by the introduction of the words "*separate use*?" The effect of these words, I think, is confined to this, viz.—they apply to and bar the husband from receiving what, without such words he would have received, viz.—the rents of the property during the life of the wife, and also during his tenancy by curtesy, in case he had a child by her; but how can these words "*separate use*" add anything to what is her own, separately and distinct from her husband, or how can they add anything in order to enable her to dispose of what was her separate property without such words, viz.—the inheritance in the land, and to do this in a different way to what she could have done before the statute. In other words, I cannot understand how these words can have the magical effect of repealing the express words in the clause of the statute.

I state it again in a different way:—A devise of lands is made to a married woman in fee, without any additional words. This gives a portion of the usufruct of that land to her husband, and leaves the rest in her. What is the husband's he can dispose of without her consent; he can sell the rents for the joint lives of both and also during his own estate by curtesy, but he cannot touch anything beyond this; to do that, a conveyance from the wife has always been and is necessary. It is her separate property by common law, the mode by which she conveyed it was by fine or recovery before the Act [366] passed, and since the Act by acknowledgment under the 77th section. Then take the next step:—A devise of these same lands is made to the married woman in fee, superadding the words "*for her separate use*." These words are confined to barring the husband's interest and giving his interest in the lands to the wife, but how can these words alter the estate of the wife in that portion of the property which never went to the husband at any time, and over which he never could have had any control?

This is how it strikes me on principle, but it remains necessary to consider the authorities. The cases cited and relied on by the Plaintiffs for this part of their argument are principally two, viz., *Atchison v. Le Mann* (23 L. T. 302), and *Adams v. Gamble* (12 Irish Ch. Rep. 102).

The former of these cases does not, I think, govern this question. The only question there was, whether the wife had an estate for life with a power of disposing of it by will, or whether she took an estate in fee-simple in the lands. The Vice-Chancellor Wood and the Court of Appeal both held that she took an estate for life with a power of disposing of it by will, and that she had so disposed of it in favour

of her son, through whom the Defendant claimed. The question did not and could not arise in that case; it is, in fact, principally cited for the *dictum* of the Lord Justice Turner to which I have already referred, but respecting which, as it does not arise in this case, and cannot in my opinion influence the decision, I shall abstain from expressing any further opinion.

In the second case the facts were these:—The testator devised a real estate to his daughter, a married [367] woman, in fee, “reserving it in her own power from any husband.” The daughter while under coverture conveyed the estate by a deed, which was not acknowledged under the Fines and Recoveries Act, and after her death, the validity of that deed was contested by her heir at law. That case, therefore, expressly raises the point before me, and as expressly decides it in favour of the Plaintiff and contrary to the opinion I have expressed. I have carefully read and considered that case, but I am unable to concur with the two learned Judges who dissented from the Lord Chancellor on that occasion. If the decision had been unanimous, I should not have ventured to differ from it, but as the Lord Chancellor, on reflection, adhered to his previous opinion (see 11 Ir. Ch. Rep. 44, 269), the case cannot possess that weight it would otherwise have had.

The distinction I have endeavoured to point out, that the words “*separate use*” only apply to what the husband would have taken without the use of these words, does not appear to me to have been sufficiently present to the minds of the learned Judges who dissented from the Lord Chancellor on that occasion. *Baggett v. Meux* (1 Colly. 138, and 1 Phil. 627) was then referred to and relied upon; but that case seems merely to decide that the restraint against anticipation, or rather a prohibition against parting with or disposing of her estate, may be applied to the fee-simple of the married woman given to her separate use. The other case relied upon (*Mayor v. Lansley* (2 Russ. & Myl. 355)) is an instance of the alienation of the life-estate in a rent charge of a married woman given to her separate use.

The point certainly is not one without difficulty, but when I consider the authorities treating on this matter, [368] referred to on the other side, beginning with *Peacock v. Monk* (2 Ves. sen. 190), although not bearing distinctly on the exact point before me, I am of opinion that I am compelled to choose between conflicting authorities, and that the preponderance, both in principle and authority, establishes that before the 3 & 4 Will. 4, c. 76, a fine was necessary to pass the interest of a married woman in that part of the fee-simple estate which did not belong to her husband, and that since that statute an acknowledgment under the 77th section is still necessary for that purpose, notwithstanding the addition of the words that the estate of the wife is “*for her separate use*.”

It is to be observed that the property is reversionary; I doubt whether this affects the case, but if it produce any effect, it only increases the difficulty I have felt in giving to the words “*separate use*” the effect contended for by the Plaintiffs. It is manifest that but for these words *separate use* in the testator’s will, the deed of 1836 would merely amount to a covenant by the husband and wife, that the wife should make the acknowledgment required by the statute when the estate fell into possession, which would in no respect bind the wife. But in fact this leaves the question where it was, viz., whether, when the words “*separate use*” are used, the statute is made nugatory, and the wife enabled irrevocably to convey her reversionary fee-simple estate without any acknowledgment.

I am of opinion that the words of the 77th clause are applicable to this estate in fee-simple, though given for her *separate use*. I think, on principle, that before the statute a fine would have been necessary for this purpose, and I have met with no cases which lay down [369] a contrary doctrine. I am of opinion, therefore, that the deed of December 1856 does not affect the reversionary estate in fee-simple of Mrs. Brotheridge.

I come now to consider how it operates on that portion of the residue given to Mrs. Brotheridge which consists of personalty. With reference to this, the statute has no application, and it has undoubtedly been repeatedly held by the Court of Chancery, and it is the constant practice, to allow a married woman to deal with a money legacy given to her absolutely *for her separate use* as her own, that is, her receipt alone is all that is necessary for the protection of the executors, and her

application to this Court to have the money paid to her or to anyone she may direct is always complied with, without any examination or ascertainment of her unbiassed wish that this should be done. I cannot, in respect of personal property, make any distinction between that which is immediately receivable and that which is reversionary. If it be her property as a *feme sole*, she may deal with it as a *feme sole*, and sell or incur it as she pleases. The words "*separate use*" here exclude the marital right from attaching to any portion of the property, whether he survives the tenant for life or not. Accordingly, as to all the residue of the personalty coming to her, whether vested or contingent, I am of opinion that it is bound by the deed, and will pass to anyone who may buy it from the Plaintiffs, and that the trustees, the Defendants, will be trustees of that one-third, for the benefit of such purchaser and his assigns when the same may fall in.

I will make a decree declaring the right according to my decision.

NOTE.—See *Bestall v. Bunbury*, 13 Irish C. Rep. 318.

[370] WILLIAMS v. WILLIAMS. Feb. 18, 19, March 19, 1863.

When a father purchases in the name of his child, his declarations of intention contemporaneous with the transaction itself are alone admissible to prove a trust. Parol evidence is admissible to prove that lands were purchased by a father in the name of his child not as an advancement but as a trustee. Purchases and mortgages were taken by a father in the name of his son. The father received the rents and interest and paid them into a bank, but he allowed his son to draw for the sums he required. The son died first. Held, that the presumption of an advancement was not rebutted.

The facts of the case are fully stated in the judgment, and need not be repeated.

Mr. Selwyn and Mr. G. Whitbread, for the Plaintiff.

Mr. Lloyd, Mr. Nalder and Mr. Everett, for the Defendants.

Murless v. Franklin (1 Swanst. 13); *Bone v. Pollard* (24 Beav. 283); *Dumper v. Dumper* (3 Giff. 583); *Sidmouth v. Sidmouth* (2 Beav. 447); 29 Car. 2, c. 3, s. 7, were cited.

THE MASTER OF THE ROLLS. I am satisfied that parol evidence is admissible, even though the subject be real estate. I will consider the case.

March 19. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this cause is, whether certain purchases made by the father in the name of his son, who had since died, were intended to be advancements for the benefit of his son, or whether the son was a trustee of them for his father.

The various transactions are these:—In December 1855 the Plaintiff, who is an auctioneer and cattle [371] dealer in the county of Carmarthen, lent £1600 to a Mr. Evan Evans, on the security of an estate in the parish of Llangranog. The mortgage was, by his direction, made out in the name of the son Thomas Williams the younger, as the mortgagee, and the property conveyed to him accordingly.

In February 1856 the Plaintiff lent £600 on the security of an estate in Llandingat, called the Baileyglaes estate, and the mortgage was made in the name of his son as the mortgagee, and the property conveyed to him accordingly, for a term of ninety-nine years to secure the amount.

In the same year the Plaintiff laid out £645 in the purchase of an estate called Gilwenfach, and in the conveyance the money was expressed to be paid by the son and the conveyance made to him in fee.

In October 1855 the Plaintiff lent £605 on the security of a messuage called the Black Swan, to two persons of the name of David and Thomas Jones, who signed a receipt for the amount and an undertaking that, as the money had been paid by the son of the Plaintiff, they would assign the mortgage deeds to the son or as he should appoint. In all these cases, the form of the transaction which represented the son as the lender of the money or the purchaser of the estate was sanctioned by the direction of the father.

In 1860 the Plaintiff laid out the sum of £1230 in the purchase of an estate called Pentwyn, in the county of Carmarthen, and the deed of conveyance, which was executed on the 1st October 1860, expressed that the consideration money had been paid by the Plaintiff's son, and the conveyance was to him in fee. [372] In this case there is a conflict in the evidence as to whether the father sanctioned the form of the conveyance to his son in fee.

On the 9th of October 1860 the son died and left a widow and five infant children. On the day of his death he executed a will, by which he left the Pentwyn estate to his son William Williams in fee. He gave the interest of the mortgage of the Black Swan to his wife, for the maintenance of herself and her children during her life, and after her death he directed the principal to be divided amongst his five children equally. He bequeathed the Baileyglæs mortgage in like manner. And he gave all the residue of his real and personal estate, subject to the payment of his debts, funeral and testamentary expenses, to be equally divided between his wife and his five children, and he appointed his wife and eldest son executors of his will.

The question is, whether these three mortgages and two estates belong to the estate of Thomas Williams the younger, deceased, or whether they belong to the Plaintiff, the legal estate in them only having been vested in his son, which has descended on the infant Defendant William Williams.

This is solely a question of intention, it depends upon what the intention of the Plaintiff was when he made these purchases and these advances on mortgage, not what his intention now is. Each case also must be taken separately, and it must be ascertained what his intentions were, on the occasion of each separate transaction, by the evidence accompanying and contemporaneous with the transaction itself. The first and most important matter is this:—It is established that, in all the first three cases, the conveyance, and in the [373] fourth case the memorandum, was made out in the name of the son, with the knowledge and assent and direction of the father, the Plaintiff; on this I think the evidence distinct. On the last, namely, the purchase of Pentwyn, which took place only nine days before the son's death, the Plaintiff asserts that it was conveyed to his son without his authority or direction. This, therefore, will require to be more closely examined by the evidence.

It is clearly established that the money was the father's. It is also, I think, established that the father received the rents of the estates and the interest of the mortgages, for, though they were paid into a bank where, by the father's direction, the son's cheques were honoured, still I think the father had the control over the whole fund, and could at any time have stopped the son's drawing.

The other facts established by the evidence which bear on the subject are to this effect:—That the father had, in a great measure, retired from business; that he took out a licence as an auctioneer for his son, and that his son assisted him throughout in carrying on his business. If there were no further evidence in the case than that which I have above stated, and it stood alone on these facts, it would not, I think, constitute the son a trustee for the father.

But there is additional and important evidence which it is essential to examine very accurately, bearing always in mind that the contemporaneous evidence of the transaction is that which alone can be relied upon, and that I must examine this case very much as I should have done if the contest had arisen, after the death of both, between the devisees of the father and the present De-[374]-fendants, instead of being, as it is, a contest between the Plaintiff and the present Defendants.

I think myself, therefore, bound to reject from consideration all that portion of the evidence of the father now as to what his intentions were before. The decided cases shew that his present declaration to that effect could not have been regarded after his decease to create a trust in the son, and I consider myself equally bound to disregard them now, although he is alive. On such occasions the declaration to that effect by the father must be contemporaneous with the event itself.

I come, therefore, to consider the evidence adduced by the Plaintiff to establish that these transactions constituted trusts in the son and not advancement to him. The first fact brought forward is a letter of the son to the mortgagor; but I do not find anything in this letter that indicates a trust in the son. That the money was the money of the father is, of course, admitted; unless it were so, the question could

not arise; but this letter looks to me as if the son considered that he had an interest in the matter, whether as joint owner with his father or not is not clear, but he talks of "paying us off." In the case of the mortgage of the property at Llangranog, two gentlemen, one of whom is the solicitor of the mortgagor and the other the solicitor of the Plaintiff, state that though he gave directions to have the mortgage made out in the name of his son, he said that his son should hold the property in trust for him. Mr. Lloyd very properly suggested that this should be accomplished by a deed or written declaration of trust, which the Plaintiff declined. There are also two letters written by the son in the Plaintiff's exhibits. The first is the 3d of November 1859 to the Rev. [375] E. Evans, mortgagor of the Llangranog, and the second is to Mr. Lloyd, the solicitor of Mr. Evans.

The rest of the evidence does not appear to bear on the question before me, it simply shews that the son managed the property for his father, that the money was the father's, that he received the rents and allowed his son to draw on the bank for the sums he required. There are also some acts of ownership, as notices to tenants and the like, which were necessarily made in the name of the Plaintiff's son. The principles of law to be applied to these facts appear to me to be admirably laid down in the judgment in the case of *Grey v. Grey* (2 Swanst. App. 597). I cannot better explain my meaning than by reading the parts of that judgment which, in my opinion, govern this case:—

"Generally and *prima facie*, as they say, a purchase in the name of a stranger is a trust for want of a consideration, but a purchase in the name of a son is no trust, for the consideration is apparent. 2. But yet it may be a trust, if it be so declared antecedently or subsequently under the hand and seal of both parties. 3. Nay, it may be a trust if it be so declared by parol, and both parties uniformly concur in that declaration. 4. The parol declarations in this case are both ways, the father and son sometimes declaring for and sometimes against themselves. 5. *Ergo*, there being no certain proof to rest on as to parol declarations, the matter is left to construction and interpretation of law. 6. And herein the great question is, whether the law will admit of any constructive trust at all between father and son. 1st. For the natural consideration of blood and affection is so apparently predominant that those acts which would imply a trust in a stranger will [376] not do so in a son; and *ergo*, the father who would check and control the appearance of nature ought to provide for himself by some instrument, or some clear proof of a declaration of trust, and not depend upon any implication of law, for there is no necessity to give way to constructive trusts, but great justice and conscience in restraining such constructions. 2d. The wisdom of the common law did so; for all the books are agreed on this point, that a feoffment to a stranger without a consideration raised a use to the feoffor; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son and made it an advancement. How can this Court justify itself to the world if it should be so arbitrary as to make the law of trusts to differ from the law of uses in the same case? . . . *Ergo*, where the father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions." (2 Swans. App. 600.)

I think all these observations apply to the present case, and applying this law to the facts in the present case, though I cannot but say that though I feel some hesitation respecting the extent of reliance which ought to be placed on the recollection of Mr. Lloyd and Mr. Bishop of the exact words spoken by the Plaintiff, yet assuming that, at the date of the loan, the Plaintiff told these gentlemen that the transaction was intended to be a trust in the son for his benefit, that this was said in the presence of the son and assented to by him at that time, then I am of opinion that this must be treated as a contemporaneous declaration of trust, which undoubtedly may be made by parol.

It is no doubt difficult to understand why the Plaintiff, in these circumstances, directed the mortgage to be [377] made in the name of the son, if he was to be merely the trustee. For in that case the usual object of these transactions would have been frustrated. If the son had survived the Plaintiff, the estate of the father would have been just as liable to probate and legacy duty as if such conveyance had not been made out in his son's name. Still, as both the gentlemen give plain and

unequivocal evidence of the parol declaration of trust made by the father and assented to by the son at the time, I consider myself bound by it and must declare the trust accordingly. The receipts of the rents by the father, as I have stated from the judgment I have read, amounts to nothing.

As to the other three transactions which took place before the purchase of Pentwyn, I am of opinion that they must be taken to be advancements by the father to the son. There is in fact nothing to rebut it, but, first, the receipts of the rents and interest by the father, which were paid to his account at the bank where the son might draw for what he required; and secondly, the present statements of the father, which, as I have already said, are not sufficient to rebut the necessary presumption of law.

The case of the purchase of Pentwyn is a very different matter; the execution of the deed conveying this property was only eight days before the death of the son. The evidence respecting it, to which I once more refer in detail, amounts to this:— That the father (the Plaintiff) gave instructions on the subject to Mr. Bishop, who prepared the conveyance, to have the deed made out to him as purchaser, and that afterwards, by the direction of the son, the conveyance was altered into the name of the son, and as this was in accordance with what had been done on former occasions, and with the [378] conduct pursued by the son for the father and with his sanction for a great length of time, Mr. Bishop complied with this direction. It is true that the devise of this estate by the son is expressly opposed to this evidence, and shews that he considered himself entitled to deal with it as owner. But still I cannot, on this evidence, find that the deed was made out in the name of the son as purchaser, in accordance with any general or particular authority of the father given to the son, or that it was done by the direction of the father, and although the will of the son is a positive declaration that the property is his, still I cannot, I think, allow this statement to counterbalance the positive and contemporaneous direction given by the father to Mr. Bishop and established by his evidence, although the father does not appear to have remonstrated, either with his solicitor or with his son during his lifetime, for the form in which the deed had been prepared and executed in disobedience to his instructions.

Upon the whole of this case, therefore, I am of opinion that as to the mortgage for £1600 on Llangranog and the purchase of the Pentwyn estate, the son must be declared to have been a trustee thereof for his father; but as to the remaining three transactions, they must be taken to have been advances and purchases made by the father for the benefit and advancement of his son, and that, on the death of his son, they belonged to him and passed as his property, under the directions contained in his will.

I have thought it unnecessary to refer to the other decisions cited before me or those which I have referred to myself; they all, and more especially the case of *Sidmouth v. Sidmouth* (2 Beav. 447), appear to me to illustrate [379] and confirm the principles laid down in *Grey v. Grey* (2 Swanst. 594), which I have read at length. I shall make a declaration accordingly and give no costs on either side, if indeed (which I apprehend would not have been the case) any costs had been asked for.

[379] *Re BLAKESLEY AND BESWICK.* April 30, 1863.

[S. C. 8 L. T. 343; 9 Jur. (N. S.) 1265; 11 W. R. 656.]

An intended mortgagor agreed to pay the reasonable costs of the mortgagor's solicitor, if the matter went off. Held, that this did not include the expenses of withdrawing the money from a banker's and of remitting it to London for payment. Application of a solicitor, after an order for taxation, to withdraw a non-taxable item from his bill, refused.

On the 20th of June Lady Sophia Giubelei entered into a negotiation in London, for a loan to her of £8000 by way of mortgage. That sum was to be advanced to her in London on Tuesday the 24th of June, by Mr. Thorp of Leeds, through his solicitors

Messrs. Blakesley & Beswick of London, and Lady Sophia undertook to pay their reasonable costs in the matter if it went off.

Lady Sophia Giubelei's title to the property was rejected on Saturday the 21st, but this was not known to Mr. Thorp of Leeds until Monday following. In the meantime, on Saturday the 21st of June, Mr. Thorpe, in anticipation of the completion on Tuesday, had withdrawn the £4000 from his deposit account at his bankers, and had directed them to remit the amount to London. For this they charged him £10 commission.

The matter went off, and Messrs. Blakesley & Beswick sent in their bill of costs to Lady Sophia Giubelei; this included the charge for £10, which, on the taxation, the Taxing Master allowed.

Mr. Jessell now moved to review the taxation, and [380] that the £10 might be disallowed. He argued, first, that this charge was not comprised in the undertaking, for if bullion had been sent, the expenses would not have been chargeable on the borrower; secondly, that it had been unnecessarily incurred before the title had been accepted; and thirdly, that it ought not to be charged in the bill of the solicitors, who had not paid it.

Mr. Phear, *contrâ*. This was one of the "reasonable costs" in the matter, and which the intended mortgagor had undertaken to bear. The remittance was made *bond fide* for the benefit of the borrower, who wanted the money on Tuesday, and to prevent her being disappointed in receiving it on that day.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this charge must be disallowed. It is clear that when a person borrows money and agrees to pay the costs of the lender, that does not include the expenses incurred by the lender in getting the money.

I never heard that a mortgagee was, under such circumstances, entitled to charge the mortgagor with his broker's commission for selling out stock, or for realising railway debentures, or for raising the money.

This is a stronger case: here the intended lender asks for the expenses which his bankers charged him for withdrawing the money and sending it to London, and which expense he thought fit to incur before he had accepted the title. I think that this sum is not included in the costs undertaken to be paid.

Neither can I accede to the proposal that the solicitors should be allowed to withdraw this item from their [381] bill of costs. In all these cases such items are charged *bond fide*; but a solicitor cannot be permitted, during taxation, to say that there are items which he should not have included, and withdraw them; for the client, on the other hand, would say, "I would not have taxed the bill if they had not been included in it."

I must disallow this £10.

[381] BICKNELL v. BICKNELL. April 30, 1863.

After decree in a suit instituted by several infants, one came of age and objected to remain Co-plaintiff. His name was struck out as Co-plaintiff and he was made a Defendant.

A suit was instituted by several infants, by their next friend, and a decree had been made.

One of the Plaintiffs, having attained twenty-one, and being desirous of retiring from the suit,

Mr. Wickens, on his behalf, moved to stay proceedings as regarded him, or that his name might be struck out as Co-plaintiff. He cited *Acres v. Little* (7 Sim. 138); *Guy v. Guy* (2 Beav. 460); and see 1 C. P. Cooper (p. 372); and *Ballard v. White* (2 Hare, 159).

Mr. Renshaw, for the next friend, referred to *Anonymous* (4 Madd. 461), and said that the suit was nearly wound up.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot stay the proceedings in the suit after decree. The proper order, if you ask it, is this:—On the appli-[382]-

cation of this Plaintiff to strike out his name, and, on the application of the Co-plaintiffs, make such Plaintiff a Defendant, and in all future proceedings his name will be introduced as a Defendant. If that be not asked, I must simply strike out his name. Let the costs be costs in the cause.

[382] *In re CHAPMAN'S WILL. April 18, 1863.*

[S. C. 9 Jur. (N. S.) 657 ; 11 W. R. 578. *In re Potter's Trust*, 1869, L. R. 8 Eq. 59 ; *In re Hotchkiss's Trusts*, 1869, L. R. 8 Eq. 648 ; *In re Woolrich*, 1879, 11 Ch. D. 668.]

A testator bequeathed a legacy to such of his nephews and nieces (children of A. B.) as should be living at his death equally, and he provided as follows, that in case any nephew or niece "shall die in my lifetime," leaving children living at my decease, such children should stand in their parent's place and be entitled to the share which the deceased parent would have been entitled to, if living at my decease. A child of a niece who had died prior to the date of the will was held entitled to participate in the legacy.

By his will, dated in 1860, the testator bequeathed the sum of £3000 "unto such one or more of his nephews and nieces (children of his late sister Sarah Mallalieu, deceased) as should be living at his death, equally." And he gave the residue of his estate equally "between such of the persons, next hereinafter mentioned or referred to as intended to take the same, as should be living at his death, that is to say," the "children of my late sister Sarah Mallalieu, deceased," and others whom he specified. He then proceeded thus :—"Provided always, and I hereby declare that in case any of my nephews and nieces, or great-nephews and great-nieces, shall die in my lifetime leaving any child or children who shall be living at my decease, and who shall then have attained, or shall live to attain, the age of twenty-one years, then and in such case, it is my will that the child or children attaining the said age of each such nephew or niece or great-nephew or great-niece so dying in my lifetime shall represent and stand in the place of his, her or their deceased parent, and shall be entitled to the same share or shares and [383] interest, as well original as accruing, in the pecuniary legacies hereinbefore bequeathed and in my residuary personal estate, as his, her or their deceased parent would have been entitled to if living at the time of my decease."

The testator died in 1861.

Sarah Mallalieu had three children, who survived the testator, but she had had a fourth child, Hannah, who had died in 1844, anterior to the date of the will, leaving one child Elizabeth H. Wrigley.

A question had arisen whether Elizabeth H. Wrigley was entitled to a share of the legacy of £3000, which had been paid into Court.

Mr. Baggallay and Mr. Lewin, for the children of Sarah Mallalieu. The substitution is in favor of nephews and nieces who "shall" die, that is a future event, and refers to those who shall die after the date of the will. The gift is in favor of those whose parents might have taken under the will, but no nephew or niece, who had died prior to the date of the will, could have been a legatee under it. There must be an original valid gift to someone in order to found a substitution for it.

They cited *Christopherson v. Naylor* (1 Mer. 320) ; *Butler v. Ommaney* (4 Russ. 70) ; *Waugh v. Waugh* (2 Myl. & K. 41) ; *Loring v. Thomas* (1 Dru. & Sm. 497).

Mr. Renshaw, for the trustees.

Mr. Southgate and Mr. Langworthy, for Elizabeth H. Wrigley and her husband, were not heard.

[384] THE MASTER OF THE ROLLS [Sir John Romilly]. I think this legacy is divisible into fourths. If the original gift had stood alone, "I give £3000 unto such one or more of my nephews and nieces, children of my late sister Sarah Mallalieu, as shall be living at my death," there could be no question but that the nephews and nieces who survived would alone be entitled to participate in the legacy. But I think that there is sufficient on this will to shew that the children of nephews or

nieces who were dead at the date of the will were to take. Much stress cannot be placed on the words "shall die in my lifetime;" it is vague. It is argued that it means "shall hereafter die," but I think the expression is constantly used in the sense "shall be dead at the time of my death."

I accept the construction of *Christopherson v. Naylor* (1 Mer. 326); but here the words are distinct, in case any of my nephews, &c., "shall die in my lifetime leaving any child," that is, shall die at any time in my life leaving children, who shall be living at my death and attain twenty-one. Here is a child of a niece who died in the testator's lifetime and which child was living at his death and has attained twenty-one. Then the testator says, she "shall represent and stand in the place of" her deceased parent, and shall be entitled to the same share as her parent "would have been entitled to if living at the time of his decease."

It is clear that the niece Hannah would have taken one-fourth if she had been living at the time of the testator's decease, and her daughter is consequently entitled to stand in her place.

[385] *Re GIRAUD. Nov. 16, 1861; April 18, 20, 1863.*

[S. C. 9 Jur. (N. S.) 862; 11 W. R. 607; 2 N. R. 9.]

By an order made under the Trustee Act, real estate was inadvertently vested in an alien. The Court declined varying the order, by inserting the name of a natural-born subject, without the consent of the Crown; but the order was made upon a rehearing.

An alien who had served on board a British man-of-war for four years in time of war held to be a natural-born subject under the 13 Geo. 2, c. 3.

By indentures, dated in 1833, a freehold messuage, &c., was conveyed to Charles Louis Giraud in fee by way of mortgage for securing the repayment of £896.

Charles Louis Giraud signed a memorandum acknowledging that he held the mortgage in trust for his father, Jean Baptiste Giraud. This mortgage had been made to the son under the impression that the father, who was born in France, was an alien. It appeared, however, that Jean Baptiste Giraud came to England about the year 1798, and served, from the 1st of April 1798 until the 24th of November 1802, as an able-bodied seaman on board a British ship of war, "The Arrogant," this country being all that time at war with France.

Jean Baptiste Giraud died in 1860. Afterwards the mortgagors were desirous of paying off the mortgage and of obtaining a reconveyance, but Charles Louis Giraud, a mariner, having gone abroad in 1844 and not having been since heard of, this could not be done. A petition was thereupon presented, under the Trustee Act, by the parties beneficially interested under Jean Baptiste Giraud's will and by his executor, under which an order had been made by the Master of the Rolls, in February 1861, vesting the legal estate in Louis Watbled the executor.

It was afterwards discovered that Watbled was an alien, and an application was now (16th of November [386] 1861) made that another name might be substituted in the order in lieu of Watbled.

Mr. Hemmings, in support of the petition, argued, first, that under the 13 Geo. 2, c. 3, and 20 Geo. 3, c. 20, Jean Baptiste Giraud must be held to be a natural-born subject; and, secondly, that, as the vesting order had been made under a mistake as to the nationality of Watbled, it might be now corrected.

Mr. Wickens, for the Crown, *contra*, argued that the provision in the Act referred to only applied after the king's proclamation to that effect (13 Geo. 3, c. 3, s. 4), as to which nothing appeared on the evidence.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the 4th section only applies to merchant ships, and I must hold that Jean Baptiste Giraud was not an alien. But I cannot make a variation in the existing order except with the consent of the Crown.

Mr. Wickens said he had no authority to consent, on behalf of the Crown, to the alteration.

April 18, 20, 1863. A petition was now presented to rehear the former petition and to vary the order in the manner asked on the previous occasion.

Mr. De Gex and Mr. Hemmings, in support of the petition, argued that as the estate did not vest in the Crown until office found, *Page's cases* (5 Coke's Rep. 52), the former [387] order, which had been made under a mistake, might be discharged, and a proper person now appointed trustee in the place of Charles Louis Giraud.

Mr. Wickens, for the Crown, raised no further objection, but asked for his costs. THE MASTER OF THE ROLLS discharged the previous order.

NOTE.—Reg. Lib. 1863, A. fol. 927.

[387] *Re CAMERON COALBROOK COMPANY. HUNT'S CASE. April 20, 1863.*

In 1848 A. transferred some shares in a company to B. In 1851 the company was ordered to be wound up. The Court refused, in 1863, to allow the official manager to contest the validity of the transaction, until he had laid a sufficient ground for it, by stating to the Court what information he had received on the subject, and when he first obtained it.

On the 2d of September 1848 Ebenezer Hunt, the holder of £190 shares in this company, transferred them to his brother, Gideon Hunt, who already held 172 other shares. In December 1849 Gideon Hunt (a dissentient shareholder), transferred all these shares to the Cameron Company.

In 1851 an order was made to wind up the company, and the transfer to the company having been held to be invalid, see *Bennett's case* (18 Beav. 339, and 5 De G. M. & G. 284), Gideon was put on the list of contributories for the whole 362 shares.

In January 1863 the official manager took out a summons in Chambers to review the list of contributories, by substituting the name of Ebenezer Hunt in the place of Gideon Hunt for the 190 shares. Ebenezer Hunt was *subpoenaed* to attend before the [388] Examiner to be examined as to the circumstances relating to the transfer of these shares; but he resisted, and the matter was adjourned into Court.

THE SOLICITOR-GENERAL (Sir R. Palmer) and Mr. Roxburgh, for the official manager. The transfer, as we are ready to prove, was a mere simulated one, and the name of Gideon Hunt, who was insolvent, was used as a mere mask to protect Ebenezer from liability. The consequence is, that the transfer to Gideon was void, and Ebenezer Hunt's name ought properly to be inserted on the list as a contributory, in lieu of Gideon Hunt. They referred to *Hyam's case* (1 De G. F. & J. 75); *Costello's case* (2 De G. F. & J. 302); *De Pass' case* (4 De G. & J. 544), said to have been compromised in the House of Lords.

Mr. Selwyn and Mr. C. Swanston, for Ebenezer Hunt. It is fifteen years since the transfer was made and twelve years have elapsed since the winding-up order; it is now too late to object to the transfer, for whatever might have been the nature of the transaction originally, the lapse of time is now a bar to reopening the matter. We therefore meet this case by an objection in the nature of a demurrer. Twelve years had elapsed in *Brotherhood's case* (31 Beav. 365; affirmed, 31 L. J. (Ch.) 861); *Ex parte Bennett* (18 Beav. 339, and 5 De G. M. & G. 284); *Dr. Grady's case* (32 L. J. (Ch.) 326); *Straffon's case* (4 De G. & Sm. 256, and 1 De G. M. & G. 576); *Shortridge v. Bosanquet* (16 Beav. 84, and 5 H. of L. Cas. 297); *Blair v. Bromley* (2 Phil. 354).

Three years after a transfer the liability of a shareholder would cease as regards creditors, and a transfer [389] made, even for the very purpose of getting rid of the liability, would be valid, unless it be shewn that the company was, at the time, notoriously in a state of insolvency. Gideon Hunt has all this time been recognized as the holder of these shares, and time is most essential where it is attempted to change a recognized ownership and transfer a liability.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that, after the length

of time that has elapsed since the winding-up order was made, namely, eleven or twelve years, the official manager ought not to examine into a transfer which took place before that time, without some considerable ground for believing that he can disturb the arrangement; he ought to have some sufficient information on the subject, and ought not wantonly to commence an expensive litigation.

I shall, therefore, require the official manager to state to me what information he has received on the subject, and when he first obtained it. That being done, I am of opinion that Ebenezer Hunt cannot refuse to be examined, assuming the first condition to be satisfactorily complied with.

I am of opinion that he stands in this situation:—He abstains from giving any evidence and will not allow any to be given. I must, therefore, as on demurrer, make every presumption against him, and, assuming that the official manager satisfies me that he was justified in not coming here sooner, I shall then enter into the merits and have to consider whether the transaction ought to be held invalid. I cannot say that there may [390] not be a fraudulent transfer which the company have a right to open at this distance of time.

I think, therefore, that the case must stand over, and if the official manager should satisfy me that there is a fair ground for further inquiry, I shall allow the case to proceed.

I agree that it has not been the practice to require this preliminary explanation on the part of the official manager, and no inquiry would have been necessary in this case if the winding-up order had been made in 1861 instead of 1851, for then I should at once have said, "You may inquire into it." But when twelve years have elapsed it is taken out of the ordinary rule. In such a case there ought to be something special to induce the Court to go into a transaction of so old a date, and I shall certainly make every reasonable and fair presumption in favor of the transaction after such a lapse of time.

[391] GOULD v. GOULD. April 30, 1863.

By his will, a testator gave his real and personal estate to trustees, on trusts for his sister. By a codicil he gave a legacy to his eldest nephew, whom he called his "heir at law," and he directed that the codicil should not give to his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds; but that the same, as to freeholds, should descend to his heir at law, and as to customary estates, to his customary heir. At the testator's death, his sister was his heiress at law and customary heir. Held, that she was not excluded from taking by descent the after-acquired copyholds.

The testator, by his will dated in 1829, devised and bequeathed his real and personal estate to trustees for his sister Sarah Gould for life, and afterwards on certain trusts for her children (exclusive of William Gould her eldest son).

By a codicil, dated in 1834, the testator said, "I give and bequeath unto my eldest nephew and *heir at law*, William Gould, the sum of £3000." He afterwards expressed himself as follows:—"And I direct that the making or publication of this my codicil shall not extend or be construed to extend to give to my trustees, for the benefit of my said sister, any freehold or copyhold estates or premises purchased by me since the date of my said will, but that (except as to the premises in Petworth hereinafter mentioned), the same estates and premises shall descend and go, as to my freehold estates to my heir at law, and as to my customary estates, to my customary heir, according to the custom of the respective manors whereof they may be holden."

The testator died in 1835, having, between the date of his will and codicil, purchased a copyhold estate called "Cold Waltham."

At the testator's death, his sister Sarah Gould was his heiress at law, and heiress according to the custom of the manor of which the copyhold was holden. But, on the supposition that his sister was excluded, William Gould was then his heir at law and John Gould was his customary heir.

[392] The question was, whether, on the death of the testator, the copyhold descended on his sister Sarah Gould or on her son William Gould.

Mr. Baggallay and Mr. Kingdon, for the Plaintiff, contended that the copyhold descended on the sister, as his customary heir, under the express words of the will. That, at all events, the heir was not to be excluded by surmise or doubtful expressions; *Hall v. Warren* (9 H. of L. Ca. 428); *Fitch v. Weber* (6 Hare, 145).

Mr. Osborne and Mr. Kay, in the same interest.

Mr. Southgate, for a trustee.

Mr. Selwyn, *contra*, for John Gould. A testator may, if he pleases, put a glossary in his will, and say what he means by particular words. Here he expressly says that he intends the codicil shall give no benefit to his sister in the freeholds and copyholds purchased since the date of his will, and also that he means his eldest nephew William Gould by the words "heir at law," thereby excluding his sister. William Gould would, therefore, have taken any freeholds purchased after the date of his will; and by the same reasoning the testator must have intended to exclude his sisters from the copyholds subsequently purchased and that they should descend on John.

In *Parker v. Nickson* (1 De G. J. & S. 177), where a testator made A. B. heir at law of all his property, it was held that it amounted to a devise to him. He also cited *Hart v. Tulk* (2 De G. M. & G. 300); *Baker v. Wall* (1 Lord Raym. 185); and see *Johnson v. Johnson* (4 Beav. 318).

[393] THE MASTER OF THE ROLLS [Sir John Romilly]. I have no doubt as to the proper construction of this codicil.

Taking the latter part of the will first, the testator says my customary estates shall descend and go to my customary heir. His sister was his customary heir. There is no ambiguity about it, you could not make a more clear devise to her as customary heir. But I am told I am not so to consider it, and for this reason:—because he says the codicil shall not be construed to give the trustees, for the benefit of his sister, any after-purchased estates, but that they shall descend. This means that the after-purchased estates shall not be held in trust for his sister for life, with remainder to her younger children, but that they shall descend on his heir, and she is the heir. There is nothing inconsistent in this; if she had predeceased the testator, then William Gould would have taken the after-acquired freehold property as the testator's heir at law and John Gould the customary property as his customary heir.

The next reason is, because he designates William as "my heir at law" in giving him a legacy, and it is said that because the testator has thought fit to call William his heir at law, it must therefore be inferred that he intended, if he could, to make William his customary heir, because he would have been his customary heir if he had been his heir at law. I should be making a will for the testator if I put such a construction on these words.

I am of opinion that the testator's sister took the copyhold estate acquired after the date of the will as the testator's customary heiress, and that it passed under her will.

[394] *Re Shirley's Trusts*. March 9, 1863.

By a settlement, trustees were to raise £2000 for A. for life, with remainder to her children, with powers for maintenance, advancement "or otherwise," and in default of children the fund was given to C. A like sum was given to B. for life, with remainder to her children, with the like provision for their maintenance "and otherwise," as before expressed, in respect to the £2000 given to A. and her children, "and otherwise in like manner, to all intents and purposes, as if such trusts and provisions were there fully repeated." Held, that this included the gift over to C. and that on the death of B. without children C. was entitled to the second sum of £2000.

By a settlement, dated in 1821, trustees were, out of the trust funds, to raise £2000 and pay the income to Isabella Ann Culverhouse for life, and after her decease

in trust for her children equally at twenty-one or marriage, with benefit of survivorship and accruer. Power was given to the trustees to apply the interest "towards the maintenance and education or otherwise for the benefit and advantage" of the children during their minority, and to apply one-half of the capital of the presumptive shares, "for or towards the putting or placing of any or either of the said children to any business, profession or employment or otherwise for his, her or their preferment or advancement in the world." And in case there should be no child of Isabella Ann Culverhouse, &c., &c., then in trust to transfer the trust moneys, funds and securities to Thomas Shirley.

The trustees were to raise another sum of £2000, of which they were to pay the income to Mary Shirley for life. The deed proceeded thus:—"And after her decease, then for the benefit of all and every the child and children of her the said Mary Shirley, to be a vested interest or vested interests at such and the same age, day or time, and with such and the like benefit of survivorship and accruer between or among them, in the event of the death of any one or more of them; and with the like provisions for their maintenance and education, and also for their advancement *and otherwise* [395] as hereinbefore expressed, declared and contained with respect to the sum of £2000 hereinbefore directed to be invested for the benefit of the said Isabella Ann Culverhouse and her child and children *and otherwise* in like manner to all intents and purposes as if such trusts and provisions were here fully repeated."

In 1862 Mary Shirley also died without having had children, and the fund having been paid into Court, the purchasers under Thomas Shirley presented a petition for payment to them of the £2000. The question was, whether Thomas Shirley took this fund under the terms of reference contained in the settlement.

Mr. Baggallay and Mr. Prendergast, for the Petitioners, argued that the intention was to repeat exactly the trusts relating to Mrs. Culverhouse's legacy in the gift to Mrs. Shirley, including the gift over to Thomas Shirley.

Mr. C. Hall, *contra*. The trusts of Mary Shirley's £2000 do not embrace the ultimate trust in favor of Thomas Shirley. The objects of the trust are Mary Shirley and her children alone; this is shewn by the terms and frame of the clause. The terms of reference relate alone to them, and the words "and otherwise" refer to the clauses of maintenance and advancement, in which the same expression, "or otherwise," is used, and not to Thomas Shirley.

Mr. Hemmings, for another Respondent.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Petitioners are entitled to the £2000, and that I should be striking words out of the settlement if [396] I held otherwise. I must incorporate in the trusts of the second sum the provisions contained in the first, as to maintenance *and otherwise* as thereinbefore expressed, &c., with respect to the first £2000 directed to be invested for the benefit of Mrs. Culverhouse, her children *and otherwise*. I am of opinion that unless I change the words "or otherwise" into "or otherwise for them," that is for the children, it includes all the previous provisions, which are to be fully repeated in the second series of trusts.

I cannot agree that the words "maintenance, education and advancement" do not cover everything that concerns the children, and these words are repeated in both bequests; but in addition to them the bequest in favour of Mrs. Shirley and her children contains the words "and otherwise." It is to be invested for the benefit of Mary Shirley and her children *and otherwise*, that is for some other person, and that person must be Thomas Shirley.

[397] *In re THE MARYPORT, &C., RAILWAY ACT. Ex parte THE EARL OF LONSDALE. Feb. 28, March 14, 1863.*

[S. C. 32 L. J. Ch. 811; 9 Jur. (N. S.) 1217; 11 W. R. 410; 1 N. R. 506. Not followed, *In re Corpus Christi College, Oxford*, 1871, L. R. 13 Eq. 334; *In re Manchester and Leeds Railway Company*, 1876, 2 Ch. D. 360.]

When parts of an estate are taken by several railway companies, and the united compensation moneys are invested in one purchase, the ordinary costs of reinvest-

ment are to be borne by them equally, and not in the proportions of their respective compensation moneys so reinvested. Portions of an estate were taken by three companies, two of which afterwards merged into one company: Held, that the amalgamated companies must bear two-thirds of the costs of a joint reinvestment.

Portions of the settled estates of the Earl of Lonsdale were taken by three distinct railway companies, by virtue of their compulsory powers.

The Maryport, &c., Railway Company took property of the value of £864, the South Durham, &c., Railway Company of the value of £845 and the Eden Valley Railway Company to the value of £3912. These purchase-moneys had been paid into Court.

Afterwards, the two latter railway companies were dissolved, and the property, rights and liabilities were transferred to the Stockton and Darlington Railway Company, into which they merged.

An eligible purchase having been found for the reinvestment of £5127, part of the fund in Court, a petition was presented by the Earl of Lonsdale to carry it into effect.

Mr. Wickens, for the Petitioner.

Mr. De Gex, for the Stockton and Darlington Railway Company, submitted that the costs ought to be borne equally between the railway companies; *Ex parte The Bishop of London* (2 De G. F. & J. 14).

Mr. C. Hall, for the Maryport, &c., Railway Company, [398] argued that the rule did not apply here, where the amount of purchase-money, in the one case, so much exceeded that in the other.

THE MASTER OF THE ROLLS. I must follow the case cited, and hold that the costs ought to be borne equally, except the *ad valorem* stamps.

This case was mentioned again, a question having arisen, in drawing up the order, whether the Stockton and Darlington Railway Company ought to bear half or two-thirds of the costs.

Mr. De Gex argued that, after the two companies had become united in the Stockton and Darlington Railway Company, one petition would have been sufficient for the investment of the money belonging to the two companies, and that therefore the Stockton and Darlington Railway Company was liable to pay only half of the costs.

Mr. C. Hall was not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. The only liability of each company was, to pay the costs of the reinvestment of its own compensation money. But if the contention of the Stockton Railway were to prevail, the effect would be this:—Suppose ten railway companies were to take portions of the same estate, and that the whole compensation were to be invested in one purchase, then each railway company [399] would be liable to bear one-tenth of the costs; but if nine of them were united, then the remaining company instead of paying one-tenth of the costs would have to bear five-tenths. Thus by the union of the nine companies a liability to pay four-tenths of the costs would be shifted on another company.

The costs must be borne in thirds.

[399] LEIGH v. BIRCH. April 15, 1863.

[S. C. 9 Jur. (N. S.) 1265; 11 W. R. 554.]

A bill was filed by the next of kin against A. B., the administratrix, and C. D., who was the partner and executor *de son tort* of the intestate, for the administration of the estate and to take the partnership accounts: Held, that C. D., who had not demurred, was bound to set out the partnership accounts.

John B. Birch and Eugenius Birch carried on the business of civil engineers in partnership.

John B. Birch died intestate in June 1862, and in November 1862 letters of administration were granted to his sister Mrs. Grier.

The bill in this case was filed by his next of kin against Eugenius Birch and Mrs. Grier, and as amended it alleged as follows:—

"Immediately on the death of the intestate, the Defendant Eugenius Birch took possession of all the property of his brother, and has remained ever since and still is, in such possession, whereby Plaintiffs submit that he has constituted himself executor *de son tort* and is liable to account in this honorable Court."

"In December 1860 the intestate became of unsound mind and was placed at a private lunatic asylum by the Defendant Birch, and the intestate continued there until his death."

[400] "The said partnership was never dissolved and continued up to the death of the intestate, and since his death the said business has been carried on by Defendant Birch with the assets of the said partnership, which has never yet been wound up or settled."

The bill prayed a declaration that Eugenius Birch was liable to account as executor *de son tort*, and that an account might be taken of the partnership business to the present time. It also prayed for an account and administration of the personal estate, as against both Defendants.

The Plaintiffs, by their interrogatories, amongst other things, required Eugenius Birch to set forth the partnership accounts.

Eugenius Birch by his answer said there was not any agreement between myself and John B. Birch as to the period for which the partnership between us should be carried on, so that the partnership could, as I submit, be dissolved at any time by either of us; yet, during our partnership, it was always understood between us (and the partnership business was carried on on that footing) that John B. Birch deceased should receive and pay the moneys receivable and payable in respect of the partnership business, and should attend to and keep the accounts of our partnership transactions. However, he did not make proper entries in the partnership book of such transactions, and he neglected to keep the accounts as he ought to have done, and in fact the accounts of the partnership were in such a confused and unintelligible state, that shortly before the commencement of the illness of John B. Birch deceased, which ended in his death, the partnership books and documents were handed over to Mr. Robinson, an accountant, to make [401] out therefrom the best statement he could. However, I believe that he has, in consequence of the imperfect state of the entries in the books, been unable to make out any satisfactory statement.

He said that when John B. Birch was removed to a lunatic asylum, he believed that he had become permanently insane, and he therefore considered the partnership determined, and that he thenceforth carried on the business on his own account. However, if the partnership was not in fact dissolved, then, inasmuch as a balance would, upon taking the accounts, be found coming to him, the Defendant, he should be a creditor upon the estate of John B. Birch. He said, that although since his death the business of a civil engineer had been carried on by him, it had not been carried on by him "with the assets of the said partnership, for there were none." That it was the fact that the partnership accounts had never been wound up or settled, but if the accounts were properly taken or could be properly taken (having regard to the neglect of the said John B. Birch to keep the partnership accounts as he ought to have done) there would, as he believed, be a balance coming to him the Defendant.

He said, "I submit that the Plaintiffs are not entitled, in this suit, to require me so set forth the accounts referred to in the 3d, 4th and 5th interrogatories to their amended bill or any of them, and in fact I am, under the circumstances herein appearing, unable to do so."

The Plaintiffs took exceptions to the answer for insufficiency.

Mr. W. W. Mackeson, in support of the exceptions. [402] The Defendant having answered must answer fully. Here Eugenius Birch is accountable as executor *de son tort* (1 Phillips, 152); and as the lunacy did not terminate the partnership; *Besch v. Frolich* (1 Phillips, 172); he is accountable to the infant Plaintiffs for the share of the intestate in the business. The accounts of the intestate's estate and of his share in the business may, as against this Defendant, be properly united in one bill; *Willett v. Blanford* (1 Hare, 259); *Thomas v. Rees* (1 Jur. (N. S.) 197).

Mr. Tripp, *contra*. By the General Order XV., rule 4, a Defendant is "at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer." Here there is no privity between the Plaintiffs and the Defendant; the bill is demurrable, and therefore the Defendant may object, by his answer, to set forth the partnership accounts and other matters. The exceptions ought to be overruled or stand over to the hearing as in *Davis v. Earl of Dysart* (21 Beav. 124).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think these exceptions must be allowed. The general rule is very plain; if a Defendant demur to the bill, he relieves himself from the necessity of answering at all; but if he answer, he must answer fully. The General Order of the Court which has been referred to does not apply to this case, but only to those cases where, though the Defendant answers, he has a particular right to object to answering a particular question; as, for instance, if it would render him liable to penalties, [403] or where a solicitor is required to divulge the secrets of his client; these are questions which the Plaintiff has no right to ask, and which it was intended to be protected by the General Order. It does not mean that a Defendant can avoid answering fully, by saying, "I might have objected by demurrer to the general relief prayed." This must be done within a particular time and at a proper stage of the cause.

I am of opinion that these interrogatories are not even substantially answered; but whether the Plaintiffs can obtain any benefit from pressing for a full answer to these matters is very doubtful. Although I am much opposed, generally, to exceptions to answers, still I am bound to say that here the Defendant has not answered.

Exceptions allowed with costs.

[403] RAIKES v. RAIKES. April 30, 1863.

A tenant for life, with power to appoint new trustees, parted with the whole of his interest in the settled property. He afterwards appointed two improper persons to be trustees. Upon a bill to remove such trustees, and also to administer the trusts and to make the tenant for life pay the costs: Held, on demurrer by the tenant for life, that he had properly been made a party.

Under the marriage settlement of Thomas Raikes, dated in 1816, certain funds were vested in trustees, upon the usual trusts for the parents and their children.

The settlement contained a power enabling Thomas Raikes, the tenant for life, to appoint new trustees.

Robert Raikes, the surviving trustee, with the concurrence of the tenant for life, sold out and misapplied the trust funds.

[404] In June 1861 the surviving trustee and the tenant for life, who were partners, stopped payment, and under the provisions of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Viet. c. 106, revealed to a great extent by the 24 & 25 Viet. c. 134, Schedule G), they presented a petition for arrangement under the control of the Court of Bankruptcy. That Court confirmed a proposal, whereby their joint and separate estates were vested in four trustees for the benefit of their creditors.

In 1862 Thomas Raikes was requested to appoint two new trustees; this he agreed to do, but insisted on appointing two insolvent persons, and notwithstanding the remonstrances of the other parties beneficially interested, he appointed them accordingly, and the trust funds had been assigned to them.

Under these circumstances, this bill was filed, by the parties beneficially interested, against the new trustees, the tenant for life, and the trustees of the deed of arrangement, praying that the new trustees might be removed, that the trusts of the settlement might be performed, that the life interest of Thomas Raikes might be impounded to answer the breach of trust, and that the tenant for life and the new trustees might pay the costs of this suit.

To this bill Thomas Raikes, the tenant for life, demurred for want of equity.

Mr. Hobhouse and Mr. Miller, in support of the demurrer. The tenant for life is not a proper party to this suit; having parted with his whole estate, his power is

gone; Lewin on Trustees (p. 433 (4th edit.)). Even if he has [405] a discretionary power; Sugd. Powers (p. 601 (8th ed.)); still a person having a mere power and no interest cannot be made a party, and there are trustees *de facto* who represent the estate. It will be said that the bill prays that he may pay the costs; but he is not a solicitor, and the cases do not apply, and besides, he is relieved from all personal liability by the Bankrupt Act.

They also referred to *Hole v. Escott* (2 Keen, 444, and 4 Myl. & Craig, 187).

Mr. Selwyn and Mr. E. Macnaghten, in support of the bill, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this demurrer must be overruled. The bill states that the Defendant claims the power to appoint new trustees, and that he has exercised it in favor of two gentlemen, who were improper persons to be appointed trustees.

He now comes forward and says that the claim of the persons so appointed cannot be supported in law, and that the appointment is wholly void, that when the cause comes on to be argued in Court, it will be found that he has no such power, and that the persons whom he has appointed, in defiance of every remonstrance, are not trustees at all.

But the trust property is vested in them, and this by means of his act, and it must be got out of them. How is it possible for him to argue that he is not a proper party when he makes such an assignment and defends it by such arguments.

[406] I am of opinion that, if he claims, as the bill alleges that he does, a right to appoint new trustees, this is a claim which must be determined by the Court. It is also a matter of urgent importance, for one of the newly-appointed trustees has refused to act, and if the other should die, questions may arise immediately requiring the intervention of trustees, though pending the suit no new trustee can properly be appointed.

The bill charges that he has occasioned the suit, and that, in spite of the remonstrances of the Plaintiffs, he has insisted on appointing improper persons to be trustees, and that the trust property has been conveyed to them, and it asks that he may pay the costs. It is obvious that there is a grave question to be argued, and that the Court may well say, at the hearing, that he has occasioned costs which he must pay.

I must overrule the demurrer.

[406] *In re JESSOP. April 16, 1863.*

[Questioned, *In re Massey*, 1865, 34 Beav. 470.]

A second mortgagee presented a petition to tax the bill of costs of the first mortgagees' solicitor, which had been paid out of the produce of the sale of the mortgaged estate. Held, that the first mortgagees must be served with the petition.

A mortgaged estate was sold by Messrs. Thorp & Barrett, the first mortgagees, under a power of sale, and Mr. Jessop acted as the solicitor in the matter. The purchase was completed in March 1862, and Mr. Jessop, having delivered his bill of costs amounting to £69, 15s. 9d., retained the amount out of the purchase-money with the sanction of his clients. There remained a surplus of £82, after payment of the principal, interest and costs of the first mortgagees.

Within a twelvemonth, the second mortgagee presented a petition for the taxation of the solicitor's bill, [407] which specified items of alleged overcharge. (6 & 7 Vict. c. 73, s. 39.) The petition was served on the solicitor alone, and it was objected that no taxation could take place in the absence of his real clients, the first mortgagees.

Mr. Pemberton, in support of the petition, cited *In re Drake* (22 Beav. 438).

THE MASTER OF THE ROLLS [Sir John Romilly]. You must serve the first mortgagees. The solicitor may say, "I have been paid by my clients, and I will not attend the taxation to defend one single item of my paid bill."

In the case of residuary legatees, where the executor has paid his solicitor's bill in full, but does not account with residuary legatees for two years afterwards, it is clear the residuary legatees could not tax the paid bill as against the solicitor. But when

the residuary legatees and the executor come to a settlement, the residuary legatees may say that the bill is very improper and they may tax it as against the executor, who will be disallowed the amount taxed off, which, if he had taxed the solicitor's bill, he need not have paid; but the residuary legatees cannot recover this amount as against the solicitor.

The petition must stand over to serve the mortgagees.

[408] WELLS v. MAXWELL (No. 1). April 28, 29, 1863.

[Affirmed, 33 L. J. Ch. 44; 8 L. T. 713; 9 Jur. (N. S.) 1021; 11 W. R. 842. For subsequent proceedings, see 32 Beav. 550. See *Greenhill v. Isle of Wight (Newport Junction) Railway Company*, 1871, 23 L. T. 888; *Green v. Sevin*, 1879, 13 Ch. D. 600.]

A. agreed to sell to B. a piece of land. A. was to make a new road, of which B. was to have the use, and B. was to expend £3000 in building a house on the property. The contract was to be completed on the 1st of August, interest was payable if not completed on that day, and time was declared to be of the essence of the contract as regarded the making of objections to the title. The contract not having been completed, the vendor, on the 4th of August, gave notice that he rescinded the contract unless completed within a month. At this time, there only remained two substantial requisitions, and which the vendors were taking steps to comply with. Held, first, that time was not of the essence of the contract; secondly, that the notice was not reasonable; and thirdly, that there was nothing in the nature of the contract which prevented its being specifically performed.

On the 26th of May 1862 the Plaintiff and Defendant signed an agreement, whereby the Defendant agreed to purchase from the Plaintiff a portion of the Worcester Park estate, with the right of using the road thereafter agreed to be made by the Plaintiff, for £2000, "to be paid on the 1st day of July next," "on a good title being shewn," and "on having a conveyance." The 2d condition of sale provided that the Plaintiff "shall, within ten days from the date, deliver to the Defendant an abstract of title, and make a good road as specified on the plan." The 3d provided that the Defendant should "make his objections and requisitions, if any, in respect to the title," within "twenty-one days from the delivery of the abstract," "and all objections and requisitions which shall not be made within such twenty-one days shall be considered as waived, and, in this respect, time shall be considered as of the essence of the contract." The 4th provided "that on payment, on the said 1st day of July," of the £2000, the Plaintiff should execute and procure to be executed, by all necessary parties, a proper conveyance. The 5th was as follows:—"That the said purchase shall be completed on the day and at the place hereinbefore mentioned or to be appointed as aforesaid, and William Maxwell shall, on that day, be let into the possession of the said premises, and, up to that day, all outgoing shall be discharged by the [409] said William Wells." "6th. That if, from any cause whatever not occasioned or arising from the default of William Wells, the said purchase shall not be completed on the said 1st day of July, William Maxwell shall pay interest, after the rate of £4 per cent. per annum, on the said sum of £2000 from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the said land, and the rents and profits (if any) from the said 1st day of July until the day of the completion of the purchase." "11th. William Maxwell doth hereby agree, by way of contract, but which is not to form part of the said conveyance that he will, within eighteen calendar months from the execution of the conveyance to him, at his own cost, erect and build and complete fit for habitation and use, upon the land hereby agreed to be sold, and with the best materials and workmanship of every description, one messuage or dwelling-house, with the necessary outbuildings thereto (and either with or without coach-houses, greenhouses and forcing pits), and will fence the said land and expend in the erection of such messuage and dwelling-house and outbuildings the sum of £3000 sterling at least." 12th. Mr.

Maxwell agreed to pay to Mr. Wells £50 towards the expense which should be incurred by him in forming a road of which he was to have the right of user.

On the 4th of June 1862 the solicitor of the Plaintiff sent to the solicitor of the Defendant the abstract of title. On the 24th of June 1862 the Defendant's solicitor delivered his requisitions on the title, which were answered on the 7th of July 1862. On the 9th of July 1862 the Defendant's solicitor sent further requisitions on title, which were answered on the 22d of July 1862. On the 4th of August 1862 the Defendant's solicitor sent to the Plaintiff's solicitors a notice, requiring [410] them within one month to comply with the nine remaining requisitions upon the title, which the notice specified, and it proceeded thus:—"And if you refuse or neglect to comply with the notice, within the time aforesaid, I do hereby determine and put an end to the before-mentioned contract."

These requisitions were complied with except the 22d and 11th, which were of this nature:—The 22d required satisfaction to be entered of an order, made by this Court on Mr. Fuller, a former proprietor of the property and a contributory of a public company, on the 3d of August 1859, to pay the sum of £900. This sum had, in fact, been paid, but satisfaction could not then be entered up, as the official manager was travelling on the Continent, and the Plaintiff's solicitors were unable to communicate with him so as to obtain his signature.

The 11th requisition related to an order of the Inclosure Commissioners, under which the whole of the Worcester Park estate had been charged with the annual sum of £195, payable for thirty-one years to the General Land Drainage and Improvement Company. The Defendant required that the portion purchased by him should be discharged from this incumbrance.

The Plaintiff endeavoured to comply with this requisition, and negotiated for the discharge of the lands purchased from its proportion of the charge; but, ultimately, the owners of the charge declined to release the lands purchased, on the ground that they were advised by their counsel that to do so would endanger the security over the rest of the estate. The Plaintiff, in consequence, entered into a negotiation for the purchase of the whole rent charge, and at length succeeded, but not until after the institution of this suit.

[411] A correspondence subsequently took place between the parties; the Defendants always insisted on their notice, and the Plaintiff insisted on the contract being performed. The two requisitions not having been complied with, the Defendant, in December 1863, commenced an action for damages against the Plaintiff, and on the 8th of January 1863 the Plaintiff filed this bill for a specific performance of the contract.

Mr. Selwyn and Mr. Jessel, for the Plaintiff. In equity the time appointed for the completion of a contract is not, as at law, of the essence of the contract; *Parkin v. Thorald* (16 Beav. 59). In *Roberts v. Berry* (16 Beav. 31, and 3 De G. M. & G. 284) it was held that the time specified for the delivery of the abstract was not of the essence of the contract. If there be an unreasonable delay on the part of the vendor in completing his title, the purchaser may, however, require the contract to be completed within a fixed time, and in default, he is entitled to rescind the contract. The time so limited must be reasonable, and such as to give the vendor a fair opportunity of removing the difficulties. In *Heaphy v. Hill* (2 Sim. & St. 29) there was a delay of two years, and in *Watson v. Reid* (1 Russ. & Myl. 236) a delay of a year in filing the bill after the abandonment of the contract, and in *Southcomb v. The Bishop of Exeter* (6 Hare, 213) there was a delay of eleven months. In *Nott v. Riccard* (22 Beav. 307) a notice to rescind, if the act were not done within a fortnight, was held sufficient; but there the vendor positively refused to comply, and therefore no extension of the time would have secured the performance of the act required to be done.

In this case, where there were only two requisitions [412] remaining, and which the vendors were doing all in their power to comply with, and, therefore, the time limited by the Defendant was neither sufficient nor reasonable.

Mr. Bagallay and Mr. Batten, for the Defendant. Notwithstanding the old authorities, it is now perfectly settled that time may be of the essence of the contract; *Selon v. Slade* (7 Ves. 265); *Levy v. Lindo* (3 Mer. 84). Time may be of the essence of the contract, either by express stipulation or from the nature of the subject of the

contract, or be made so by the delay of the vendor in completing it. Here the 5th condition expressly provides that the contract shall be completed on the 1st of July, and the object of the Defendant was to erect a house on the land for a residence, which of itself made time essential. In *Levy v. Lindo* (3 Mer. 84) Lord Eldon observed that Lord Thurlow had said that time was not of the essence of the contract, but that he (Lord Eldon) had deviated from that rule, and he then proceeds, "And there is no species of purchase to which the reason of this deviation is more applicable than to that of a house for residence." With such an object delay might render the purchase useless; — *v. White* (3 Swan. 108, n.). Here one month's notice was reasonable. In *Benson v. Lamb* (9 Beav. 502) the time limited by the notice was ten days, and in *Macbryde v. Weekes* (22 Beav. 533) it was one month. The Defendant has, therefore, effectively put an end to the contract.

The Plaintiff created unnecessary delay in paying off the whole rent charge, which was not completed until the 16th of February 1863. He ought to have got it apportioned under the 12 & 13 Vict. c. 100, ss. 11, 12.

But, secondly, this is not such a contract as the [413] Court can specifically perform. It cannot compel the Defendant to build a house or the Plaintiff to make a road; *Storer v. The Great Western Railway Company* (3 Railw. Cas. 106); *Flint v. Brandon* (8 Ves. 159); *Lane v. Newdigate* (10 Ves. 192); *The South Wales Railway Company v. Wythes* (1 Kay & J. 186). A contract must be specifically performed in its entirety and not in part, and if there be any portion of it which the Court cannot specifically enforce, the whole fails; *Hills v. Croll* (2 Phill. 60); *The South Wales Railway Company v. Wythes* (1 Kay & J. 186); *Ogden v. Fossick* (32 L. J. (Chanc.) 73).

Mr. Selwyn referred to *Sanderson v. The Cockermouth and Workington Railway Company* (11 Beav. 497).

THE MASTER OF THE ROLLS [Sir John Romilly] (without hearing reply) said: I think the Plaintiff is entitled to a decree for the specific performance.

In the first place, upon the first question which has been principally argued, whether time is of the essence of this contract, I am of opinion that it is not. I do not find any passage in this contract which limits a time for the performance of the contract. It is to be assumed that the parties expected that the contract would be performed on the 1st of July, but there is no agreement that either party should be at liberty to repudiate it if it were not performed on that day. Lord Thurlow held that time could not be made the essence of the contract in ordinary cases of purchases; but that doctrine has been completely overruled since that time, [414] and there can be no doubt that time may now be made of the essence of the contract, but it requires a distinct and express stipulation for that purpose. Here, so far from finding any agreement that the contract shall be completed by the 1st of July, it appears to me that the contract itself provides for the possibility of its not being completed by that time, for it states in the 6th clause, that if, from any cause whatever, not occasioned by the default of the Plaintiff, the purchase should not be completed by the 1st of July, not that the contract shall be at an end, but that the Defendant shall pay interest from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the land and the rents from that day until the day of completion of the purchase. In fact, there is not a word said as to time in the contract, except in the 2d and 3d clauses, which provide that the abstract shall be delivered within ten days, and that the objections to the title shall be delivered within twenty-one days from that period, and if not, then that all the objections to the title shall be considered as waived, and that, in this respect, time shall be considered as of the essence of the contract. Why does the contract say "in this respect" if it was meant that time should be of the essence of the contract in every other respect?

This, therefore, is distinctly a case in which, in my opinion, no time whatever is limited for the performance of the contract. But if it had been, and if, by the terms of this contract, the 1st of July had been the time limited for the performance of the contract, it has been clearly waived, because it was not until the 4th of August that notice was given to rescind the contract, if certain things were not done within one month. There had been a long correspondence between the solicitors of [415] the vendors and the solicitors of the purchaser from the 1st of July down to the 4th of August, when this notice was given.

I am then told that though time is not specified to be of the essence of the contract, yet the character of the contract or the subject-matter of the purchase may make it so. This undoubtedly is so, and if the property sold is perishable by the lapse of time, or if the subject of the contract is a matter which has a peculiar value in the mercantile market, such as mines and the like, which may vary from time to time, then, no doubt, time may be of the essence of the contract, although it is not so specified. But nothing of that sort exists here, the only thing that is alleged is, that the property was wanted for a residence.

The case of *Levy v. Lindo* (3 Mer. 84) was referred to, in order to establish the proposition, that where a person purchases a house for the purpose of a residence, it may be assumed that time is of the essence of the contract. But that was a very different case, that was the purchase of an existing house, which the purchaser wished to go into immediately, and it was pointed out that if the house remained untenanted until the performance of the contract, it would become seriously impaired. Here, so far as appears from the contract, the building of the house within eighteen months would be for the benefit of the vendor and not of the purchaser. It is an onerous contract by which the purchaser binds himself to build a house within eighteen months for the benefit of the vendor, which is the ordinary course when a man takes a building lease of a plot of land. Therefore the case cited does not apply, and I see nothing in this case, either in the nature of the property sold or in the [416] terms of the agreement, which makes time of the essence of the contract.

The only question then is, whether, in that state of the case, and considering the communications which were going on between these parties down to the 4th of August, the notice then given was a sufficient and effective notice. It appears that certain requisitions had been made, and, at that time, there were only two requisitions which had not been answered. I adopt the distinction between answering a requisition and complying with a requisition. For instance, if the requisition be, that the vendors do shew in whom a charge on the estate is vested, and that such person will join in the conveyance, an answer that the charge is vested in A. B., and that he will convey, is a sufficient answer to the requisition, but not a compliance with it; for the compliance only takes place when A. B. joins in the conveyance. It is a question of conveyance, and not of title, and the requisition is only complied with when A. B. joins in the conveyance and discharges the land from his charge upon it.

These were the two remaining requisitions, viz., the 11th, which related to the release of the land from the drainage charge, and the 22d, which related to an order of this Court making a call upon the former proprietors of the lands for £900 in respect of a company which was being wound up. I treat them both as substantial objections. Now what takes place is this:—On the 25th of August the solicitors of the vendor send a notice to the solicitor of the purchaser, in which they state, "We have a certified copy of the order which we are ready to produce to you. The vendor is taking the necessary steps to get the land agreed to be sold to Mr. Maxwell discharged from the liability under this [417] order, but as we have, of course, no controul over the movements of the Commissioners we cannot undertake to effect it within the time limited by Mr. Maxwell's notice. The draft declaration of Mr. Cuff is sent herewith for perusal. Messrs. Eyre & Lawson have undertaken to get satisfaction of this *lis pendens* entered. The £900 has been long since paid to the official manager. The vendor is advised that, except as to No. 11, which will be effected without any delay, he has now complied with all the purchaser's requisitions, and he will insist on the contract for sale being fulfilled by Mr. Maxwell." I think that strictly this notice ought not to have said "complied with," but "answered."

An answer is sent to that saying, "that Mr. Maxwell will adhere strictly to the notice he has given." On the 6th of September, two days after the time had expired, the vendor's solicitors wrote, saying, "We send copy letter received from Messrs. Eyre & Lawson, which will explain why satisfaction has not been entered to the *lis pendens* by Dr. Fuller, and which we presume will be satisfactory. The general drainage charge in respect of the piece of land purchased by your client will also be released, but we have not yet quite arranged whether the parties in whom it is vested will join in the conveyance to your client, or whether they will wish us to get

the whole charge released; in the latter event, we shall probably take a transfer of their charge under the Drainage Act to the first mortgagees. We believe the above comprise all the remaining requisitions in your notice to Mr. Wells."

Here was a complete answer that the vendor's solicitors had done everything that was required to be done, and that everything would be complied with and a complete title made.

[418] The answer to that is, that the Defendant "will adhere strictly to his notice, and as that has not been complied with he will treat the contract as at an end." No further communications take place between the parties, but the Plaintiff's solicitors are employed in the meantime, during the Long Vacation, in taking the proper steps necessary for complying with these two requisitions. The action is brought on the 1st of December, and then the parties are put at arm's length. Notice is given that the Plaintiff will insist on his contract, and this bill is filed in January 1863.

The question is whether, in that state of circumstances, a month was a reasonable time to give for complying with the requisitions and making the conveyance. I am of opinion that it was not. It is clear that I should be overruling the case of *Parkin v. Thorold* (16 Beav. 59), which was confirmed by the Lords Justices and has received the high sanction of Lord St. Leonards, if I were to hold that, in that state of circumstances, while the matter was going on, one party could say to the other, "You shall complete this within a month or else we will have nothing more to do with the contract." The cases of *Nott v. Riccard* (22 Beav. 307) and *Benson v. Lamb* (9 Beav. 502), which were cited, are totally different cases.

I am therefore unable to say that this is a case in which time is of the essence of the contract, or that the parties had a right to make it so, or to hold that, by reason of the non-compliance or negligence of the vendor, the Plaintiff was entitled to say "Unless you do something effectual for the purpose of removing these objections within one month, I am entitled to put an end to the contract."

[419] That being my opinion upon the question of time, I think the other objection is one which it is impossible to support, namely, that this is a contract which this Court will not enforce. Without referring to any of the decided cases, of which there are several similar to this, *Storer v. The Great Western Railway Company* (3 Railw. Cas. 106) and *Sanderson v. The Cokermouth Railway Company* (11 Beav. 497) are clearly instances in which that has been done, and there is nothing more common and ordinary. If the contention of the Defendants were to prevail, it would amount to this:—That whenever a man enters into a contract for the sale or purchase of a piece of land, and there is anything to be done by either party by way of easement or by way of accommodation to the other, this Court cannot specifically enforce the contract. I am of opinion that this is not the rule of this Court, and that it is perfectly distinct from a simple tradesman's contract between A. B. and a builder to build him a house, or as between A. B. and a roadmaker to make him a road, which rest upon totally different considerations. It is suggested that no means exist by which I could enforce it. The Court has many modes of enforcing it; but the simplest mode is this:—If the vendor refuses to perform it, I should allow the purchaser to make the road, and allow him to deduct from the purchase-money the proper amount of expenses for making it. This would be a very simple and effectual way of completing the contract on his part. Undoubtedly if this were a contract which depended upon the fact of the road being made, and if it were a condition precedent that there should be no contract unless the road were made, then other considerations would arise; but upon the construction of this contract, I am of opinion that such is not the effect of it, [420] but that the effect of it is simply that as a part or as a condition of the contract the Defendant is entitled to have the road made.

What I propose to do upon that part of the case is this:—I think I could not come to a satisfactory conclusion, without some further evidence upon the subject, that the road has been completed to such an extent as is reasonably fair, having regard to the contract between the parties; but I will require the Plaintiff to undertake to do this within some reasonable time before the conveyance is executed, either to the satisfaction of the Defendant or of some surveyor to be appointed by the Court. There must be a decree for the specific performance of the contract, and a perpetual

injunction against the proceedings at law, and as the Defendant has contested the contract he must pay the costs up to and including the hearing.

NOTE.—Affirmed by the Lords Justices, 22d June 1863.

[421] WEALE v. OLLIVE (No. 2). May 4, 5, 1863.

A testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on their deaths. There was a gift over, if they should omit to make their wills. Held, that they took absolute vested interests and not a life interest, with a power to bequeath, and that the gift over was void for repugnancy.

The testator by his will, dated in 1840, said:—

"I give the whole of my property, of every description, in trust to my executors to invest the same in English funds of Government all spare moneys that may come to their hands, that they may pay the interest of the same half-yearly to my nephew Thomas Ollive, of 30 Great Pultney Street, Golden Square, for his life, or they may empower him to receive the amount personally from the public offices appointed to pay the same; but he shall have no power to sell or mortgage this life interest to any other person, and in case of so doing, he shall forfeit his interest from the said funds, and they shall revert to the next claimant as I will appoint, that is to say, after his death or in case of his forfeiture, the interest shall be paid to the children of the said nephew Thomas Ollive and the children of my two nieces Frances Weale and Frances White that shall be legitimately born in wedlock, each sharing alike, and receiving their yearly interest after arriving at the age of twenty-one years. And should my executors think proper they may advance them a certain sum before their coming of age, should they have right of claim at that period; when advanced, that portion of interest will be reduced on arriving at the age of twenty-one years, in the same proportions as they had a previous advance. And after the said age of twenty-one years, they shall have the right to will away their share to whom they please on their death; and should they omit to make their will, then their interest shall go into the general fund for the benefit of the surviving children of [422] my nephew and nieces aforesaid, and the last surviving children of my nephew and nieces aforesaid, and the last survivor shall be at liberty of disposing by will of the residue funds, supposing they may be increased by all former lapses of claims under various circumstances. Should the last of the aforesaid children omit the disposal of the residue on their death, then it shall become the right of my nearest of kin living."

The testator died in 1847.

Thomas Ollive died in 1863, but he had had no children, and the question now arose as to the rights of the children of the nieces under the will.

Mr. Selwyn, Mr. Cottrell, Mr. Hobhouse, Mr. White, Mr. W. Q. Williams, Mr. Cole, Mr. Law and Mr. Horsay, contended, first, that the unrestricted gift of income to the children of Thomas Ollive, Frances Weale and Frances White was a gift of the corpus of the fund; *Humphrey v. Humphrey* (1 Sim. (N. S.) 536); *Elton v. Shephard* (1 Bro. C. C. 532). Secondly, that this was an absolute gift, and not a life interest with a power of appointment; *In re Maxwell's Trust* (24 Beav. 246); *Southouse v. Bate* (16 Beav. 132); *In re Mortlock's Trust* (3 Kay & J. 456). Thirdly, that the gift over, in case the legatees omitted to make a will, was inconsistent with and repugnant to the absolute gift, and that it was therefore simply inoperative; *Ross v. Ross* (1 Jac. & W. 154); *Williams v. Lomas* (16 Beav. 1); *Henderson v. Cross* (29 Beav. 261); *Holmes v. Godson* (8 De G. M. & G. 116); *Hughes v. Ellis* (20 Beav. 193); *Green v. Harvey* (1 Hare, 428).

[423] Mr. Baggallay and Mr. Schomberg, *contra*, for the legal personal representatives of Thomas Ollive, and who was one of the next of kin of the testator, contended that there was an intestacy as to some of the shares beyond the estate for life. They argued that the cases cited were instances of absolute gifts in the first instance with superadded words, which were held repugnant. That here there was a

mere life interest given with a power of disposition by will, with a gift over to the testator's next of kin in default of appointment; *Cooke v. Bowler* (2 Keen, 54); *Blewitt v. Roberts* (Craig & Ph. 274). That a gift over after an absolute interest, in default of the legatee not doing a particular act, was not necessarily void, but had the effect of restraining the extent of the prior gift; *Doe d. Stevenson v. Glover* (1 C. B. Rep. 448).

May 5. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case I am of opinion that the children of the nieces took an absolute interest. The will no doubt is very inartificially drawn; it was, as the testator states on the face of it, prepared by himself. It was suggested, that in consequence of the will having been drawn by the testator himself, it might admit of a different construction from what it would if it had been drawn by a professional man; but I apprehend that this is not so, and that the rules of construction must be exactly the same in both cases. The testator gives the interest of his residuary estate in trust for his nephew Thomas Ollive during his life, and he declares that he shall have no power to sell or mortgage his life interest to any other person; and in case of so doing, he shall forfeit his interest from the said [424] funds and they shall revert to the next claimant. I apprehend that this declaration was wholly void and had no sort of effect. The testator might have given the income of the property to Thomas Ollive until he became bankrupt or insolvent, and then have given it over to another person; but it was not competent to him to give a life-estate and then to say that he should not dispose of it. After the death of Thomas Ollive, or in case of his forfeiture, the testator says, "The interest shall be paid to the children of the said nephew Thomas Ollive and the children of my two nieces Frances Weale and Frances White, each sharing alike and receiving their yearly interest after arriving at the age of twenty-one years." If the will had stopped there, a question might have been raised, whether, notwithstanding the words "sharing alike" that did not merely give them a life-estate: but even then it is to be observed, that when he gives Thomas Ollive a life-estate, he expressly uses the words "for his life" and speaks of his life interest: he uses no such words here, but says they are to share the interest equally. He then gives his executors a general power of advancing any one of the children until they attain twenty-one. That being so, I think that their interests vested in them immediately on the death of the testator, subject to the life interest of Thomas Ollive, and liable also to be reduced *pro tanto* by the birth of any subsequent child (although that question does not arise here) before the period of distribution. Up to this point every intention is shewn that they should take absolute interests in their shares. The testator proceeds, "and after the age of twenty-one years, they shall have the right to will away their shares to whom they please on their death." The interest is therefore given to them for an indefinite period and without any qualification, and when they attain twenty-one they are at liberty to will away their shares as they think fit. It [425] appears to me that this gives to them an absolute interest in their shares.

Then follows a singular direction, "and should they omit to make their will, then their interest shall go into the general fund for the benefit of the surviving children of my nephew and nieces aforesaid." Here the word "interest" must, I think, mean the whole capital of their shares, and which is to go into the general fund. I am of opinion that this provision is repugnant to the character of the interest which he had before given them. Something might possibly have been said, if this direction had related to real estate, and there had been a direction that if the children omitted to do some act at a particular time the estate should go over to another; but I am satisfied that such a question does not arise here, which is merely whether this is a power which is incidental to the estate or repugnant to it. I fully concur in all those cases which hold that a right to will is an incident to and belongs to an absolute interest, and cannot be treated as a power. When an absolute interest is given, then the right to dispose of it by will is incidental to that estate and not a power attached to it. Here, if the testator had merely intended to create a power to bequeath this property, he ought to have given it to the children for life, with a power to dispose of it by will; instead of which, he gives it them in words, which, in my opinion, plainly import an absolute interest in the fund, and then adds, that if they do not dispose of it by will, it shall go to certain other persons. That was a condition

which he had no power to impose on the absolute interest which he had previously given them.

The rest of the will appears to me to confirm this view, and I should be creating an intestacy if I were to [426] hold otherwise, and this I am certain was not the intention of the testator. The case of *Cooke v. Bowler* (2 Keen, 54), which was strongly pressed in argument, does not appear to me to assist the contention that the children of the nephew and nieces took for life only, for in that case the words "for life" were used.

I think that the testator gave an absolute interest to these children, and that the condition imposed on them was void for repugnancy. I must make a declaration that they take absolutely in equal shares.

[426] *Re CORRIE'S WILL. May 23, 25, July 6, 1863.*

[S. C. on appeal (sub. nom. *Trevillian v. Knight*), L. R. 1 H. L. 30.]

A substituted bequest held subject to the same contingency as the original bequest. A testator bequeathed his residuary personal estate to his nephew and niece equally, and after their respective deaths, amongst their "issue," if there should be any "children" to take their parents' share. But in case the nephew or niece died "without issue, or leaving such they should die under twenty-one without issue," then he gave his or her share to the other of them or his or her issue "if he or she be then dead leaving issue as aforesaid." The niece died in 1811 leaving issue; the nephew died in 1862, leaving no issue. Held, that "issue" in the first part of the will meant "children," but in the latter part "issue generally," and that on the death of the nephew all the issue of the niece then living took *per capita*.

The testator bequeathed £15,000 consols to his wife for life, and his residuary personal estate (including the reversion of the £15,000) to his sister Mary Streatwells for life, and he proceeded as follows:—

"And after the death of my sister, I desire the principal moneys, &c., to be kept at interest by my executors and trustees with what I have before ordered to be paid to my sister, with the interest or dividends on the aforesaid £15 stock after my wife's decease; and I desire the interest of all to be paid and applied and I give and bequeath equally between my nephew John Corrie and his sister my niece Mary Portal, the share of my niece [427] to be paid" to her separate use for the term of her natural life, "and after her decease and the decease of my said nephew respectively, I give and bequeath the principal moneys equally among *their issue*, if there be any child or children to take the share of their deceased parent. And in case both (1) my nephew and niece both (1) die without issue, or leaving issue they shall die under the age of twenty-one years without issue, then I give the share of him, her or they so dying to the other of them or his or her issue, if he or she then be dead leaving issue aforesaid. But if both my nephew and niece aforesaid shall die without issue aforesaid," then he gave a moiety to Robert Campbell and his heirs, and the other moiety to Mary Lowree and her issue.

The testator died in 1807, his sister died in 1818, and his wife died in 1824.

Mary Portal died in September 1811, leaving issue, and a moiety of the fund was thereupon divided amongst them.

John Corrie died in August 1862, without having had any issue, and the second moiety then became divisible.

Mary Portal had seven children, of whom three of them died infants in 1811, a fourth, William, died without issue in 1826, and a fifth, Caroline (the wife of the Petitioner Mr. Knight), died in 1837. Two only, named Frances and Charlotte, survived John Corrie and were still living.

There were numerous grandchildren and great-grand-[428]-children of Mary Portal living, whom it is not necessary to specify.

(1) It was conceded that this word "both" meant "either."

The moiety of the fund which became divisible on the death of John Corrie having been paid into Court, Mr. Knight, as representative of his wife, presented this petition, praying a declaration of the rights of the parties, and for payment.

There were forty-three Respondents to the petition.

Mr. Hobhouse and Mr. Busk, for the Petitioner, the legal personal representative of Caroline (one of the daughters of Mary Portal), who died in 1837, in the life of John Corrie. First, in the gift to "issue" of John Portal's share, that word must be construed "children," in the same way as it was used in the former part of this will, where there is a reference to the parents' share; *Ross v. Ross* (20 Beav. 645). The gift is by substitution, and children and grandchildren cannot take concurrently; *Robinson v. Sykes* (23 Beav. 40).

Secondly, the gift vested in all the children of Mary Portal, and it was not a necessary qualification that a child should survive the tenant for life. The question, whether a substituted gift is subject to the same conditions and qualifications as the original gift, has been the subject of much difference of opinion, but the balance of authority and the most recent cases are in favor of there being no such implied condition; Jarman on Wills (vol. 2, p. 172 (3d edit.)); *In re Pell's Trust* (3 De G. F. & J. 291).

Mr. Selwyn, Mr. Speed and Mr. Faber, for grand-[429]-children now living. Issue is here used in its unlimited and extensive sense, and it may be construed differently in two parts of the same will; *Carter v. Bentall* (2 Beav. 551). This gift over will therefore include grandchildren. But those only will take who survive John Corrie, the tenant for life; for it would be a strained construction to hold that a legacy given over in case of A.'s death should belong to the estate of B., who predeceased A.

Mr. Leach argued that "issue," in the first instance, meant "children," and that "issue aforesaid" in the latter part meant the same class, or the issue before designated. He cited *Malcolm v. Taylor* (2 Russ. & M. 425).

Mr. Schomberg argued that "issue" meant "children," and that the children of Mary Portal who survived the tenant for life alone took.

Mr. Pemberton, for Mr. and Mrs. Murray and their trustee, argued that the issue took subject to the same contingency as their parents. He cited *Macgregor v. Macgregor* (2 Coll. 192); see also *Atkinson v. Bartrum* (28 Beav. 219); and *Crause v. Cooper* (1 John. & H. 207).

Mr. Druce and Mr. Townsend, for other parties.

Mr. Hobhouse, in reply.

May 25. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case a question of considerable interest and difficulty arises, having regard to the state of the authorities, for it must be admitted that the passages read [430] from the last edition of Jarman on Wills (vol. 2, p. 172 (3d edit.)) does not overstate the conflict of authorities. I have always considered the rule to be, that where, by a clause in a will, children are substituted for their parents, the same contingency which applies to the parents is also applicable to the children, and that it is necessary that the children should survive the period indicated to entitle them to take. Later authorities seem to contradict that view of the case, but it is scarcely possible to say there are more authorities one way than the other. That is what I have always considered the rule, and it has considerable advantages, because, where a testator gives a legacy to one, but if he be dead at a particular period to another, it is improbable that he could have intended a dead person to be substituted for a dead person; on the contrary, the probability is, that he intended a person living at that period to be substituted for one then dead, though the rule is, that the vesting is to take place as speedily as possible, and also that the class shall be ascertained as early as possible.

Here the gift is to the nephew and niece, and after their deceases respectively to their issue "if there be any child or children to take the share of their deceased parent." And in case both my nephew and niece both die without issue, or leaving issue they shall die under the age of twenty-one years without issue, then I give the share of him, her or they so dying to the other of them, or his or their issue, if he or she then be dead, leaving issue aforesaid." It is admitted that the word "both" in the last passage is to be construed "either."

The state of the case is this:—The niece died in 1811, leaving seven children

surviving her, and her [431] share has been distributed. The nephew John Corrie died in August 1862, without issue, and the question is, to whom his share goes, or which of the niece's issue are to take. Two of her children survived John Corrie, the tenant for life, and four died before him without leaving any issue. The first question is, how is the word "issue" to be construed, does it mean "children" or "issue generally?" I am of opinion it means "issue generally." In the first part of the will, where the testator says "amongst the issue if there be any child or children to take the share of the deceased parent," I have no doubt that "issue" means "children." In the next sentence he proceeds, "and in case both [either] my nephew and niece both die without issue, or leaving issue, they shall die under the age of twenty-one years without issue:" here, though "issue" in the first instance means children, yet I think that in the second instance it means "all issue generally." He proceeds "then I give the share of him, her or they so dying to the other of them of his or her issue, if he or she then be dead leaving issue aforesaid; but if both my nephew and niece aforesaid shall die without issue aforesaid," then he gives it over. I first consider this passage without the word "aforesaid." It is plain "issue" means without any issue at all, for the existence of any child or grandchild would prevent the gift over taking effect, and issue must here mean issue generally or there would be an intestacy. In the previous sentence (reading it as the events have happened) the testator says, if my nephew "die without issue, or leaving issue they shall die under the age of twenty-one years without issue." Here again "issue" must obviously include not only children but grandchildren, because he speaks of issue dying without issue, which refers to grandchildren, and therefore means any issue. Then he gives the share of the nephew to the niece "or her [432] issue, if she be then dead, leaving issue aforesaid." She was dead and left issue, and they will take.

It was argued, from the addition of the word "aforesaid," that I must hold "issue" to mean children throughout; but I am not of that opinion. At the commencement the testator speaks of issue as children, and of their taking their parents' share, but he afterwards uses the word "issue" in a sense which goes clearly beyond children. Therefore "issue aforesaid" means issue last aforesaid, and it is *nomen generalissimum*.

That lets in forty-four persons; there is about £10,000 stock to be divided; and the question is, whether these forty-four persons are to participate in it. My duty is, to disregard the consequences. The question is, whether all the issue of Mary Portal, including those who died before August 1862, take. I am of opinion, that in affirmation of that which I stated to be the rule, the words of this will mean, those only of the issue who survived John Corrie, the tenant for life, and not those who died in his lifetime. Observe the consequences; the nephew's share is given to the niece "or her issue" if she be then dead leaving issue. It is clear that if any of the class who die in the life of John Corrie, the tenant for life, are to be included, the words "her issue" cannot receive any different interpretation whether such issue predeceased her or not. The niece left seven children, three of whom died a month after her; but if they had died a month before her, they must be included in the class, if all the issue coming into existence after the death of the testator, though dying before the tenant for life, are to be included in the class to take. On the death of John Corrie, this gift vested in possession in Mary Portal if she survived [433] him, but if not it then vested in her issue, therefore the gift to her issue was in abeyance, or the class contingent. How can they all, including those then dead, take? According to the rule, it must be because it was vested in them, but while she was alive it was contingent. They might, by possibility, take, because they had a sort of *nunc pro tunc* vested interest in this fund. It is clear that if all the niece's issue had died, even a day or two previously to the death of John Corrie, the gift over would have taken effect, because the niece had no issue at that time. Why, if there happened to be but one surviving child, am I not to construe the gift in the same way? Why am I to let in a number of deceased persons to participate in the bequest if there be but one survivor, but hold that it goes over if there be none surviving?

I think it means this:—If my nephew dies without issue, I give his share to my niece, but if she be then dead, leaving issue, then to such issue, and therefore that the issue who survive the tenant for life alone take.

Declare that, upon the death of John Corrie, the funds vested in possession in all the issue of Mary Portal then living *per capita*.

NOTE.—Upon appeal, the Lords Justices, as I have been informed, differed. The decision was therefore affirmed, on the 18th of December 1863, but the parties intend to appeal to the House of Lords. [See L. R. 1 H. L. 30.]

[434] SCHOLEFIELD v. LOCKWOOD (No. 1). Feb. 12, 13, March 18, 1863.

[Affirmed, 4 De G. J. & S. 22; 46 E. R. 822; 33 L. J. Ch. 106; 9 L. T. 400; 9 Jur. (N. S.) 1258; 12 W. R. 114. For subsequent proceedings, see L. R. 7 Eq. 83.]

Estates of a husband were settled on the husband for life, with remainder to such uses as the husband and wife should appoint for raising money by mortgage, and in default to the wife for life, with remainder to the husband and wife in equal moieties. The husband and wife executed the power, for the purpose of raising money for the use of the husband. Held, that the wife's estate could not be considered as surety for the husband's debt, and that she had no equity to have the whole mortgage money paid out of the husband's moiety alone.

Several questions arose in this case, which it will be convenient to keep separate.

Mr. Dutton was seized of certain real estates in Yorkshire. A post-nuptial settlement, dated the 26th of July 1832, was executed for valuable consideration, which was made between Mr. Dutton of the first part, Mrs. Dutton his wife and trustees of the other parts, whereby Mr. Dutton conveyed the estates to the use of himself for life, with remainder to such uses as Mr. and Mrs. Dutton should jointly appoint, for the purpose of raising money by way of mortgage or otherwise; and in default of the execution of such power and subject thereto, upon trust (after paying a certain specified sum) for Mrs. Dutton for life; and after her death, as to one moiety, to Mr. Dutton in fee, and as to the other moiety, to such uses as Mrs. Dutton should appoint; and in default, to her in fee-simple.

On the 1st of June 1837 Mr. and Mrs. Dutton executed their joint power of appointment reserved to them by the settlement of 1832, by way of mortgage to secure two sums of £600 and £400, which were raised for the benefit of Mr. Dutton alone.

Mr. Dutton died in 1858 and Mrs. Dutton died in 1859, and a question arose between the persons claiming under them respectively, as to the mode in which the mortgages of £600 and £400 ought to be borne.

Mr. Hobhouse and Mr. Wickens, on behalf of the [435] persons entitled to the wife's moiety of the estate, argued that in the mortgage transaction of 1837 Mrs. Dutton was a mere surety for her husband, the money having been raised for his benefit and received by him alone. That consequently the whole mortgage was payable out of Mr. Dutton's moiety of the estate, so as to exonerate Mrs. Dutton's moiety altogether therefrom; *Lancaster v. Evors* (10 Beav. 154).

Mr. Selwyn and Mr. E. F. Smith, for the Plaintiff, an incumbrancer by judgment on the husband's moiety, distinguished this case from that of an ordinary mortgage of a wife's estate for the benefit of her husband. They pointed out that here the mortgage had been created by virtue of a power reserved by the husband out of his own estate for that purpose, and not out of any interest actually vested in the wife. They cited Jarman on Wills (vol. 2, p. 609 (3d edit.)); *Jenkinson v. Harcourt* (1 Kay, 688).

March 18. THE MASTER OF THE ROLLS [Sir John Romilly] said that he thought that Mrs. Dutton could not, in the absence of any stipulation to that effect contained in the deed, say that the whole of the charge was to be thrown on her husband's moiety, to the exoneration of her own.

NOTE.—Affirmed by Lord Westbury, L. C., 6th November 1863. [4 De G. J. & S. 22.]

[436] SCHOLEFIELD v. LOCKWOOD (No. 2). Feb. 12, 13, March 18, 1863.

A property which was subject to a mortgage of £1400 was settled by a deed, which erroneously stated that it was subject to a mortgage of £1200. The error being clearly proved, the Court, as between the parties claiming under the settlement, and under the peculiar circumstances, treated the estate as subject to £1400, without a cross-bill to rectify the settlement.

Mr. Dutton was seized of three properties in Yorkshire, subject, as to the second, to a mortgage for £1400 to Powell, and as to the third, to a mortgage of £3000 to another person.

By a post-nuptial settlement executed for valuable consideration in 1832, and made between Mr. Dutton of the first part, his wife Mrs. Dutton of the second part, and other parties, after reciting that Mr. Dutton was entitled to the property in question, subject to two mortgages on part thereof for securing the sums of £3000 and £1200, and after reciting other matters, the properties were settled, subject to the above mortgages, on Mr. and Mrs. Dutton successively for their lives. But they had a joint power of appointment, with an ultimate remainder to them in fee in equal moieties.

It will be observed that the deed stated erroneously one mortgage to be £1200 instead of £1400.

Subsequently, in 1835, Mr. Dutton mortgaged the first and second properties, expressly subject to the mortgage of £1400; and in 1837 Mr. and Mrs. Dutton executed their power of appointment to secure a further mortgage, and they thereby empowered the mortgagee to sell and to pay the mortgage of £1400 and interest. This deed expressly referred to this mortgage as being one to Powell, and stated the amount of it to be £1400 and interest.

In addition to this, Mrs. Dutton, who died in 1859, [437] had, in an answer put in by her in November 1841, in a suit in Chancery in which she was a Defendant, admitted that the £1200 was inserted in the deed of 1832 by mistake, and that the sum of £1400 was intended to have been inserted therein instead of it.

After the death of Mr. and Mrs. Dutton, the representatives of Mrs. Dutton insisted that, under the settlement of 1832, the property was charged with £1200 only, as between the husband and wife.

Mr. Hobhouse and Mr. Wickens, on behalf of persons claiming under Mrs. Dutton, argued that as between Mr. and Mrs. Dutton and those representing them, the property was only subject to a mortgage for £1200 and not to £1400, and that Mr. Dutton and those representing him were estopped, by the deed, from alleging that the mortgage exceeded £1200. That consequently the remaining £200 was payable out of Mr. Dutton's moiety of the estate.

Mr. Selwyn and Mr. E. F. Smith, *contrà*.

March 18. THE MASTER OF THE ROLLS [Sir John Romilly]. The question I have to determine depends on the effect to be given to the deed of 1832. There was no mortgage for the sum of £1200 affecting any part of the property, and I am called upon to decide whether this is a settlement of the property subject to the entire mortgage of £1400 or only to six-sevenths of it, viz., the £1200 mentioned in the deed. If there had been nothing more in the matter, the terms of the indenture, remaining unperformed, would be binding upon me; but I think that the subsequent transactions and dealings [438] of the parties concerned and the declaration connected with them, establish, conclusively, that this sum of £1200 was introduced into this settlement by mistake for £1400, and where this is established and has been acted upon, it is not, I think, necessary that the mere formality of a suit should be gone through to rectify an error, admitted by the persons interested in contending the opposite and who were parties to the transaction, in a deed, the trusts of which are fully performed or about to be so by my order, and where the persons originally interested in these trusts are all dead.

How this is made out will appear from the circumstances I am about to refer to. [His Honor referred to the mortgage of 1835 by Dutton, subject to the £1400, and

the appointment of 1837 by way of mortgage by Mr. and Mrs. Dutton, with trusts for sale and to pay that sum.] The deed of 1837 expressly refers to the mortgage to Powell, and states it to be for a sum of £1400 and interest, and I consider this indenture, which was duly executed by Mrs. Dutton, as equivalent to an express declaration under seal, that the deed of 1832 contained the sum of £1200 by mistake for £1400. The mortgage is referred to as the mortgage of Powell, it is expressly treated as being a mortgage for £1400, which was the real amount, there was no other mortgage, and the original settlement of 1832 does not treat the £1200 as the portion of the mortgage, but as the entire mortgage.

It is contended, on the other side, that Thomas Dutton and those who claim under him are estopped, by the expressed recital in the deed of 1832, from alleging the contrary; but I do not concur in this argument. If this were so, it would equally apply if a suit were instituted to rectify the settlement, and no deed could [439] ever be reformed, if the persons who committed the mistake were to be estopped from alleging it (however conclusive the evidence of such error might be) by the fact that the deed stated the contrary.

In addition to this, Mrs. Dutton, in a suit in this Court admitted that the £1200 was inserted in the deed of 1832 by mistake for £1400.

I consider this point, therefore, conclusively established, and I must treat the settlement of July 1832 as if the sum of £1400 now appeared therein instead of the £1200, as representing the mortgage due to Powell.

[439] SCHOLEFIELD v. LOCKWOOD (No. 3). *Feb. 12, 13, March 18, 1863.*

Where the liability of a mortgagee in possession to account without annual rests once begins, it continues until changed by some further agreement come to between the mortgagor and mortgagee.

In February 1841 Mrs. Lockwood entered into possession of property mortgaged to her. At this time, the interest on her mortgage was in arrear and amounted to £96, and she and her representatives had remained in possession. The rents were more than sufficient to keep down the interest on the mortgages, and in 1858 the surplus amounted to £671.

Under these circumstances, the representatives of the parties entitled to the equity of redemption insisted that the mortgagee in possession ought to account with annual rests.

Mr. Selwyn, Mr. E. Smith, Mr. Hobhouse, and Mr. Wickens, for the parties entitled to the equity of redemption.

[440] Mr. Baggallay and Mr. Forbes, for the representatives of the mortgagee.

Wilson v. Cluer (3 Beav. 136) was cited.

THE MASTER OF THE ROLLS. I think it impossible to charge the mortgagee with annual rests; it being admitted that, at the time she took possession, the interest was in arrear, and that she did not receive within some weeks anything to pay off any capital. It is clear that when the liability of a mortgagee to account without annual rests once begins, it must continue until changed by some further agreement is come to between the mortgagor and mortgagees.

March 18. THE MASTER OF THE ROLLS [Sir John Romilly]. In February 1841 Mrs. Lockwood entered into possession of the property included in the mortgage, the interest then in arrear amounting to £96, which, in my opinion, as I expressed at the time of the hearing, makes it impossible for the account against her estate to be taken with annual rests. There will be the common account against a mortgagee in possession and nothing more.

[441] HARVEY v. HARVEY. May 28, 1863.

[See *Burbidge v. Burbidge*, 1867, 37 L. J. Ch. 48.]

A farmer bequeathed "the whole of the consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in or upon his dwelling-house and farm at his death to trustees, to carry on the farm "until the 6th of April next subsequent to or following the time of his decease," and after that day, to transfer "the consumable and other provisions, farming stock and effects," &c., then upon his house and farm to his son. He declared that his trustees were not to sell the "farming stock and effects" except in the ordinary course of management of the farm, and that the money produced thereby should fall into his residue. The testator died about four o'clock on the 5th April, at which time there was on the farm, besides the ordinary farming stock, a large quantity of corn and wool of the last year's produce, and an excess of fat sheep and stock of the value of £3314. Held, that these passed to the son.

The testator was tenant from year to year of the farm mentioned in his will. The tenancy commenced on the 6th of April in the first year of the tenancy, and it was liable to be determined on the 6th of April in each year, subject to due notice being given.

By his will, dated in 1861, the testator bequeathed as follows:—

"I bequeath the right of occupation of and all my interest in my farm at Brauncewell and Dunsby, now held by me under the Marquis of Bristol, to my son Thomas Harvey. And I declare that such right of occupation of and interest in the said farm shall commence as and from the 6th day of April *next subsequent* to or following the time of my decease. I bequeath my household furniture and effects, and the whole of the consumable and other provisions, *farming stock and effects*, farming implements, growing crops and tenant right which shall be in and upon my dwelling-house and farm at Brauncewell and Dunsby aforesaid at the time of my death to John Harvey, Richard Sutton Harvey and George Mortoni [his executors], upon trust to carry on my farming and grazing business, and, for that purpose, to continue tenants of the said farm at Brauncewell and Dunsby, and employ my live and dead agricultural stock and such part of my personal estate [442] as they shall think fit, until the 6th day of April *next subsequent* to or following the time of my decease; and upon further trust, immediately after the said 6th day of April next subsequent to or following the time of my decease, to transfer the household furniture and effects, consumable and other provisions, *farming stock and effects*, farming implements, growing crops and tenant right, which shall be then in and upon the said dwelling-house and farm at Brauncewell and Dunsby aforesaid, to my son Thomas Harvey for his own absolute benefit.

"I declare that the trustees or trustee, for the time being of my will, shall not sell and dispose of or otherwise convert into money the live and dead farming *stock and effects*, which shall be in and upon the said farm at Brauncewell and Dunsby now occupied by me, except nevertheless such part or parts thereof as it may be usual or desirable, from time to time, to sell or dispose of in the ordinary course of management of my farming and grazing business. And I declare that the money to be produced from such sale or sales shall go along with and be considered as forming a part of my residuary personal estate. I direct that a valuation of the household furniture and effects, consumable and other provisions, *farming stock and effects*, farming implements, growing crops and tenant right hereinbefore directed to be transferred to my son Thomas Harvey as aforesaid shall, on the same being so transferred to him, be made."

The testator then proceeded to state that if the amount of the valuation should be less than £6000 then he bequeathed to his son Thomas Harvey, in addition, such a sum of money as, with the said valuation, would make £6000.

The testator died about four o'clock in the afternoon [443] of the 5th of April 1862. At the time of his death, there remained upon the farm, besides the growing

crops and the ordinary farming stock, about 264 quarters of wheat and thirty quarters of barley, the produce of the preceding year and then unthrashed, about 471 tods of wool; and, besides such sheep, horses and beasts as it was then usual to keep in the ordinary course of management of the farm, there were 338 fat sheep, two cart-horses and a mare and twenty-six beasts, which were in excess of the live stock which the farm could, at the testator's death, profitably carry, and which were then, in the ordinary course of management thereof, properly for sale and not for use upon the farm. Sixty-two of the fat sheep had been clipped and ordered to market by the testator before his death, and the testator having died very suddenly, such lot was accordingly taken away by the salesman on the 7th April 1863. The value of all these amounted together to £3314.

The Plaintiff Thomas Harvey took possession of the farm on the 6th of April 1862, and the question was, whether this stock of unthrashed corn and the wool and fat sheep, &c., belonged to the Plaintiff Thomas Harvey, as part of the property directed to be transferred to him on the 6th day of April 1862, or was to be considered as part of the general personal estate of the testator.

Mr. Baggallay and Mr. Bristowe, for the Plaintiff Thomas Harvey, cited *Vaisey v. Reynolds* (5 Russ. 12); *Steward v. Cotton* (5 Russ. 17, n.); *Brooksbank v. Wentworth* (3 Atk. 63).

Mr. Hobhouse and Mr. Bathurst, *contra*, cited *Cole v. Fitzgerald* (3 Russ. 301).

[444] THE MASTER OF THE ROLLS [Sir John Romilly]. The testator never anticipated that his death would occur on such an inopportune moment as to leave to his trustees about nine hours only for the performance of the trusts which they had to perform previous to the 6th of April.

The testator directs his farm to be carried on "until the 6th day of April next subsequent to or following the time of his death," he must, as in ordinary parlance, be taken to mean that particular day which first happened after his decease. He died about four o'clock on the 5th of April, and it was obviously impossible for the trustees to perform the trust in the intervening time.

The important question arises on the direction to transfer to the Plaintiff on the 6th of April "the household furniture and effects, consumable and other provisions, farming stock and effects, farming implements, growing crops and tenant right" in and upon his dwelling-house and farm. This is clumsily expressed, for his tenant right could not be "in and upon the dwelling-house and farm." It is to be observed that the words "farming stock and effects" are used in two other places. He at first gives his "farming stock and effects," &c., to his trustees to carry on his business. He, in a subsequent part, declares that they are not to sell "the farming stock and effects," except as may be usual or desirable in the ordinary course of management of his farm. Is it possible to say these words "farming stock and effects upon the farm" do not carry the corn, wool and sheep ready for sale to the trustees. The clear intention of the testator was that they should pass to his executors, and if proper be sold [445] by them. If the testator had died a month sooner, they would clearly have taken these articles under the previous bequest to them, and on the 6th of April they would have left on the farm only such portions of them as were proper and necessary to carry on the farming business.

The rule is distinct, that unless there is some very strong indication to the contrary, on the face of the will, the same words must mean the same thing in every part of the same will in which they are used. If, therefore, these words would carry the corn, the wool, the fat sheep and the beasts to the trustees, how can I say that, in the direction to the trustees to transfer the same things to Thomas Harvey, they mean something more limited and restricted? This is a construction which this Court cannot admit. If the words are to be restricted in the manner the Defendant insists, then the same restricted meaning must be given them in the next sentence, and none of these are to be sold by the trustees. It is possible that the wool would not be included in the words "live or dead farming stock," but I have no doubt it comes under the words "effects."

I have no doubt that the singular and unforeseen period of the death of the testator has defeated what he expected would be the result of his will; but I think the Plaintiff is entitled to the corn, wool, sheep and beasts.

[446] PRICE v. SALUSBURY. Dec. 12, 15, 1862; Jan. 13, 1863.

[S. C. on appeal, 32 L. J. Ch. 441; 8 L. T. 810; 9 Jur. (N. S.) 838; and in House of Lords, 14 L. T. 110.]

Practice as to permitting a bill to be amended after replication.

Specific performance of a contract partly by parol, though possession had been given and rent paid, refused, on the ground that it would be violating two rules regulating the exercise of the jurisdiction in specific performance; first, that a written agreement cannot be varied by parol; and secondly, that when a parol agreement is sought to be enforced, on the ground of part performance, it must be shewn, plainly and distinctly, what the terms of the agreement are, and that the acts of part performance done are referable to that agreement alone.

Possession given and payment of rent under one agreement cannot be considered as a part performance of that agreement as substantially varied subsequently.

A written and signed agreement for a lease from the Defendant to the Plaintiff was entered into in June, and possession was given and rent paid. Afterwards, it was discovered that there were errors as to the nature of the tenures and rentals of the property, and in December a fresh written and signed agreement was entered into. This was afterwards again varied by parol. A bill by the tenant for specific performance of the varied agreement was dismissed by the Master of the Rolls, and on appeal, the Lords Justices disagreeing, the decree was affirmed.

This was a bill for specific performance, under the following circumstances:—

The Defendant, Sir Charles J. Salusbury, was, in 1859, possessed of considerable property, consisting of between twenty and thirty different holdings, besides many cottages and some chief rents, in the parishes of Bishton, Llanmartin, Llandeuvau and Llandewi, all in the county of Monmouth. Much of this was held under the Diocese of Llandaff, partly on leases for years, which would expire in 1866, and partly on leases for lives, and the rest of the land was freehold held by the Defendant in fee-simple. There had been, before 1859 and in the early part of that year, much negotiation and talk between the Defendant and Plaintiff respecting these lands, and a proposal was made to the Plaintiff by the Defendant, more than once, to take them all at a fixed rent to be paid in advance. Ultimately, in June 1859, an agreement was come to, which was as follows:—

“Be it remembered that Sir Charles John Salusbury, Baronet, hereby agrees to let, and William Price, yeoman, to take, all and every the leasehold farms, farm-houses, lands, hereditaments and premises held by [447] him, the said Sir Charles John Salusbury, under the Lord Bishop of the Diocese of Llandaff, situate in the respective parishes of Bishton, Llanmartin, Llandeuvau and Llandewi, in the county of Monmouth, and the rights, easements and appurtenances therewith held, used or enjoyed, for and during all the rest, residue and remainders now to come and unexpired of and in the several term and terms of years in the same several and respective premises, from the 25th day of December, now next ensuing, at the yearly rent of £739, 19s. 9d., clear of all existing and future taxes, rates and outgoings (except property tax), and to be payable by yearly payments on the 28th day of December in every year. William Price to pay to Sir Charles John Salusbury one whole year's rent, in advance, on the 25th day of December next, for which Sir Charles John Salusbury agrees to allow him interest thereon at the rate of £5 per cent. per annum. And William Price is to be entitled to the full benefit and advantage of him Sir Charles John Salusbury of and in all and every the leases of the said premises so granted to Sir Charles John Salusbury by the Lord Bishop of the Diocese of Llandaff as aforesaid. And Sir Charles John Salusbury hereby further agrees to execute proper assignments of such leases to him, William Price, when required so to do. Provided that if William Price shall fail to pay to Sir Charles John Salusbury the said whole year's rent in advance, as aforesaid, the assignment of the premises shall be forfeited. As witness the hands of the said parties this 23d day of June 1859.”

The amount of £739, 19s. 9d. was arrived at by referring to a list of the tenants' names, with the sums they paid set opposite to their names, amounting in the whole to £639, 19s. 9d., with an addition of £100 per annum. Immediately after the agreement had been [448] executed, the Defendant signed printed notices on the tenants to quit on the 25th December 1859, and then he gave them to the Plaintiff to deliver to the tenants, which he accordingly did. In this way, notices to quit were signed by the Defendant and delivered to all the tenants under him, except to the Plaintiff himself. On serving the notices, the Plaintiff discovered, from the inquiries he made from the tenants, that the list above referred to was imperfect. In one case, the sum set against the name was £16 instead of £53, as it ought to have been, and in three other cases the figures were not inserted at all, but blanks were left in the list opposite their names, which ought to have been filled with the sums of £5, £25, and £4; these added to the £37, the deficiency already mentioned, amounted altogether to £71, which, if added to the £639, 19s. 9d., would make the total rental received by the Defendant amount to the sum of £710, 19s. 9d.

The Plaintiff said that this error being discovered early in December 1859, he went through the list with the Defendant, and made up the amount of the rent previously paid to be the sum of £710, 19s. 9d. already mentioned, to which the £100 agreed upon as the addition to be paid by the Plaintiff, being added, made up the £810, 19s. 9d., which sum was paid by the Plaintiff to the Defendant, who gave him a receipt for that amount on the 9th of December 1859, as follows:—

"December 9th, 1859.—Received of Mr. Price his rent, in advance, for the year 1860, of the leasehold property in different parishes.

"£810, 19s. 9d.

CHARLES SALUSBURY."

By his inquiries from the tenants, the Plaintiff also discovered, between June and December, that a portion [449] of their holdings were held by the Defendant for lives, under the See of Llandaff, and also that of a portion of the land in the parish of Biston, held by some of them at a rental of about £17, the Defendant was seised in fee-simple. He also discovered that the boundaries were confused and difficult to be distinguished. Having ascertained these facts, the Plaintiff, on the 26th December, called on the Defendant, and obtained from him his consent to sign a memorandum modifying the first agreement. Accordingly, the Plaintiff went away, caused such memorandum to be prepared, and brought it back to the Defendant who signed it. This second document was in these words:—

"26 December 1859.—This is to certify that the lifehold property in the different parishes, and the freehold property in the parish of Bishton, belonging to me is to be held by William Price, at the same rent, per acre per year, in proportion of the present rental of the whole, after the term of years lease is expired until the longest liver that is in the life lease is expired."

On the same day the Defendant signed an authority for the Plaintiff to take possession, which he did, except as regarded two or three small holdings.

But these two papers and the revised list of the tenants and the amount opposite their names did not constitute the agreement sought to be enforced; for the second list, containing the tenants' names and the rents paid by them, was also inaccurate. The Plaintiff said that, by mistake, it did not include two rents of £11 and £10, 16s. for two pieces of land, containing together a little more than twenty acres, held by the Plaintiff himself, at separate rents from his farm, of which the Defendant was seised in fee, and which were [450] situated at Bishton. The Plaintiff alleged that on the 26th of December 1859 the Defendant agreed that the Plaintiff should have a lease of these two pieces of freehold, at the same rent per acre as the average rent per acre agreed to be paid for the lands for which the rent of £810, 19s. 9d. had been agreed to be paid; but this was not specified in the memorandum of the 26th December 1859. The Plaintiff, however, stated and gave evidence, to the effect, that they were intended to be so included by the words of the second memorandum.

The bill in the penultimate paragraph stated the result of the agreement in these terms:—

"34. The final agreement made between the Plaintiff and the Defendant, as

hereinbefore appears, is to the effect that the Defendant should assign to Plaintiff all the Defendant's estate and interest in the said lands and hereditaments now holden by the Defendant of the Bishop of Llandaff for lives and for years, and also to grant to the Plaintiff a lease of the said freehold lands in Bishton, belonging to the Defendant in fee, for the lives of the said Edward Banks, Caroline Alston and Mary Phillips, and the longest liver of them. The rent for the whole property taken by the Plaintiff to be £810, 19s. 9d. per annum, and an added sum of £17 or thereabouts for the said freehold lands in Bishton, which were to be taken at an acreage rent as aforesaid, free from all deductions, except in respect of property tax, during the residue of the said term of twenty-one years, and an apportioned part of such rent to be paid for the said lifehold and freehold lands after the expiration of the said term of twenty-one years, such apportioned rent being calculated at the same average rent per acre as the Plaintiff is to pay for the whole of the said land, during the whole of the residue of the term of twenty-one years, as aforesaid. The Defendant appears [451] to dispute the facts of some parts of the Defendant's freehold lands being included in the said lease, and if it shall appear that the Defendant has any freehold lands not so included therein, the Plaintiff, of course, does not claim them."

This paragraph, as originally framed, did not state the agreement in the form in which it at present appeared, either in the original bill, or indeed in the bill as it stood after it had been once amended. It was not until after the bill had been a second time amended that it assumed its present shape. This second amendment introduced the passage in italics, and it took place under peculiar circumstances. It had been permitted by the Court, after replication filed, while the evidence on which each side intended to rely was known to that side, but was unknown to the other side. It had been permitted, notwithstanding the earnest opposition of the Defendant, who contended that, in fact, the proposed amendments would introduce a new case.

Another difficulty, as pointed out by the Court, was that if the memorandum of December 1859 had the effect attributed to it by the Plaintiff in his evidence, it must include the whole of the Defendant's lifehold property in the different parishes, and the whole of his freehold property in the parish of Bishton belonging to the Defendant. But the Plaintiff shewed that he held a piece of wood of the Defendant which was not intended to be included, and it also appeared that there were some smaller portions of freehold land in Bishton belonging to the Defendant which were not included in the agreement sought to be enforced by this bill.

The passage in the Plaintiff's bill relating to this [452] matter, and which was introduced upon the last amendment, was as follows:—

"The rents contained in the said list are correct, except that the rent paid by the Plaintiff by mistake, did not include two rents of £11 and £10, 16s. for two pieces of land, one called Jones's Meadow, containing 7a. 2r. 17p., or thereabouts, and the other a piece of common land containing 12a. 3r. 12p., or thereabouts, which were held by the Plaintiff of the Defendant at separate rents from his farm. Both these pieces of land are in the parish of Bishton, and are held by the Defendant in fee-simple. The Plaintiff also held a piece of wood from the Defendant at £2 a year; the piece of wood is in the parish of Llanwern, but was not included in the agreement, the subject of this suit."

The cause now came on for hearing.

Mr. Selwyn and Mr. Jessel, for the Plaintiff.

Mr. Baggallay and Mr. Whitbread, for the Defendant.

The Marquis of Townshend v. Stangroom (6 Ves. 328); *Woollam v. Hearn* (7 Ves. 24); *Clowes v. Higginson* (1 Ves. & B. 524); *Sutherland v. Briggs* (1 Hare, 26); *Mundy v. Jolliffe* (5 Myl. & Cr. 167); *Ridgway v. Wharton* (6 H. of L. Cas. 238); 29 Car. 2, c. 3, were cited.

Mr. Selwyn, in reply.

[453] Jan. 13. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a bill filed for the specific performance of an agreement, whereby the Defendant agreed to let to the Plaintiff certain lands on certain terms and conditions; the agreement is a parol one, and the Plaintiff seeks the specific performance of it, on the ground of part performance. The first duty of the Plaintiff is to establish what the terms of the

agreement were. They do not appear in any one or more written documents; but it is alleged to be a parol agreement, evidenced partly by two documents in writing and partly by parol evidence, and which agreement has been part performed by letting the Plaintiff into possession of the property demised, and by accepting rent from him on the terms and according to the conditions of the agreement. This parol agreement, depending on two documents, the deficiencies in which are to be supplied by parol testimony, has been found so embarrassing to the pleader that he has thought it desirable to set forth, in the nature of a summing up of his previous allegations in the bill, what the agreement is which the Plaintiff seeks to enforce. He has done this in the penultimate paragraph of this bill. [His Honor stated it (see *ante*, p. 450). He then stated the circumstances under which the amendment, after replication, had been permitted.]

I find it so difficult, without hearing the cause, duly to appreciate the result and effect of such and similar applications, whether they be to amend or to add fresh evidence, that I frequently grant such applications, reserving to myself, at the hearing, the consideration of the circumstances under which the application was made, and how it may bear upon the opposite party at the hearing, and then to consider whether, if I had been, at the time when it was made, in possession of all the cir-[454]-cumstances which the hearing of the cause discloses, I should have thought it right to grant such application, not, in any case, for the purpose of treating the Plaintiff's bill as if such amendment had not been made, but for the purpose of considering, when the whole case is before me, whether the amendment has been introduced, not in order to correct some accidental slip, but for the purpose of fitting and adjusting the Plaintiff's case to evidence subsequently obtained, and which, if the Plaintiff's case be correct, ought to have been within his knowledge when he filed his bill.

This appears to me a somewhat striking instance of the necessity of making this reservation, for the amendment, made in consequence of the order so obtained, adds a fresh term to the agreement, which had not been previously stated in the bill, but which was required, for the purpose of making the evidence and the peculiar situation of the property of which possession had been delivered to the Plaintiff consistent with the terms of the alleged agreement. This is more worthy of observation, because it must be admitted to be a circumstance extremely unusual, that a Plaintiff, who comes to enforce the specific performance of an agreement, should not be able accurately to state, in his instructions for the original bill first filed, exactly what that agreement is, in all its details, the specific performance of which he seeks to enforce.

It is obvious, looking at this bill and the various amendments added to it, that the pleader, who prepared it, must have felt extremely embarrassed as to the mode in which he should state the agreement, so as to make it consistent with all the various ramifications of evidence, depending partly on written documents and partly on oral testimony, and complicated with the peculiar nature of [455] the property, consisting of leasehold, lifehold and fee-simple all intermingled with each other. This uncertainty is unfavorable to the Plaintiff's case, which requires that there should be no doubt or uncertainty about the terms of the agreement which he seeks to enforce, which ought to be distinct in his mind and memory when he gives his instructions, and which he is not at liberty afterwards to modify and qualify, to suit the arising difficulties of the case. I felt this very strongly at the close of the opening and the reading of the written evidence in support of the Plaintiff's case.

At the same time, I am bound to state, on the other side, that the *viva voce* testimony of the Plaintiff, who has been cross-examined in Court by the Defendant, has gone a great way to remove the difficulties from his case, and to supply deficiencies in it, which were, as I thought, previously existing and all but insuperable. He has convinced me that a definite agreement was originally entered into between the Plaintiff and Defendant, and modified and added to by a further agreement come to between the same parties.

To explain my decision I must refer to the outlines of the facts established in this case. [His Honor stated the first agreement and the subsequent discovery of the inaccuracies.]

If the Plaintiff had come for the specific performance of the agreement of the 23d of June 1859, simply, or even with the variation produced by the altered list, as the

consideration of which the receipt of the 9th of December 1859 was given, it would have been very difficult for the Defendant to have resisted his demand; but much more took place before the terms of the agreement, as the Plaintiff seeks to enforce it, were settled. [456] The imperfection of the statement of the amount of rent paid by the Defendant's tenants was not the only thing discovered in the interval between June and December by the Plaintiff. [His Honor stated the other errors in the second document of the 26th of December 1859. See *ante*, p. 449.]

If these two papers, together with the revised list of the tenants and the amount opposite to their names, had constituted the agreement sought to be enforced, or had contained all the terms of the agreement, stating all and omitting none, although the difficulty in the way of the Plaintiff would then have been considerable (increasing as it does every step), still, even then, the Defendant might have found it difficult to resist a decree for specific performance. But these documents, so modified, neither constitute the whole agreement, nor do they contain all the terms and conditions of the agreement, the specific performance of which the Plaintiff seeks to enforce.

The second list, containing the tenants' names and the rents paid by them, was also inaccurate. The Plaintiff says that, by mistake, it did not include two rents of £11 and £10, 16s. for two pieces of land containing together a little more than twenty acres, held by the Plaintiff himself at separate rents from his farm, of which the Defendant was seised in fee, and which were situated at Bishton. The Plaintiff, however, stated, and gave evidence to the effect, that they were intended to be included by the words of the second memorandum. The Plaintiff alleges that, on the 26th of December 1859, the Defendant agreed that the Plaintiff should have a lease of these two pieces of freehold at the same rent per acre, as the average rent per acre agreed to be paid for the lands for which the rent of £810, 19s. 9d. had been [457] agreed to be paid; but this was not specified in the memorandum of the 26th December 1859.

However, it is to be observed that this allegation, now made by the Plaintiff, was not made as his original bill, and even after it had been corrected by his first amendments, the allegation respecting it was, as now averred, incomplete, and it was only made perfect by the second amendment, made under the circumstances already mentioned. This is not, as in some cases it might be reasonably considered to be, a mere technicality arising from a slip of the pleader; it is obviously substance, and the whole case and evidence satisfy me, that the averment of agreement has been necessarily and unavoidably altered, to meet the exigencies of the case as they arose from time to time.

But the difficulty does not cease here. Even if the memorandum of December 1859, in its loose and general way, could be construed to have the effect attributed to it by the Plaintiff in his evidence, then the meaning of this memorandum must be to include the whole of the lifehold property in the different parishes, and also all the freehold property in the parish of Bishton belonging to the Defendant. But this is not the agreement, the specific performance of which is sought by this suit; for the Plaintiff says, that besides the two pieces of land above mentioned (which he asserts to have been included in the agreement), he also held a piece of wood from the Defendant at the rent of £2 a year, in the parish of Llanwern, which is not included in the agreement, and which, as the Plaintiff insists, was not intended to be included in it. And, besides all this, it further appears from the evidence, that there are also some small portions of freehold lands in Bishton belonging to the Defendant which are not included in the agreement, as that agreement is [458] alleged, and as it is sought to be enforced by the Plaintiff.

It is obvious, from this statement, that the whole thing is too vague and uncertain for the Court to be able to satisfy itself that it can ascertain what the real terms of agreement were, which, if ever, were finally settled between the Plaintiff and the Defendant; whether it be that which the Plaintiff originally alleged, or that which the parol evidence of the Plaintiff alone now supports. The pleader, no doubt, has, as I have said, ultimately, after a second amendment, with great difficulty stated a parol agreement which, though not that originally stated by the Plaintiff, and which, though not that proved by the written documents which are given in evidence, is attempted to be supported by the evidence of the Plaintiff. Singularly enough this evidence is given by the Defendant; it is not confirmed by anything else, and it is now relied on, on behalf of the Plaintiff, in order to make the agreement alleged

consistent with the delivery of possession to the Plaintiff of the various pieces of land held by the tenants whose names were written in the lists referred to, and which possession was effected by the notices to quit given to the Plaintiff and delivered by him, and also, at the same time, to make it consistent with the amount of rent paid by the Plaintiff and received by the Defendant.

It is complicated and intricate, and leaving out of consideration altogether the denial of the Defendant, I have endeavoured, by means of the parol evidence of the Plaintiff, and by taking the other statements as they appear in the list of tenants and the evidence, to trace out and complete the agreement as the Plaintiff now alleges it; but even then I have been unable to do so, unless by paring off from one list, and adding on to another list, and all this without any security for its [459] accuracy, beyond the mere unsupported oath of the Plaintiff, and all this in the teeth of a denial by the Defendant of any concluding agreement at all. In fact, I am convinced that the task is an impracticable one, and that if the Court were to support the Plaintiff's case, as he now states it, it would be violating several of the most important rules which regulate Courts of Equity in the exercise of its jurisdiction in specific performance, one of which is, that if this is to be considered as a written agreement, it cannot be varied by parol; and that if this be a parol agreement sought to be enforced in this Court on the ground of part performance, it must be shewn, plainly and distinctly, what the terms of the agreement are which has been part performed, and that the acts of part performance are referable to that agreement alone; which, in my opinion, has not been done.

My impression on this subject was so strong at the hearing of the case, that I was at first in doubt whether I ought to have called on the Defendant to be heard in answer to it; but, as the Defendant proposed to examine the Plaintiff, I thought it desirable to hear the account he gave of the matter, and his evidence given in Court went so far to support his case, that it made it necessary for me to go into the matter more fully and minutely. It appears that he is unable to write, beyond signing his name and setting down figures, and that he reads imperfectly—only sufficiently well to distinguish whose handwriting it is if it be familiar to him, and also to read figures. He is, however, a very acute man, and gave his evidence in a way which went, so far as it was possible, to support the case he had made by his bill; but the most careful attention to that evidence satisfies me that the agreement of the 23d June 1859 was entered into without any knowledge of the real circumstances [460] connected with the property proposed to be demised. That it was then found impracticable to act on this agreement, and that afterwards, although some patching of the original agreement was resorted to, no definite and concluded agreement was come to, suited to the peculiar nature of the tenures of the land demised and to the possession given in respect of the notices signed and served in June 1859.

Even if such an agreement could be spelt out of the proceedings and evidence of the parties, I am still of opinion that there was no part performance of it. The acts constituting the part performance must have reference to the agreement sought to be enforced; but the possession given, in this case, was in respect of the agreement of June 1859, and under notices then signed and served, not in respect of a subsequent and newly-altered agreement. The evidence of the Plaintiff shews that the agreement on which he now relies could not have been entered into before the 26th of December 1859. The first payment of rent is before the agreement of June 1859 was finally moulded into the form the Plaintiff now contends for, which was not till the 26th of December, and after that the rent paid is ambiguous and may be referable as much to one as the other.

The evidence of the Plaintiff seems to me to amount to this:—The agreement, as he now alleges it, is what would, if the Plaintiff and Defendant had each, in June 1859, fully understood every circumstance connected with the holding and position of the property intended to be demised, have been agreed upon between them, and the additions and alterations made by the Plaintiff are in the spirit of the agreement and for the purpose of giving due effect to it and to the possession which was delivered to the Plaintiff and the payment made by him [461] in pursuance of it. The Plaintiff was certainly, and I believe the Defendant also was, in June 1859,

ignorant of what the tenures were of all the property, and how they were intermingled. At this time notices were signed and served, in order that possession might be given of the whole property, leasehold, lifehold, and freehold, except that held by the Plaintiff. This is inconsistent with the agreement then in force. After this, in order to make the agreement fit with the possession delivered, first one term is added, then another change is made or attempted by the Plaintiff to be made, then a piece is omitted or attempted to be omitted by the Plaintiff, as the light respecting the property gradually dawned upon his mind, and was by him communicated to the Defendant. The evidence, however, of the Plaintiff shews that the Defendant, throughout the whole matter, knew what he was about; and I cannot, on account of the peculiar and qualified self-stultifying plea of the Defendant,⁽¹⁾ concede anything to him or his case which would not belong to a person actively and intelligently managing his own property.

I think that the Plaintiff's bill must be dismissed; but having regard to the circumstances of the case, and more especially to the evidence given by the Plaintiff *vis à vis*, to the effect, that the first and repeated solicitations to the Plaintiff to take a lease of the property proceeded from the Defendant, in the first instance, although the whole matter was never finally completed, I do not think fit to give any costs.

NOTE.—On appeal, the Lords Justices disagreed, and this decree was affirmed; but an appeal to the House of Lords is pending.

[462] HOWARD v. GUNN. May 29, 1863.

Where the solicitor of a company writes a letter apparently on behalf of the company, he has no such property in it as to entitle him to prevent its publication, although he swears that it was written in his private capacity.

In January 1863 the Plaintiff, the Defendant and others were concerned in getting up a company, called "The City of London and General Fire and Life Insurance Company, Limited." The Plaintiff Howard acted as the solicitor, and the Defendant Gunn as the manager.

It was arranged by the Defendant, as the acting manager, that Mr. Jamieson of Aberdeen should have 1000 shares allotted to him and his friends. But the Plaintiff, on the 12th of February 1863, sent a letter to Mr. Jamieson, by which he appeared to negotiate a new arrangement, and it was in the following terms:—

"London, 12th Feb. 1863.—My dear Sir,—Being at the offices of the company to-day, I saw your letters to Mr. Gunn; and in reference to your inquiry as to how the company is going on, I am happy to inform you that a large number of applications has been made, and that the directors have determined to allot only to those persons, whom they can rely upon will hold the shares for the purposes of investment, and as I have no doubt your friends are persons of that class, I take for granted you will not object to guarantee for them, or procure for them a guarantee, not to part with any share that may be allotted to them for a period of three months from the day of allotment, and for that purpose I enclose you a form of letter, which you will be good enough to sign (to be altered by you if you guarantee for the whole, or to be left intact if signed by the parties), and I shall be obliged to you if [463] you will forward the same to me by the return of post, as the allotment is intended to be made on Monday next. Referring to the recent interview between yourself and Mr. Gunn, and the proposal which you made, at the time, to place two thousand shares or upwards, I need scarcely remind you that you have not performed your part of the bargain, and that therefore the directors are relieved from making any allotment whatever to you or your friends. You may, however, rest assured that the directors are perfectly ready to fulfil their part of the undertaking to the utmost, provided you

(1) This referred to a statement of the Defendant as to his deficient memory.

give them the assurance above asked for, and which you will, of course, remember you have expressed at all times your readiness to do."

On the following day Mr. Jamieson sent a copy of this letter to the Defendant, with a letter, saying that he did not know in what capacity the Plaintiff had written to him, but that "it did not appear to be official." He remonstrated against the attempt to change the first arrangement with him, and insisted on the directors fulfilling their engagement.

Disputes and differences ensued; Jamieson took hostile proceedings, and the directors returned the deposits and wound up the company. Subsequently, on the 27th of March 1863, Howard gave to Gunn a written guarantee, for payment of £600 for a year's salary, and to indemnify him against all costs, &c., in consideration of Gunn's waiving all further claims against the company.

Gunn had recently written and published a pamphlet, entitled "Statement relative to the Difficulties of 'The City of London and General Fire and Life Insurance [464] Company, Limited,' addressed to the Shareholders by A. H. Gunn, late Manager of the Company." This contained a copy of the Plaintiff's letter of the 12th of February 1863, and of the guarantee of the 27th of March 1863.

The Plaintiff filed this bill in May 1863, to restrain the publication of these two documents. In his affidavit, he said that the letter in question had been written by him in his private capacity and not as solicitor of the company, and that he had never parted with his property therein. That the pamphlet contained many false and garbled statements respecting him and his conduct.

On the 7th of May the Plaintiff obtained an *ex parte* injunction, restraining the publishing and selling of the letter and guarantee, and a motion was now made to dissolve the injunction.

The Defendant did not contradict the Plaintiff's statement that the letter had been written in his private capacity; but he said it was unknown to him whether the Plaintiff had "any authority or instructions" to write it. The Defendant also said, that his conduct and character having been impugned, he considered that he ought and that he was legally entitled to publish the pamphlet and documents to exculpate himself.

Mr. Selwyn and Mr. Locock Webb, for the Defendant, argued that these letters were written by the Plaintiff merely as the agent and on behalf of the company, and that the Plaintiff had no property in them. But that even if he had, still the Defendant had a right to publish them as a statement to the shareholders to vindicate his [465] conduct and the proceedings of the company; *Percival v. Phipps* (2 Ves. & B. 19).

Mr. Baggallay and Mr. Ince, for the Plaintiff. The writer of letters has a property therein similar to a copyright, and no one is entitled to publish them against his wishes or without his consent; *Pope v. Curl* (2 Atk. 342); *Gee v. Pritchard* (2 Swan. 402). Here, the letters were written by the Plaintiff as a private individual, and not in his capacity of solicitor to the company.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this injunction cannot be sustained. I accede to the views of the Plaintiff, that a person has a property in letters written by him, and that this right cannot be violated by the person who receives them; but this, however, is subject to many exceptions and qualifications.

If the agent or servant of a company write a letter to a shareholder, it is the property of the company, and the agent or servant cannot say to the company, "You shall not produce or publish that letter." Many instances may be adduced to shew that a letter is not always necessarily the property of the person who wrote it. If the solicitor of an insurance company established in London, by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot say that the company have not a right to publish it.

[466] Take it a step further and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf of and by their direction. Thus, if it were written to a

person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company, in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company objecting to its contents, shall the solicitor be allowed to complain of its publication and to insist that it is a private letter, though it appears to be written on behalf of the directors? The answer is, if that be so, it ought not to have been written.

This letter, which was written to Jamieson, who had applied for shares, was apparently, on the face of it, written on behalf of the directors, and its contents clearly shews it. It is not marked "private" or "confidential;" it was written to guide the directors in the allotment of shares, and it asks that Mr. Jamieson should give the directors a written guarantee not to part with the shares for three months. If the Plaintiff did not intend to write this letter on behalf of the directors, he ought to have said distinctly, "This communication is not made on behalf of the directors," or "I am a shareholder and make this communication to you in my private capacity." But, on the contrary, the Plaintiff, in terms, writes on behalf of the directors to guide them in their allotment, and asks for an answer by return of post.

If that letter was not written on behalf of the directors, it was written to deceive Jamieson. It has all the appearance of having been written by the Plaintiff on their behalf, and Jamieson so treats it, for he writes to the manager in answer to it. Can the Plaintiff be [467] allowed to say that the company have no right to publish it? and if they have, is not the Defendant entitled, as regards the Plaintiff, to bring it forward? It is obvious that this was not a private letter and was not intended to be a private letter.

The second document is really an agreement, but they both relate to the management of the company, and the solicitor of the company cannot claim any exclusive property in them, and say that the company and their manager are not entitled to publish them. I must dissolve the injunction with costs.

[467] WENTWORTH v. LLOYD. *March 11, 12, 16, 17, 18, 20, April 17, 1863.*

A bill to set aside a purchase of property by an agent dismissed with costs, it being proved that the Plaintiff had distinct notice, at the time, that the agent was one of the beneficial purchasers, and the vendor not having instituted a suit for six years.

Evidence of the notoriety of a fact in a neighbourhood rejected.

This bill was filed to set aside a sale by an agent to himself and others, on the allegation that the fact had been concealed from the vendor.

The Plaintiff Mr. Wentworth and the Defendant Mr. Lloyd were jointly and beneficially interested in the sheep and cattle on the runs of property in the Liverpool Plains on the Namoy River in Australia, called the Namoy Stations, and in the profits to arise therefrom, in equal proportions.

Towards the end of 1852 the Plaintiff was desirous of selling the property, and previous to March 1853 he consulted Mr. Mort, an auctioneer and land agent at Sydney, on the subject of the sale. On the 11th of March 1853 the Plaintiff and Defendant Lloyd went to Mort and gave him a description of the station and [468] stock, and authorized him to sell it as an entirety. But afterwards, and before any contract had been entered into, it was settled that Lloyd's share was not to be sold, and that the Plaintiff's share alone should be disposed of. After this had been settled, an arrangement was made (unknown to the Plaintiff) between Croft, Tooth and Mort, under which they were to take the Plaintiff's half, estimating the whole at £29,860, the half of which sum was to be paid or secured to the Plaintiff. The purchasers were to become partners with Lloyd in the concern, and he was to have the management of it. The exact date of the whole transaction did not clearly appear, but the Court thought, on the evidence, that the parol agreement to sell to Croft and Edward Tooth took place on the 15th or 18th of March.

Considerable discussion took place between Croft, Tooth, Mort and Lloyd, at which the Plaintiff was not present, and of which he knew nothing, as to the shares and interests which these four gentlemen were to take in the partnership, and how it should be managed. This was finally settled at a dinner at which these four gentlemen were present, on the 24th of March 1853. By the terms of this partnership, so arranged, Lloyd was to have the general control of the concern, Mort was to be the agent in Sydney, and one-tenth of the profits was to be the salary of Lloyd's brother for the active management of the stations. The right of closing the concern was to be left to the majority; but in the case of a sale, or of dissolution, at any time, Lloyd was to be at liberty to take the whole or the share of any one of his partners at a valuation, and the firm was to be called Lloyd & Co.

Mr. Mort represented to the Plaintiff that he had sold the entirety for £29,860, and he signed a contract for the sale on the 30th March 1853, of which he presented [469] the Plaintiff, Mr. Wentworth, with a copy. It was as follows:—

"I have this day sold for Messrs. Wentworth & Lloyd to Messrs. Lloyd, Croft & R. and E. Tooth, the stations belonging to the former gentlemen in the Liverpool Plains and Gwydir Districts, together with the sheep and cattle, horses, stores, &c., thereupon. Price for the sheep, 9s. (nine shillings), taking them at 42,000; for the cattle, 30s. (thirty shillings), taking them at 5800; store horses, drays, bullocks, &c., to be taken at £2000 (two thousand pounds); and 260 rams, 20s. (twenty shillings) each, making the amount as follows, viz. :—

42,000 sheep, at 9s.	.	.	.	.	£18,900
5800 head of cattle, at 30s.	.	.	.	.	8,700
260 rams, at 20s.	.	.	.	.	260
Stores, &c.	.	.	.	.	2,000
					<hr/>
					£29,860

"Payment— $\frac{1}{4}$ (one-fourth) cash, residue by bills at six, nine and twelve months. Bank interest added on transfer of stations and order for delivery being given. Delivery to be made and received on the 1st day of May next.

"For vendors and purchasers, THOS. S. MORT.

"Sydney, 30th March 1853."

This contract was wholly silent as to Mort's having any interest in the concern, and the Plaintiff mainly relied on this very strong circumstance in his favour. The contract was sent to the Plaintiff apparently on the 30th of March, the day it bore date, and it was returned by him on the 2d of April to Mort. Three months afterwards, on the 1st of July following, Lloyd gave £2500 to each of his three partners for their bargain, [470] shewing that, at that time at least, the Plaintiff might have got an increase of £50 per cent. for his moiety, and might have obtained £22,430 for it instead of £14,930, the amount paid to him.

This bill was filed on the 24th of March 1859 by Wentworth against Lloyd, Mort, Tooth, and others, insisting that the sale was void, and stating that he had not discovered the fact that Mort had been a co-purchaser until the month of February 1859. It prayed a declaration that the Plaintiff was entitled to one moiety of the stations, sheep, stock, &c., for a reconveyance, and for an account of the profits, the Plaintiff being willing to account for the £14,930 received by him.

THE SOLICITOR-GENERAL (Sir R. Palmer), Mr. Southgate, Mr. Surrage, and Mr. Marsden, for the Plaintiff.

Sir H. Cairns, Mr. Baggallay, and Mr. Pemberton, for Mr. Lloyd.

Mr. Rolt and Mr. Dickenson, for Mr. Mort.

Mr. Selwyn and Mr. Erskine, for Mr. Croft.

Mr. Jessel, for Mr. Tooth.

Mr. Roundell, for the other Defendants.

Randall v. Errington (10 Ves. 423); *Murphy v. O'Shea* (2 Jones & Lat. 422); and see *Charter v. Trevelyan* (11 Cl. & Fin. 714); *Gillett v. Peppercorn* (3 Beav. 78); *The Bank of London v. Tyrrell* (27 Beav. 273, and 10 H. of L. Cas. 26).

[471] *April 17.* THE MASTER OF THE ROLLS [Sir John Romilly]. This suit is instituted to set aside the sale of certain runs of land in Australia, on the ground that the Defendant, Mr. Mort, who was the agent employed by the Plaintiff to effect the sale, took a beneficial interest in the purchase, and that this circumstance was well known to all the persons who joined in the purchase. That, in fact, as to parts, Mr. Mort sold to himself, and that he did this with the knowledge and concurrence of his co-purchasers, but without the knowledge or sanction of the Plaintiff. The law applicable to the subject is not disputed, at least as to its general effect. If the fact, as I have stated it, be established, the sale cannot be permitted to stand good, and though there may be considerable complication and some difficulty in working out the consequent equities, the decree must proceed on the basis of the sale itself being wholly annulled. *Prima facie*, all that a Plaintiff has to do, in such a case, is to prove the fact of the agency of the Defendant and the fact that he was beneficially interested in the sale made. This the Plaintiff has done beyond all doubt or question; he has also as clearly proved that all the co-purchasers were aware both of the agency of Mort and his interest in the purchase. The burthen then falls on the Defendants to prove how they can justify or maintain such a sale.

Although there are considerable distinctions between the case of each Defendant severally, yet generally they all unite in this one defence, which is put prominently forward by the Defendant Lloyd and the Defendant Mort, viz., that the Plaintiff was, from the beginning of the transaction, and was throughout the transaction, and has continued down to the present time, cognizant of the interest his agent took in the purchase, and that [472] he has never complained of this till after the lapse of several years, when the property in question has become very much more valuable than could have been anticipated at the time of the transaction itself. This, if established, would unquestionably constitute an effectual bar to the Plaintiff's obtaining any relief in respect of such sale or ever questioning its validity.

The transaction complained of took place in March 1855, the bill was not filed till the 24th March 1859, the Plaintiff avers that it was not till February 1859 that he became acquainted with the vice which taints the transaction, viz., the sale by the agent to himself. The real question which, in my opinion, I have to determine is one of fact:—Did the Plaintiff or did he not know of the interest taken in the purchase, by the gentleman whom he had employed as his agent to sell, at the time of the transaction itself or within a very short space of time afterwards? The task of proving this falls on the Defendants. The Plaintiff declares that he was wholly ignorant that Mort had any interest in the sale, and that he never would have consented to the sale had he been made acquainted with the fact. The Defendants, Lloyd and Mort, declare that he was fully cognizant of that fact, and that they severally informed him of it. This is the main point on which this case depends, and I now proceed to consider and to examine the evidence on both sides relating to it.

Before doing so, it is proper to make a few observations on the question whether this property was sold at an undervalue. It is true that, if it was not, this cannot add to the validity of a sale made by an agent to himself. If sold for a full value it would not make such a sale good, but still if sold for an undervalue, it would import the additional ingredient of fraud into the [473] transaction, and explain the motives for such a sale by the agent to himself. In this case I think the ingredient of fraud does not enter, and I am of opinion, on the evidence, that the property sold for its full market value at that time, that is, in March 1853. The discovery of gold in Australia raised the price of stations generally in so rapid a manner as to make the increased price given by Lloyd three months after no badge of fraud or any evidence of an undervalue in the price given in March previously.

I do not think that the evidence offered, as to the notoriety in Sydney of the fact that Mort was a purchaser, is properly admissible to influence the decision of the cause, and I have wholly disregarded it.

The burthen of proof, to establish that Mr. Wentworth knew of the fact of Mort's interest, lies with the Defendants, and the question is, have they satisfied that obligation? It is certain, however, that if they concealed it from Mr. Wentworth, they did not do so from anyone else. The mortgage deed securing to Mort the

purchase-money paid by Lloyd to Mort, Croft and Tooth was duly registered in July 1853. This deed distinctly states the interest of Mort as a purchaser. Previously to that time, Lloyd went to Mr. Gilbert Wright (who was the Plaintiff's solicitor) with instructions to prepare the articles of partnership between him and the purchasers, Mort, Croft and Tooth, explaining the whole matter and shewing Mort's interest as a purchaser. [His Honor examined the evidence and, in the course of it, made some observations in relation to the circumstance, that in taking the evidence in New South Wales the Plaintiff had prevented his solicitor stating what the Plaintiff had said to him on the subject of the sale, by objecting that the communication was privileged. But as these [474] observations were made under the impression (which turned out to be erroneous), that the solicitor had been called as a witness by his client, and that the objection had been raised in his cross-examination, they are here omitted.]

The burthen of proof lies on the Defendants to prove distinct information to the Plaintiff and acquiescence by him after such information given. It must, however, be observed, though the burthen to do this lies on the Defendants, yet that, when a matter is contested six years after the event has occurred, where much material evidence may have been lost, the Defendants are entitled to every fair and reasonable presumption that may be drawn in favor of the direct testimony they adduce. In my opinion the Defendants have discharged the obligation so laid on them, and they have proved, though he may afterwards have forgotten it, that distinct information was given to the Plaintiff, at the time, of the fact that Mort was one of the beneficial purchasers of the moiety sold by the Plaintiff, and also that the Plaintiff has acquiesced in that fact, by not taking any steps to contest the sale for six years after it was accomplished. This being my opinion, it becomes unnecessary for me to consider any question of detail between the other Defendants. The Plaintiff's case fails, in my opinion, as regards Lloyd and Mort. It fails, therefore, altogether as against all the Defendants, and the bill must be dismissed with costs.

NOTE.—Affirmed by the House of Lords, 27th of May 1864.

[475] *Re SEWELL. May 8, 1863.*

A solicitor, who had ceased to take out his certificate in 1853, with the intention of being called to the Bar, which he had abandoned, was allowed to renew his certificate without undergoing an examination.

Mr. John Pearson applied, on behalf of a solicitor who had ceased to take out his certificate in 1853, with the intention of being called to the Bar, for an order enabling him to renew his certificate without undergoing a preliminary examination. He stated that the Court of Queen's Bench had decided he must be examined, and observed that he was still on the Rolls of this Court as a solicitor.

THE MASTER OF THE ROLLS [Sir John Romilly]. I have considered this case and the statement of the Incorporated Law Society. As I understand the case, this gentleman practised till 1853; at that time he ceased to take out his certificate, intending to be called to the Bar. He has ever since been actively engaged in legal pursuits, he has never abandoned the profession, and there is not the slightest personal imputation against him. I think I am not entitled, under these circumstances, to refuse his certificate, and to say that he is bound to go through an examination.

I have considered this matter very fully, and I do not know at the end of what time I am to assume his want of legal knowledge.

I am not at liberty to refuse the application.

NOTE.—*Anon.* 16 Jur. (O. S.) 222 *Ex parte Leith*, 7 W. R. 578; 6 & 7 Vict. c. 73, s. 25.

[476] *Re TILLEARD. March 5, 1863.*

[S. C. on appeal, 3 De G. J. & S. 519; 46 E. R. 736; 32 L. J. Ch. 765; 8 L. T. 587; 9 Jur. (N. S.) 1217; 11 W. R. 764. See *In re Rotherham Alum and Chemical Company*, 1883, 25 Ch. D. 107; *In re Russell*, 1886, 55 L. T. 71; *In re Skegness and St. Leonards Tramways Company*, 1888, 41 Ch. D. 235.]

The solicitor of a railway company, in his bill, charged 500 guineas, in a lump sum, for attendances and correspondences for a period of above one year. The bill was ordered to be taxed. Held, that the solicitor might supply a detailed statement of the items comprised in the general charge exceeding that amount, but that he could not increase his demand beyond 500 guineas.

This case came on before the Court upon a petition of "The Great Northern and Western of Ireland Railway Company," praying for a review of the taxation of the bill of costs of Messrs. Tilleard, the former solicitors of the company.

Messrs. Tilleard had delivered to the company their bills of costs, containing the two following lump charges of 500 guineas each:—

- "1856, June to August 1857.—For attendances on the promoters on the formation of the company, and in promoting and passing the bill through Parliament, including Mr. Freeman's journey in Ireland in October 1856, all attendances on capitalists, engineers, contractors, subscribers and landowners, arrangements with bankers for the deposit, attendances on the Parliamentary agents, negotiations with the Great Southern and Western of Ireland and the Midland Great Western of Ireland Railway Company, and voluminous correspondence, the whole extending over the period between June 1856 and August 1857 . . . £525
- "1856, October.—Taking the reference, 105 miles, including all attendances connected therewith, and payments of railway fares from London and travelling expenses, and other incidental expenses and gratuities for information . . . £525"

Messrs. Tilleard afterwards delivered a rider to the [477] bill, containing the particulars and charges in detail in respect of these two general items. These particulars amounted in the whole to £1246, 16s. 11d., of which £789, 9s. 6d. related to the first lump sum, and £457, 7s. 5d. to the second.

In 1860 the Court ordered the bill to be taxed, but, on that occasion, the Court held that the rider formed no part of the bill.

In the course of the taxation, the Taxing Master received the rider in support of the items; he taxed it, and allowed, in respect of the first lump charge, the sum of £521, 8s. 6d., and in respect of the second, the sum of £355, 9s. 5d.

The Petitioners now submitted—"That the Master ought not so to have received and taxed the rider in support of the two items of £525, and ought not to have allowed those sums or any part thereof, but that they ought to have been dealt with on the footing of the bill alone, and ought to have been wholly disallowed." They also objected, "that the rider was not referred to the Master for taxation, either by the order or otherwise, and that the two items in the bill did not nor did either of them contain a sufficient specification of the work and charges in respect of which the two sums of £525 were respectively claimed, to entitle such sums or either of them to be allowed."

Another objection to the certificate arose out of the following circumstances:—Originally six Irish lines had been projected by the promoters of this company; but after the preliminary expenses had been incurred, four of them had been abandoned, and an Act was obtained (20 & 21 Vict. c. xxxiv.) authorizing the construction of two only of the lines. The 52d section provided that [478] "the expenses, costs and

charges of obtaining and passing this Act and preparatory thereto shall be paid by the company." In relation to this, the Petitioners objected as follows:—

"That the Master has allowed several items of charge for work done and services rendered, and for expenses incurred by Messrs. Tilleard, not only before the passing of the company's Act of Incorporation, but prior to the formation of the company and to any subscription contract being entered into for the formation thereof, and has also allowed several items of charges and expenses relating, for the most part, to the four projected lines of railway, which, though originally contemplated by certain promoters thereof, in connection with the two lines of railway for the making of which the company was formed and the subscription contract entered into, were abandoned by the promoters thereof prior to the formation of the company, and are not authorized by the company's Act, and were never promoted or adopted by the company, nor by any body of directors or other managing body authorized to act on their behalf, and which charges and expenses were not incurred at the instance of or on behalf of the company, or by their direction or authority, or by the direction or authority of any managing body on their behalf."

The Petitioners submitted, "that such charges and expenses are not 'expenses, costs or charges of obtaining or passing the company's Act, or incidental or preparatory thereto,' within the true intent and meaning of the 52d section of the company's Act of Incorporation, and that the funds of the company are not liable to pay the same; and that, therefore, the charges prior to the formation of the company ought to be wholly disallowed as against the company, and that the charges relating in part to the four abandoned lines of railway ought to [479] be apportioned, with reference to the several lines of railway to which they so respectively relate; and that so much thereof as relates to the said four other lines of railway, as aforesaid, ought to be disallowed as against the company."

Mr. Baggallay and Mr. Martineau, in support of the petition. The taxation ought to have proceeded on the bill as delivered, which alone was referred for taxation, and without regard to the rider, which the Court has already decided formed no part of the bill. To allow the items in the rider to be taxed would be to permit a supplemental or new bill to be delivered, which has been repeatedly refused, and which can only be permitted upon a special application for that purpose. On such general charges nothing can be recovered at law or in equity. Thus, in *In re Pender* (10 Beav. 390; and see *In re Catlin*, 18 Beav. 519), one item of a solicitor's bill was:—"Attending Captain Hodges and Mr. Lewis a great many times in London; discussing this matter with them; making arrangements for procuring copies, deeds, &c., and expenses—£2, 10s." Of this the sum of £1, 3s. 4d. was struck off, on the ground that the only date given being May 28th, the Master could only allow for the attendance on that one day. Upon a petition to review the taxation, Lord Langdale observed:—"This bill having been submitted to taxation, the Master has struck out many items. As to the first charge of £2, 10s., 'for attending a great many times,' I must say that it is an item so expressed as, strictly speaking, to entitle him to no payment. A solicitor is not to make a general sweeping charge in his bill of costs for many attendances, but he must specify the very thing for which he makes his claim. It is said that he was detained in town several days. He might be so, [480] but that is not the thing charged for; and I do not think the Master would be justified in allowing what he has, if it had been objected to. If the business has really been done, the solicitor must thank himself if he has made out his bill in such a way as to prevent his charge being allowed."

The bill ought to specify distinctly the business done, in order that the client may know whether it is advisable to tax the bill or not. In *Ivimey v. Marks* (16 Mee. & Wel. 843), it was held that an attorney is bound to specify, in his bill, as well every Court, as the name of every suit, in which the business charged for was done. Such bill is an entire thing, and if the same bill blends charges for work done in a Court of Equity with charges for work apparently done in some Court of Common Law, without pointing out which the client cannot judge or be advised whether he should refer the whole bill for taxation, and the charges in the same bill for equity business, though correctly stated, cannot be recovered; *Cook v. Gillard* (1 Ellis & B. 26); *Pigot v. Cadman* (1 Hurl. & N. 837).

But even if the solicitor be allowed to specify and explain the items of a general charge contained in his bill, he ought to specify items to the exact amount charged, and not bring in items of double the amount to be taxed, taking his chance upon which of them he can recover; *In re Lett* (31 Beav. 488). Secondly. All the items in regard to the abandoned lines ought to be disallowed. They are not within the terms of the Act, and there is no liability on the part of the company to pay them. The subscription contract (27th December 1856) and the Act (27th July 1857) were for a different line.

[481] Mr. Selwyn and Mr. Pole were not called upon.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Taxing Master has come to a right conclusion upon both these matters. With respect to the two lump sums of 500 guineas each, I concur in the conclusion come to by Lord Langdale in the case of *In re Pender* (10 Beav. 390), and I have always taken the same view in similar cases that such a sum by itself and unexplained must be simply disallowed on taxation; but, I think, it is open to the solicitor who charges such an item to give evidence of what did really occur and how it is made up, but the evidence must be limited to what he really has done to earn the amount of that item. In addition to that, I am also of opinion that, before taking in such a bill for taxation, if it has not been previously explained, the client is entitled to have such an item explained, and it must be given to him for that purpose. If a solicitor puts a series of items amounting to £1000 in his bill, and, in brackets, says I only charge £500, he cannot afterwards be allowed to charge more; but the client is entitled to have the items vouched for the purpose of shewing that the items properly chargeable amount to £500 in the aggregate. I concur that this rider is not part of the bill of costs; but yet it was properly before the Master. Before the taxation, the client says, I do not understand one of the items, and the solicitor gives him a letter of explanation; both parties are entitled to make use of that explanation before the Taxing Master. If it had formed part of the bill it was delivered in time. It appears that, on a former occasion, when taxation of the bill was asked, I held that these riders formed [482] no part of the bill, and I am still of that opinion. If the question before the Taxing Master had been whether the solicitor was entitled to augment the 500 guineas to £789, I think he was not at liberty so to do. The solicitor says, "I claim in respect of this item 500 guineas. You ask for an explanation: you are entitled to one, and this charge of 500 guineas is made up of items in respect of which I insist I was entitled to charge £790, but I only charge £525." He does not alter his bill; the charge is still £525, and he cannot claim any more than that sum, but he is entitled to take all these items in and have them taxed for the purpose of shewing how he makes out that the 500 guineas is due to him. It was the reason why I directed the taxation of this bill, and, if the Taxing Master had allowed more than 500 guineas upon it, I should have held that it was an improper allowance, and I should have disallowed the excess beyond the 500 guineas.

I am of opinion that the cases which have been cited do not shew that I ought to come to any different conclusion in this case. The case of *Irving v. Marks* (16 Mee. & Wels. 843) does appear to me a very strong case; but if it is the law that a solicitor cannot be allowed items in his bill of costs for law business done by him because he has not stated the Court in which it was done, or because he has mis-stated it, or that the charge of a lump sum was an improper item, then I ought not to have directed the taxation at all. It would have been a reason for saying that there could be no taxation of such a bill, and that the solicitor should be left to recover what he could by an action at law. I do not think any of the cases lead to that result, and the case that Mr. Baggallay has pressed strongly upon me, of *Pigot v. Cadman* (1 Hurl. & N. 837), only states this:—That, where a client [483] requires his solicitor's bill of costs to be taxed, he is entitled to have the whole bill before him. Thus, in the present case, if Messrs. Tilleard & Co. had attributed the moneys paid to them on account (which appears to have been £5000 or £6000) to the payment of particular items in the bill, or to the items of the bill down to a certain point, and had only delivered a bill for the rest, then the Court would have said, "That will not do, you must deliver the whole bill, and you must say how much you have received in respect of the whole of that bill." That was all that was decided in *Pigot v. Cadman*, and I have no doubt

that the Court came to a right conclusion on that occasion. I am, however, of opinion that, upon an ambiguous or a lump item, a client is entitled to receive an explanation before the bill is taxed, and even if he does not, the solicitor may offer it. On the taxation, though the solicitor cannot alter the amount claimed, he is still at liberty to use the explanation given to his client by him; and he is bound by that explanation. In this respect, it appears to me that the Master has come to a right conclusion.

I also think that the Master is also right in respect to that which seems to be the most important part of this case, viz., in allowing the costs which were incurred by the solicitor in relation to the line from Tallamore to Athlone and from Castleres to Sligo, which were preliminary matters. In the first place, a matter of this description ought to be treated liberally, and the clause in the Act says, "The expenses, costs and charges of obtaining and passing this Act and incidental and preparatory thereto shall be paid by the company," that is, the costs incidental and preparatory to the passing of this Act. Here were some landed gentlemen and proprietors, in various parts of Ireland, who considered that it would be very desirable to have four lines of railway [484] connected and united together, but it was impossible to know which of them it would be desirable to have without having a survey and examination made of the ground. They have all the projected lines examined, and they give notices with respect to four; but, on reflection, they consider that only two are likely to pay, and they accordingly abandon the other two. Now I think that, to a very great extent, the examination of where the railway ought to stop is incidental and preparatory to the passing the Act. The determination of what places it ought to avoid, where it ought to stop and to what point it ought to continue, was, to some extent, incidental and preparatory to the preparation of the bill for the railway which was actually carried. But this requires a closer investigation. But I think it ultimately turns on this—the acquiescence of the directors of the company. [His Honor then examined the facts and came to the conclusion that the directors had, by their conduct and acquiescence, prevented themselves disputing the charges, and he dismissed the petition with costs.]

[485] *Re PAGE* (No. 2). *April 20, 22, 1863.*

On an ordinary taxation the Taxing Master had disallowed the costs of a deed of reconveyance from a benefit building society of property in a registered county, thinking that a receipt was sufficient under the 6 & 7 Will. 4, c. 34, s. 2. The decision was reversed by the Court.

Mr. Page had acted as the solicitor of Mr. Freeman, who died in April 1861. After his death and upon the application of his executor, an order had been made to tax Mr. Page's bill of costs. In taxing the bill, it appeared that a mortgage to a benefit building society of property in Middlesex had been paid off by his client.

Mr. Page, finding that documents not under seal could not be registered at the Middlesex Registry Office, prepared a short deed of reconveyance to be prepared in order to register it. This was executed and registered accordingly. By the Benefit Building Societies Act (6 & 7 Will. 4, c. 32, s. 2), a mere receipt endorsed on the mortgage revests the estate.

In the taxation the Master only allowed the solicitor the expense of a receipt on the mortgage, thinking the reconveyance unnecessary. The question as to propriety of the disallowance now came on for discussion.

Mr. Selwyn and Mr. Bury, for Mr. Page, argued that the expense, having been *bona fide* incurred for an Act necessary for clearing the title, ought to be allowed.

Mr. Baggallay and Mr. A. Smith argued that the deed was unnecessary, and that to allow the costs of it would be to defeat the benefit intended to be given to members of benefit building societies by the Act.

[486] *April 22.* THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Taxing Master is wrong as to this item. It is not competent for the Taxing

Master to enquire whether the business could have been done in a better way. If an action at law had been brought and judgment obtained in a Superior Court, and the Taxing Master thought that it ought to have been brought in the County Court, is he at liberty to disallow the costs when he has been merely directed by the Court to tax them? Suppose a bill were filed in this Court to administer an estate, and the Taxing Master should be of opinion that it ought to have been by summons, could he disallow the costs?

I apprehend that in such cases the Court itself must determine such a question, and give a special direction to the Taxing Master to tax the bill as if the action had been brought in the County Court or as if the suit had been commenced by summons. Such points can only be determined by the Court or in an action for negligence.

[487] *Re PAGE* (No. 3). April 20, 1863.

[S. C. 8 L. T. 231; 9 Jur. (N. S.) 1116; 11 W. R. 584.]

A solicitor had employed an auctioneer to sell some property for his client. He however made no previous arrangement as to the amount of his remuneration, and the auctioneer had retained, out of the deposits, more than would be allowed under the bankruptcy scale. Held, reversing the decision of the Taxing Master, who had merely allowed the amount according to the scale in bankruptcy, that the whole charge ought to be allowed to the solicitor.

Another point raised in the taxation was this:—Mr. Page had employed an auctioneer to sell his client's house property. The auctioneer had charged £85, 5s. The amount had been retained by the auctioneer out of the deposit, but it was included as an item in the solicitor's cash account.

The Taxing Master thought that the solicitor ought to have made some arrangement with the auctioneer previous to his employing him, and he allowed the solicitor only £47, 18s., this being the amount which, according to the regulated scale, would be allowed in bankruptcy. (See Bankruptcy General Orders of 19th May 1855, schedule.)

This charge of £85, 5s. included the printing, advertising and all other expenses, and was computed at £5 per cent. up to the first £500 purchase-money and £2, 10s. per cent. on the remainder. This, from the evidence of several auctioneers, was said to be the usual charge in the trade; some said up to £1000, but most up to £2000, in the absence of any express stipulation. One said his charge was £5 per cent. up to £1000 and £3, 10s. per cent. up to £2000.

Mr. Page said he had allowed the charge to the auctioneer in the usual course, and that he never received or had any controul or power over the deposit, as it had been paid into the hands of the auctioneer. He now asked that the Master might review his taxation as to the £37, 7s. taxed off.

[488] Mr. Selwyn and Mr. Bury, for Mr. Page. The taxation of the solicitor's bill and cash account ought to have been limited to his receipts and payments; the sum charged by the auctioneer was never received by Mr. Page, and it formed no part of his professional account. The Taxing Master, in dealing with this sum, has in fact charged the solicitor with wilful default; but a solicitor is under no obligation to make a bargain with an auctioneer or tradesman employed on his client's behalf; all that he is bound to do is, to see that no unfair or exorbitant charge is made, and which could not be maintained upon an action being brought to recover it. The scale in bankruptcy has no application, it may be ample when applied to large estates, but it is insufficient in the case of a single sale. They cited *Davenport v. Powell* (14 Sim. 275).

Mr. Baggallay and Mr. A. Smith, *contra*. The charge for the sale of the property was far too high, and as to the alleged custom, it is not to be regarded; tradesmen may arbitrarily fix their own scale of charges, but they cannot bind the public or compel them to acquiesce in them. No prudent man would authorize the sale of his

property without first making some stipulation with the auctioneer as to the charge for it, and such is the usual custom. The solicitor, therefore, as the agent of the vendor, was bound to protect his client against overcharge, by stipulating for a fixed and reasonable amount for the auctioneer's remuneration, and not have left him to make any charge he thought fit. The scale of allowance in bankruptcy is ample, and is higher than that allowed by the Judges in Chambers.

THE MASTER OF THE ROLLS [Sir John Romilly] said that the case must be considered on the principle that the auctioneer had [489] been employed by the solicitor and not by the client, and, in that view, the allowing the amount to be deducted from the deposit was the same as if the auctioneer had sent in his bill and it had been paid by the solicitor. That so far he considered that the Taxing Master had rightly considered the case.

But if, as appeared from the evidence, the auctioneer could have recovered the amount claimed by him at law, and assuming, as appeared from the absence of any evidence to the contrary, that there was no negligence or improper conduct on the part of the solicitor, he was of opinion that the amount must be allowed.

His Honor added: It would have been a different matter if the auctioneer had not been paid, and had been employed for the purposes of the suit in the course of the progress of it, in which case a principle of *quantum meruit*, or the rules made by the Court in analogous cases might have been applicable; but that, even in those cases, he had found it necessary where an auctioneer, surveyor or accountant was so employed, to make a special agreement with him as to the amount of his remuneration.

NOTE.—See *Meymott v. Meymott*, Master of the Rolls, 21 June 1864, *post*, which, however, is distinguishable.

[490] THORN v. THE COMMISSIONERS OF HER MAJESTY'S WORKS AND PUBLIC BUILDINGS. *March 6, April 16, 1863.*

On questions as to the extent of the authority of an agent, the same rules of law and equity apply to boards and public companies as to individuals.

A proposal to receive tenders for certain things to be sold (specifying no limitation or qualification), and an acceptance (also specifying no limitation or qualification), is a contract for the whole.

The Defendants advertised that offers would be received for old Portland stone of Westminster Bridge. The Plaintiffs made an offer for the stone of a particular quality, which was accepted. Held, that this was a contract for the purchase of all the stone of that quality.

By this suit the Plaintiffs sought to compel the Commissioners of Works and Public Buildings specifically to perform a contract entered into between them and a gentleman of the name of Thomas Page, as the agent of the Defendants, to sell to the Plaintiffs the arch stone, the spandril stone and the Bramley Fall stone contained in the old Westminster Bridge, which had been pulled down by the direction of the Defendants and under the authority of an Act for that purpose.

The case arose under the following circumstances:—In August 1853 an Act was passed (16 & 17 Vict. c. 46), the object and effect of which was fully and accurately expressed by its title, viz., "An Act to Transfer Westminster Bridge and the Estates of the Commissioners of Westminster Bridge to the Commissioners of Her Majesty's Works and Public Buildings, and to Enable such last-mentioned Commissioners to Remove the present Bridge and to Build a New Bridge on or near the Site thereof."

The Act contained all the powers and provisions necessary to enable the Defendants to effect the purposes so specified in the title of the Act, and it was not disputed that they had full power to sell and dispose of the materials of the old bridge in such a manner as they might think fit.

On the 15th of August 1853 the Defendants appointed Mr. Page chief engineer, for the conduct and [491] superintendence of the necessary works, and the instructions given to him on his appointment contained nothing specifically pointing to the subject now before the Court. On the resignation of Mr. Graham, the resident engineer, on

the 31st August 1857, the Defendants, by their secretary, wrote to Mr. Page and authorized him to engage Mr. Harris as resident engineer of the works, subject to certain conditions, which were accepted by him and approved of by the Defendants. On the 19th May 1860 an advertisement appeared in the *Times* newspaper, which was in the words following :—

“Old Westminster Bridge.—Offers will be received for the old Portland stone, Bramley Fall stone and rough rubble of this bridge. Apply to Mr. Harris, resident engineer at the works.”

This advertisement was inserted by Mr. Page, and on the 21st of May 1860 the Plaintiffs wrote a letter to Mr. Page in the words and figures following :—

“Sir,—I beg to offer for Westminster Bridge stone—ninepence per cube foot for the arch stone, four ditto ditto ditto spandrill ditto, six ditto ditto ditto Bramley Fall ditto, you filling the barges and delivering alongside our wharf.—I have the honor to be your obedient servants,
“P. THORN & Co.”

On the 28th of May 1860 Mr. Page authorized Mr. Harris to accept the offer of the Plaintiffs.

The stone was in part delivered to the Plaintiffs ; but disputes having arisen, the Defendants refused to continue the delivery of the rest. The Plaintiffs thereupon filed this bill on the 2d of September 1862, which prayed that the Defendants might be decreed to specifically perform the agreement for the sale to the Plain-[492]-tiffs of all the arch stone, spandrill stone and Bramley Fall stone contained in old Westminster Bridge. 2. That the Defendants might be restrained from selling any of such stone to any other person. 3. That the damages caused by the breach of the agreement by the Defendants might be assessed and paid.

At the hearing five questions were raised. First, whether Mr. Page had authority to enter into the contract. Secondly, whether there was a binding contract. Thirdly, whether it comprised all the stone of the specified quality. Fourthly, whether the Plaintiffs had, by subsequent conduct, forfeited their rights. Fifthly, whether the Plaintiffs had abandoned their contract.

Mr. Selwyn and Mr. Swanston, for the Plaintiffs.

THE SOLICITOR-GENERAL (Sir R. Palmer) and Mr. Hanson, for the Defendants, cited *Harnett v. Yeilding* (2 Sch. & Lef. 549); *Pooley v. Budd* (14 Beav. 34); *Pollard v. Clayton* (1 Kay & J. 462).

April 16. THE MASTER OF THE ROLLS [Sir John Romilly]. There are, I think, five questions to be considered in this case. The first is, whether Mr. Page was the agent for the Defendants for the purpose of entering into any contract with the Plaintiffs for the disposal of this stone. If this be decided in favor of the Defendants, the consideration of any further question is immaterial ; but if this be decided in favor of the Plaintiffs, the next question to be considered is, whether what took place between Mr. Page and the Plaintiffs amounted to a contract [493] with them ; and thirdly, if it did, whether, according to the true construction of that contract, the Plaintiffs are entitled to purchase the entirety of the stone of the three descriptions arising from old Westminster Bridge. If these questions are decided in favor of the Plaintiffs, then arises a further question, whether the Plaintiffs have not forfeited all interest in the contract, by reason of the irregular manner in which they have performed, or rather failed to perform, their part of it ; and *fifthly*, and lastly, whether the Plaintiffs have not abandoned the contract, or at least acquiesced in the repudiation of it by the Defendants.

His Honor referred to the evidence on the first point, and said :—

Upon this evidence, I am of opinion that it is not possible for the Defendants to maintain their contention that Mr. Page was not their agent for the purpose of entering into this contract with the Plaintiffs. It is obvious that if, instead of being a public Government board, the case had been that of a private individual rebuilding one bridge and removing an old one, and employing an engineer for that purpose, and that these facts had occurred, no Court of law or Equity would afterwards have

permitted him to repudiate such a contract and to deny the authority of the engineer as his agent. I am of opinion that, in a matter of this description, a public Government board cannot be treated in any different manner from that in which a private individual would be dealt with. Whether it be a private individual, or whether it be a private or a public company, or whether it be a Government board, the same rules of law and equity, as I apprehend, apply to all alike, and persons dealing with them are not only bound by the same obligations, but are also entitled to the same rights, and to rely on the same principles. The first point, there-[494]-fore, must, in my opinion, be decided in favor of the Plaintiffs.

The second question, it is clear, must be decided in favor of the Plaintiff. Both Mr. Page and Mr. Harris concur with the Plaintiffs on this subject, and the passages I have read prove that the offer of the Plaintiffs, such as it was, was simply accepted without condition or qualification or reservation.

The third question is, what the offer was which was so accepted. This depends on the construction to be put on the original advertisement and the tender of the Plaintiffs following it, by the acceptance of which by the Defendants, through their agents Mr. Price and Mr. Harris, without the imposition of any conditions or limitations whatsoever, the contract is created. The Plaintiffs contend that this means the whole of the stone of the kinds mentioned in their offer; the Defendants contend that it means only so much stone as they may think fit to let them have.

This point, I am also of opinion, must be decided in favor of the Plaintiffs. In the first place, the words of the advertisement are general:—"Offers will be received for the old Portland stone," &c.; that is, offers will be received for all or any part of the Portland stone, &c. It would, no doubt, have been open to any person making a tender to offer to take a portion of what was offered only, specifying what portion he desired to take; and accordingly, the Plaintiffs offered to take the arch stone, the spandrill stone and the Bramley Fall stone only, and made no offer to take the rough rubble. But their offer, which follows the advertisement in the generality of its terms, is, to take Westminster Bridge stone of the description and at the prices I have already [495] mentioned. I think this means the whole of such stone. If it does not, it is plainly no contract at all for anything; for the vendors could immediately afterwards have said: "Our contract means that we accept your offer only for as much as we choose to let you have," though the Plaintiffs might, as the fact is, have been put to great expense to enable them to perform the contract, in the belief that their offer to take the entirety of the stone had been accepted, the delivery of one ton, or even one cwt. of stone, would have satisfied the contract. And again, on the other hand, unless the Plaintiffs had contracted to take the whole, it is plain that the converse objection would apply, and that the vendors might say, on the faith of your taking the whole, "We have accepted your offers and rejected others which would have enabled us to dispose of it, and now, when you have taken a ton of each sort, and when the price of this sort of stone has fallen, you refuse to take any more." I think neither of these contentions could be supported. I think it also almost impossible that anyone could hold the contract to be wholly one-sided, and that it meant: "You, the Plaintiffs, must take the whole, if we, the Defendants, choose to require it; but you are not entitled to require us to let you have any more than we desire." Such a contract, which gives to one party all the advantage of a rise in the price of the article sold, and none of the disadvantage of a fall in the price of it, obviously could not be supported without express words, and would certainly make most persons very reluctant to enter into any dealings with a Government board. It follows, therefore, that, in my opinion, the true construction of the contract is, an offer to take the whole of such stone, and an acceptance of that offer, which compels the Defendants to deliver the whole of that stone. Unless it means this, it means nothing, and the contract is merely idle and illusory. In that case the advertisement [496] is a mere delusion, and the acceptance by the Defendants of the Plaintiffs' offer amounts to nothing.

This is not a subject on which, in my opinion, the evidence of the custom of the trade is very material, for commonsense, as well as common justice, points out that a proposal to receive tenders for certain things to be sold, specifying no limitation or qualification, and a tender accepted to buy these goods, also specifying no limitation

or qualification, must have a meaning; but that meaning must include the whole, as no limit can be placed upon it, nor can any line be drawn that would not be plainly arbitrary between the whole and what amounts practically to nothing. The evidence, however, on this subject, as was to be expected, fully confirms the Plaintiffs' contention, and shews that, according to the custom of the trade, when the old materials of a building about to be removed are offered for sale without reserve as to the quantity, the whole is understood by vendor and purchaser to be included in the offer to sell, and the whole is understood, in like manner, to be included in the tender to purchase.

The Defendants take a distinction of this description:—They say that a large portion of this stone was worked up in the construction of the new bridge, and that this was not intended to be sold, and that the Plaintiffs never made any complaints of its being so used, and yet that, if the contract include the whole of the stone, it would also include the portion so used by them, under the direction of Page and Harris, in the construction of the new bridge. But this does not appear to me to destroy the true construction of the contract or invalidate the Plaintiffs' contention. In the first place, the fact is not clearly established in the evidence, and the Plaintiffs' affidavit asserts that it was only a portion of the flag stones which were so used; but [497] assuming the fact to be as stated by the Defendants in their answer, this would not alter the true construction of the contract, it would rather fall within the head I have shortly to consider, viz., that of acquiescence of the Plaintiffs in the rejection of the contract by the Defendants; but in truth I think it cannot be so treated, but must be regarded simply in this light:—Although we, the Plaintiffs, are entitled to the whole of this stone under the contract, yet, if you want a portion of it for the construction of the new bridge and the prosecution of the works, we shall make no objection. All which might be done tacitly without any arrangement being expressly come to for that purpose.

I now come to consider the fourth point, which is prominently brought forward by the Defendants, and on which a considerable amount of evidence, principally documentary, has been put forth. The effect of it may be shortly stated to be, that the Defendants were dissatisfied with the manner in which the Plaintiffs performed their engagement, that, in consequence, they declined to let them have any more stone.

Upon carefully considering the facts proved before me on this part of the case, the difficulty in which the Plaintiffs were placed, with regard to their double relations with the Defendants and the continued supply of stone to them by Mr. Page up to the month of April 1862, I think that the forbearance of the Plaintiffs in overlooking the occasional violations of the contract by the Defendants, and delaying to file this bill till September 1862, cannot be imputed to the Plaintiffs as any acquiescence in the repudiation of the contract by the Defendants; or as sufficient to constitute a bar to the relief which they ask, except so far as regards any account for the stone sold through Eversfield & Home prior to the 12th of [498] April 1862. After the 12th of April 1862, undoubtedly, the Plaintiffs were at arm's length; but, within five months after that time, the bill is filed, and after the 12th of April 1862 a correspondence went on between the Plaintiffs and the Defendants, the former endeavouring to induce the Defendants to withdraw their refusal to deliver any more stone. This correspondence is not concluded till the 24th June 1862, and this bill is filed on the 2d September following. I am of opinion that this is not, in these circumstances, any delay which ought to preclude the Plaintiffs from obtaining the relief they seek in this Court, and to which, in my opinion, they are entitled.

To sum up the conclusions which I have arrived at, I am of opinion that the advertisement of Mr. Page and the written offer of the Plaintiffs was unconditionally accepted by him and constituted a valid and binding contract between the Plaintiffs and Mr. Page, so far as he was able to make one on behalf of the Defendants. I am of opinion that Mr. Page was acting within the scope of his authority, as agent of the Defendants, when he entered into that contract, and that they are bound by it. I am also of opinion that, by the true construction of that contract, the Defendants were bound to deliver to the Plaintiffs, and that the Plaintiffs were bound to take from the Defendants, at the prices mentioned in their tender, all the stone of the old

Westminster Bridge of the three descriptions mentioned in their tender; and further, I am of opinion that the Plaintiffs have not forfeited their right to have this contract enforced, by reason of the irregularities in payment mentioned in the answer, or by reason of their not having sooner sought the aid of this Court, although I am of opinion that they have waived their right to any relief in respect of the damage sustained by them [499] prior to the 12th April 1862, by reason of the occasional violation of the contract by the Defendants.

Decree specific performance and grant the injunction as prayed. Take an account of damages sustained by Plaintiffs since the 12th April 1862, by reason of the breach of the agreement by the Defendants, and also the costs of the suit, unless, as in some of these cases, I am precluded from giving them by statute.

[499] *DREW v. LOCKETT.* April 20, 22, May 28, 1863.

[S. C. 8 L. T. 782; 9 Jur. (N. S.) 786; 11 W. R. 843. See *Forbes v. Jackson*, 1882, 19 Ch. D. 621.]

A surety who pays off a debt for which he became answerable is entitled to all the equities which the creditor could have enforced, and that, not merely against the principal debtor, but also against all persons claiming under him.

A. mortgaged his estate to C., and B. became A.'s surety for the debt. Afterwards A. mortgaged the estate to D., who had notice of the first mortgage. The first mortgage was subsequently paid off, partly by B., the surety, but D. got a transfer of the legal estate. Held, that the surety had still priority over D. for the amount paid by him under the first mortgage, as surety for A.

At the close of the year 1852 the Plaintiff, who was then Miss Odell and residing with her step-father, the Defendant Lockett, was entitled to two undivided fifth parts in certain freehold and copyhold hereditaments, a part of which were in question in this suit. Her step-father, Mr. Lockett, was entitled to two other undivided fifth parts in the same hereditaments, and his daughter Miss Lockett, now Mrs. Ayres, was entitled to the remaining one-fifth. In January 1853 Mr. Lockett was desirous of borrowing some money on the security of his share in the property, to facilitate which the Plaintiff consented to join with him and to make her share of the property also liable for the sum advanced. Accordingly, on 21st January 1853, an indenture of mortgage was executed by and between Mr. Lockett of the first part, the Plaintiff of the second part, Mr. Smithenden of the [500] third part, the Defendant Thomas Swarder of the fourth part, and Mr. Evans of the fifth part, whereby Mr. Lockett mortgaged his undivided two-fifth parts to Mr. Evans to secure the sum of £2000, and the Plaintiff also mortgaged and charged her undivided two-fifths in the same hereditaments unto Richard Evans for further securing to him the sum of £2000 which had been advanced by Evans to Lockett on the security of the two-fifths belonging to Mr. Lockett in the hereditaments. It was proved that Miss Odell joined with Mr. Lockett in the execution of this indenture as a surety only. This was shewn by the deeds themselves, and also by the recital in the subsequent deed of the 24th December 1855, which was distinct on the point. She received no part of the money advanced to Mr. Lockett and derived no benefit therefrom. In April 1853 the Plaintiff married her present husband, the Defendant Robert Drew, and thereupon a settlement was made of the Plaintiff's property, bearing date the 26th of April 1853. On the 3d of July the Defendant Mr. Swarder had notice of the existence of this settlement and of the rights and interests of the Plaintiff and her children under it. Subsequently to this, Mr. Lockett made a further mortgage of his interest by deeds of 26th of August 1853, in favor of Miss Charsley, which was further secured by an indenture bearing date the 24th of December 1855, presently mentioned. This mortgage was now vested in the Defendant Thomas Swarder, under an indenture of transfer of the 24th of June 1858. In addition to this, the Defendant Lockett executed various other charges and incumbrances affecting his

two-fifths in favor of the Defendant Thomas Sworder, to secure to him sums of money advanced by him to the Defendant Lockett.

In 1855, Evans being desirous of realizing his mort-[501]-gage security, a portion of the hereditaments included in his mortgage was sold to Mr. Abel Smith, and was conveyed to him by an indenture, bearing date the 24th of December 1855, but in fact executed on 28th March 1856. What was sold was the two-fifths belonging to the Defendant Lockett in this portion, the two-fifths of the Plaintiff and the remaining one-fifth which belonged to Miss Lockett, the lady who was now the wife of Benjamin Ayrea. All the persons interested in these shares and all the incumbrancers upon them were made parties to the deed, and all executed it except Miss Lockett, who was at that time an infant, and who was to execute it and receive her one-fifth of the purchase-money, providing, on attaining twenty-one, she assented to this sale of her share. The amount of the purchase-money, after certain deductions, was £4385. The amount of the share of the purchase-money belonging to the Defendant Lockett in respect of his two-fifths, and also of the Plaintiff's share of the purchase-money in respect of her two-fifths in the property sold, was each the sum of £1754; but Mr. Evans, the mortgagee, required to be paid in full the total amount due to him, which the two-fifths of the purchase-money belonging to Mr. Lockett did not discharge. The consequence was that £394, 3s. 8d. had to be taken from the two-fifths of Plaintiff's share of the purchase-money, and this was done and paid to Evans accordingly, for the purpose of paying him, in full, all that was due to him for principal and interest. Accordingly, he was then fully paid off; and as regarded the remainder of the property included in his mortgage, he was a trustee for the rightful owners.

By an indenture of even date, to which the Plaintiff was not a party, Evans, the mortgagee, by the desire of Lockett, conveyed to Miss Charsley all the undivided [502] two-fifths parts or shares of the Defendant Lockett in the remainder of the property included in the mortgage of January 1853, but not included in the sale to Smith, as a further security for the sum advanced by her, and at the same time, by this instrument, he conveyed the legal estate in these hereditaments to her. All these charges, together with the legal estate in the hereditaments, were now vested, by assignment and conveyance, in the Defendant Sworder, and the question the Court had to determine was, whether the Plaintiff was entitled, by virtue of her having been a surety only to secure the sum of £2000 lent to Lockett, to stand in the place of Evans, the mortgagee, as against the two-fifths of Lockett in the remaining property not included in the sale to Smith, and so conveyed to Miss Charsley as before stated by the deed of even date, and whether the Plaintiff was entitled to have, as against this remaining unsold portion of the mortgaged property, the same rights and securities as Evans had, in order to enforce payment of the £394, 3s. 8d., being the balance of the purchase-money of her undivided two-fifths share in the said property which was sold, and which balance was retained for the purpose of paying the mortgage debt due to Evans.

Mr. W. R. Ellis, for the Plaintiff, cited *Lancaster v. Evors* (10 Beav. 154); *Stansfield v. Hallam* (29 L. J. (Ch.) 173); *Praed v. Gardiner* (2 Cox, 86); Sugden's Vend. (p. 1010 (11th edit.)).

Mr. Southgate and Mr. Marten, for the Defendant, referred to *Copis v. Middleton* (Tur. & Russ. 224); *Williams v. Owen* (13 Sim. 597); *Farebrother v. Wodehouse* (23 Beav. 18).

[503] Mr. Ellis, in reply, referred to *Lake v. Brutton* (18 Beav. 34).

May 20. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether the Plaintiff and the parties claiming under the settlement of the 26th of April 1853 have a right to be paid the £394, 3s. 8d. out of Lockett's share, in priority of Sworder, the transferee of the second mortgage of the 26th of August 1852.

The general right of a surety to stand in the place of the creditor, who has been paid off, is not disputed; *Lancaster v. Evors* (10 Beav. 154) and many other cases establish it, and the general right is not questioned. But, on behalf of the Defendant Sworder, it is insisted that this right is confined to the right as between the original creditor and the principal debtor, and that it does not extend to the case where subsequent incumbrances have been made by the principal, so as to deprive such

subsequent incumbrancers of their security, and that as, in this case, on the 26th August 1853, Lockett mortgaged his undivided two-fifths, subject to the mortgage to Evans, to Miss Charsley, to secure a sum of £728, which mortgage is vested in the Defendant Mr. Sworder, who acted as solicitor for the lady in that transaction, he is entitled to have that paid out of the two-fifths belonging to Lockett, against all persons except the mortgagee Evans, and the authorities which are relied on for this purpose are *Williams v. Owen* (13 Sim. 597); *Bowker v. Bull* (1 Sim. (N. S.) 29); and *Farebrother v. Wodehouse* (23 Beav. 18) before me.

[504] But I am of opinion that none of these cases establish the proposition that would be necessary in order to maintain the contention of the Defendant. In the first place, all question of absence of notice of the first incumbrance and any right which might flow from being a purchaser for value without notice may be disregarded in the present case. No such questions arise here, the prior mortgage to Evans was well known to the subsequent mortgagees, and it was subject to that charge that the subsequent mortgages were created. The utmost that any of those cases have gone appears to me to be this:—that as the surety knew that if the mortgagee, the payment of whose debt he guaranteed, advanced any further money to the mortgagor on the security of the same property, he would be entitled to tack the second mortgage to the former, and that he could not be compelled to reconvey the property until both mortgages were satisfied, so the surety cannot insist on interposing between the two securities, and put himself in a better situation than the person for whom he became surety. That he cannot insist on being a first mortgagee before the second mortgagee, if he tender the money sufficient to pay off the first mortgage, and thus endeavour to exclude the second charge created in favour of the original creditor. The validity of these decisions is not now the question before me, but they stand on a separate ground, and it is to be observed that this right of a first mortgagee to tack further advances is a matter which the surety might prevent by a stipulation in his original contract, that his suretyship for the first charge should cease and determine in case he, the mortgagee, should advance further sums on the security of the same property without the consent of the surety. But even this exception from the rule can only apply in cases where the first mortgagee has made his subsequent [505] advance in ignorance of any other charge having been made by the mortgagor on the same property in favour of any other person. In other words, it is only in cases where the first mortgagee could tack his subsequent advance to his first mortgage that he could apply this exception to the doctrine. But if, after the mortgage, for the payment of which the surety is bound, the mortgagor should obtain money from another person on the security of the first mortgaged hereditaments, and if notice of that second mortgage should be given to the first mortgagee, then no further advance made by him to the mortgagor could be tacked on to his first mortgage, nor could the right of the surety to stand in the place of the first mortgagee, in respect of his first mortgage when paid off, be contested, in case the surety advanced any money for that purpose, unless, in the solitary case, where the first mortgagee advanced further money on the same security, without knowledge or notice of any charge prior to his second advance.

I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor, whose debts he paid off, could have enforced, not merely against the principal debtor, but also as against all persons claiming under him. It is to be observed that the second and any subsequent mortgagee is in no respect prejudiced by the enforcement of this equity; when he advances his money he knows perfectly well that there is a prior charge on the property, and if he thinks fit to advance his money on such security, it is his own affair, and he cannot afterwards with justice complain. The amount being limited, it is a matter of indifference to him whether the first mortgagee or the surety is the prior claimant for that amount, and it would be, in my opinion, [506] a violation of all principle if, when the surety pays off the debt, he were not to be entitled, as against the principal debtor and those who claim under him, to be paid the full amount due to him.

In this case both Miss Charsley and the Defendant Sworder knew that the two-fifths of Lockett's were mortgaged for £2000 and interest; it was subject to that

charge that they advanced this money; but now the Defendant Sworder seeks to make out that the charge is £394 less than that sum; nay, more, for the Defendant, who is consistent and logical in his contention, accordingly insists that the Plaintiff ought to contribute one-half of the first mortgage debt, as if she had originally received one-half of the money advanced by Evans. In this case, suppose the Plaintiff to have paid off Evans and to have taken a transfer of his mortgage securities, it is plain that no conveyance or release could have been obtained from her until she was repaid the full amount of the debt due to her in respect of Evans' mortgage. The legal estate vested in Sworder in the unsold portion of the mortgaged hereditaments cannot, in my opinion, avail him; he cannot thereby convert his mortgage, which was subject to the £2000 and interest included in the first charge, into a charge having priority over that £2000, either as against Evans or as against any person entitled to stand in his place. If he cannot as to the whole, so neither can he do so as to any portion thereof, and that is what he now seeks to do by his present contention. The case of *Willoughby v. Willoughby* (1 Term Rep. 763), to which I frequently have occasion to refer (see *Sharples v. Adams*, 32 Beav. 213), determines that, in such circumstances, the legal estate does not put the person who gets it in any better situation [507] than he stood in before. As regards all incumbrancers, of which he had notice before he advanced his money, they have priority over him, whether he has or has not got in the legal estate.

The remaining points urged by or on behalf of the Defendant Mr. Sworder are equally untenable. In the 7th paragraph of his concise statement, he insists that the Plaintiff did not join in the mortgage merely as surety; that she was considerably indebted to Mr. Lockett for repairs, &c., on the mortgaged property and for her maintenance, and that she joined in the mortgage to secure such moneys; and in addition to this, that a considerable portion of the mortgage money was raised for the purpose of being laid out in the repairs, &c., of which the Plaintiff has had the benefit.

This is not proved, but if every word of it were true, it would not entitle Mr. Lockett, or anyone claiming under him, to contest the right he admitted, when he induced the Plaintiff to become surety for him to Evans, viz.: that she was to have all Evans' rights over again against him, Lockett, if she paid off Evans or any part of his debt. If Mr. Lockett has any claim against the Plaintiff in respect of improvement of the property or her maintenance, he must bring that forward in the ordinary way, although, in the circumstances of this case, after the lapse of time which has occurred, it is difficult to see how such a claim could be supported; but even if supported to the fullest extent, it could not, in respect of it, give him a charge on her property, or any right to be paid out of the produce of the sale of it, unless upon a clear contract for that purpose, entered into by Miss Odell, after admitting his claim and [508] knowing what she was about. It is not suggested that anything of the sort occurred here.

A case is also attempted to be made out by Mr. Sworder against the Plaintiff of acquiescence on her part; but I am of opinion that no such case is established, nor after the settlement of her share in April 1853 could it, even if established, be of any avail as against anything except her separate estate for life in the property settled.

I am of opinion, on the whole of this case, that the Plaintiff is entitled, in this Court, to the first charge on the hereditaments left unsold in March 1856, and conveyed by Evans to Miss Charsley, exactly in the same manner as if the £394, 3s. 8d. taken from the Plaintiff's share of the two-fifths of the purchase-money had not been paid to Evans; as if his mortgage had not been paid off in full, but that amount was still due to him.

[509] BAGOT v. BAGOT. LEGGE v. LEGGE. May 6, 26, June 8, 1863.

[S. C. 33 L. J. Ch. 116; 9 L. T. 217; 9 Jur. (N. S.) 1022; 12 W. R. 35. See *Elias v. Snowden Slate Quarries' Company*, 1879, 4 App. Cas. 466; *In re Barrington* 1886, 33 Ch. D. 527.]

It is a question of degree, to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not.

Semble, that a mine, the working of which had been discontinued for twenty or thirty years, in consequence of its not having been remunerative, might, after that time be worked by a succeeding tenant for life; but a mine, where the working of which has been abandoned by the owner of the inheritance for the advantage of the property, cannot be worked by a succeeding tenant for life.

After a long delay in taking proceedings against a tenant for life in respect of waste, the Court endeavours to deal liberally towards him.

When a tenant for life impeachable for waste improperly, knowingly and wilfully commits waste, he cannot derive any benefit from the timber cut.

As to the time from which interest is chargeable against a tenant for life who commits waste.

If a tenant for life commit waste, the produce does not belong absolutely to the first tenant in tail *in esse* while there is a possibility of prior tenants in tail coming into *esse*. *Semble*.

The first of these suits was instituted by a tenant in tail to make the estate of a prior tenant for life, who was impeachable for waste, liable for acts of waste committed in his lifetime. The second was for the administration of the estate of such tenant for life.

The estate was derived from the Rev. Walter Bagot, who, by his will, dated the 4th of May 1798, devised all his real estates, subject to a term of 1000 years, for payment of debts, legacies, &c., to his eldest son Egerton Arden Bagot for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of Egerton Arden Bagot successively in tail male, with similar limitations in favor of each of the testator's other sons, Walter, William, Harvey, Humphrey and Ralph, successively, for life, and of their respective issues in tail male, with an ultimate remainder to the right heirs of the testator. The will contained no provision to exempt the several tenants for life from impeachment for waste.

The testator died in July 1806.

[510] Egerton Arden Bagot thereupon entered into possession of the real estates, and he continued in possession down to his death in February 1861. Prior to this time the testator's sons, Walter, William, Harvey and Humphrey, had died without issue male, and at this time the estate stood limited to Ralph Bagot for life, with remainder to his son (the Plaintiff) William W. Bagot in tail. The latter was an infant, having been born on the 24th of January 1847.

Egerton Arden Bagot had, by his will, after reciting the will of his father, devised certain hereditaments of his own to Ralph Bagot for life, with remainder to his first and other sons in tail male; and he discharged his paternal settled estates, and all persons entitled thereto, "from all sums of money, claims, rights and interests, to which he had become entitled previously to the date of his will, in consequence of his having discharged or purchased any incumbrances affecting the said paternal estates, or purchased leasehold interests granted out of or affecting the same." And he declared that if any person taking any interest under his will in his estates should, in any manner, dispute or call in question any of the dispositions of that his will, or make any claim against his estate, in respect of any dealings or transactions which had taken place with or in reference to paternal settled estates, that then he should forfeit his estate. He also, by codicil, directed that the amount of any such claim, if established, should be paid one of the incumbrances on his paternal estates, which had been paid off by him and out of his own devised estates.

The first suit was instituted in April 1862 by William W. Bagot, the infant tenant

in tail, against his father, the tenant for life in possession, and the executors of [511] Egerton Arden Bagot. The bill stated that "during the period when Egerton Arden Bagot was in possession, as tenant for life, of the real estates so devised, as aforesaid, by the will of Walter Bagot, he, from time to time, with full knowledge that he was impeachable for waste, committed divers acts of waste, by felling timber other than for necessary repairs, and by opening and working new mines and mines which had been abandoned, and mines which were not in a state of working at the death of the testator Walter Bagot, some whereof had never been worked by the testator or by any other person whilst he was in possession thereof, and others, if they had been so worked whilst he was in possession thereof, had nevertheless been abandoned or were lying dormant at his death, and that Egerton Arden Bagot, from time to time, sold the said timber and minerals, and obtained large sums of money as the proceeds thereof, which he applied to his own use, and thereby he amassed a very considerable fortune."

The bill prayed a declaration that the personal estate of Egerton Arden Bagot was liable to answer to the Plaintiff for all the benefit and profits received by him from the acts of waste, with interest from the periods they were respectively received, and it prayed an account of the timber improperly felled, and also of the coals and minerals gotten by him from mines under the estates which were unopened, abandoned or dormant at the death of Walter Bagot, the testator, distinguishing those prior to the Plaintiff's birth in 1847.

The executors of Egerton Arden Bagot, by their answer, said that their testator had granted several leases for his life of divers coal mines under the Lancashire estate, some of which were new and unworked, and that [512] others were lying dormant; and that he had felled timber on the settled estates; and that, to the best of their knowledge, he had received for coals from unopened mines, before the Plaintiff's birth, £7923, 15s. 4d., and after his birth, £11,752, 18s. 2d.; from dormant mines, before his birth, £9759; after his birth, £1375; for timber cut, £4330, 13s. 9d. They stated that none of the mines had, as they believed, been worked from 1775 to 1806, while Walter Bagot, the settlor, was in possession. They also stated their belief that part of the timber, or the proceeds thereof, had been employed or expended in rebuilding, repairing and improving the estates, and they claimed to set off or retain all just allowances in respect of some incumbrances which had been paid off by Egerton Arden Bagot, together with the outlay and expenses he had incurred in rebuilding, and in repairs and improvements, which they alleged were far beyond what could have been required by a mere tenant for life. They also insisted on the clause of forfeiture and the benefit of the provision contained in the will and codicil of Egerton Arden Bagot.

Mr. Osborne and Mr. G. N. Colt, for the Plaintiff. The estate of the tenant for life is clearly accountable for the waste committed; but a distinction must be made as to that prior to the Plaintiff's birth in 1847 and that subsequent. As to the former, the amount ought to be invested for the benefit of the parties entitled to the estate in succession, giving to the former tenant for life no benefit from his wrongful acts. As to the latter, the Plaintiff, as the owner of the first estate of inheritance, is entitled absolutely to the produce, and interest is chargeable on the amounts received from the time of their receipts. They cited *Williams v. The Duke of Bolton* (1 Cox, 72); *Powlett v. The Duchess of Bolton* [513] (3 Ves. 374); *Whitfield v. Bewit* (2 P. Wms. 240); *Lushington v. Boldero* (15 Beav. 1); *Garth v. Cotton* (3 Atk. 751; S. C. 1 Ves. sen. 524; 1 Dick. 185; 1 White & Tudor's Lead. Cas. 559); *The Duke of Leeds v. Lord Amherst* (14 Sim. 357; S. C. 2 Phil. 117; 20 Beav. 239); *The Marquis of Ormonde v. Kynnersley* (15 Beav. 10, n.); *Bateman v. Hotchkin* (No. 2) (31 Beav. 486); *Foley v. Burnell* (1 Bro. C. C. 274).

As to the dormant mines, it appears that the settlor entered into possession of the estate in 1775, and died in 1806, and that, during thirty-one years, none of the mines were worked. The dormant, or abandoned mines, are therefore in the same position as the unopened mines; *Viner v. Vaughan* (2 Beav. 466).

As to the alleged lasting improvements, they cited *Caldecott v. Brown* (2 Hare, 144); *Dent v. Dent* (30 Beav. 363).

Mr. Hobhouse and Mr. Lewin, for Ralph Bagot, the tenant for life in possession,

argued that the money received in respect of the waste ought to have been invested ; that the prior tenant for life, being a wrongdoer, was not entitled to any benefit from his wrongful act, and that therefore the fund ought to have been accumulated. That the present tenant for life was entitled to the income of the fund so accumulated prior to the birth of the tenant in tail ; *Gower v. Eyre* (Sir G. Cooper, 156).

Mr. Selwyn, Mr. Baggallay and Mr. Rasch, for the executors of Egerton Arden Bagot, argued that no interest was payable on the amount received in respect of timber and minerals prior to the death of Egerton Arden Bagot, who was entitled to the rents and profits for life, and that, at the utmost, interest could only be [514] chargeable from the filing of the bill. That after the great lapse of time (now fifty-four years) during which no complaint had been made, it was impossible to ascertain the circumstances under which the timber had been cut, that the trees might have been deteriorating, or have consisted of necessary thinning, or windfalls, and that by cutting them, the estate might have been improved instead of injured, and those in remainder benefited thereby. That the only case in which interest had been given from the time of the receipt of the money derived from the sale of the timber was *Williams v. The Duke of Bolton* (1 Cox, 72 ; 3 P. Wms. 268, n. ; 3 Ves. 574) ; but that must have been a special case, for Lord Thurlow considered it "a fraud on the settlement (especially considering the express words of the settlement)," besides, the suit was for administration. But in *The Duke of Leeds v. Earl Amherst* interest was only given from the death of the tenant for life, and in *Garth v. Cotton* it was only given from the filing of the bill.

That it might be said that the remainder-man had lost the improved value by growth of the timber cut, but that could not apply to minerals, which were not improved by time.

That the acts of Egerton Arden Bagot were either rightful or wrongful ; if rightful, he was entitled to the income of the money produced, but if wrongful the remedy was by action at law and not by a suit in equity. They cited *Blake v. Peters* (31 L. J. (N. S.) Ch. 884 ; 32 L. J. (N. S.) Ch. 200, on appeal) ; *Ferrand v. Wilson* (4 Hare, 344 ; S. C. 15 L. J. (N. S.) Ch. 41) ; *Gent v. Harrison* (John. 517 ; S. C. 29 L. J. (N. S.) Ch. 68) ; *Clavering v. Clavering* (2 P. Wms. 388) ; *Mildmay v. Mildmay* (4 Bro. C. C. 76) ; *Phillips v. Barlow* (14 Sim. 263 ; S. C. 14 L. J. (N. S.) Ch. 35).

[515] Mr. Atkin, for the Hon. Honora Legge and other Defendants in the suit of *Legge v. Legge*.

Mr. Osborne, in reply ; *Jesus College v. Bloom* (3 Atk. 262 ; 1 Amb. 54) ; *Parrott v. Palmer* (3 Myl. & K. 632) ; *Wellesley v. Wellesley* (6 Sim. 497).

May 26. THE MASTER OF THE ROLLS [Sir John Romilly]. The object of this suit is to make the estate of Egerton Arden Bagot, deceased, liable for certain acts of waste committed by him on the family estates, when he was in possession of them as tenant for life. That his estate is liable to some extent is not disputed : the questions I have to determine relate to the extent of that liability, and the mode of application of the sums which will have to be paid in respect of that liability.

The property was settled by the will of the Rev. Walter Bagot, made in the year 1798. By it he created a term of 1000 years, the trusts of which were to raise money in aid of his personal estate, and also the sum of £1800, which, under his marriage settlement, he was bound to pay, and subject thereto, he gave the estate in question to Egerton Arden Bagot, his eldest son, for life, with remainder to his first and other sons in tail male ; and in default, to the second and every other son of the testator for life, with remainder to their first and other sons in tail male respectively, ending, in the event of failure of sons of all the prior tenants for life, to the Defendant the Rev. Ralph Bagot, the sixth son of the testator, for life, with remainder to his first and [516] other sons in tail male. As to no one of the estates for life given does his will contain any provision freeing the tenant for life from impeachment for any waste committed by him.

The second, third, fourth and fifth sons of the testator have all died without issue male during the life of Egerton Arden Bagot. The Plaintiff is the eldest son of the Defendant the Rev. Ralph Bagot ; he is the heir in tail in remainder, and if he survives his father, and do not previously alienate his inheritance, he must necessarily be the heir in tail in possession.

The testator died in July 1806. His eldest son Egerton Arden Bagot thereupon entered into possession of the settled estates, and he continued in such position down to the time of his death, which took place on the 4th February 1861. The property consisted of the family mansion and estate in Warwickshire, and of an estate in Lancashire which was possessed of valuable minerals. I have already noticed that Egerton Arden Bagot had no power to commit any waste, and it is shewn that he was aware of his liability in this respect. Notwithstanding this restriction, he cut timber to a large extent, and he worked the minerals both by working old abandoned mines and by opening new ones.

With respect to the abandoned, or as they are called in the pleadings and evidence, "the dormant mines," I am of opinion that he is not shewn to have been guilty of any waste in working these. It is always a question of degree, to be established by evidence, whether the working of a mine which has been formerly worked is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months or [517] two years before he became possessed of the property, must still be considered to be an open mine. A mine not worked for a hundred years could not, I think, be properly so treated; and my present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working of it, but which, from the rise in price of iron and coal, had become remunerative, might, without waste, be worked again by a succeeding tenant for life; but if the abandonment of the mine had taken place long ago, and if the owner of the inheritance had discontinued the working, with a view to some advantage to the property, which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, then I doubt whether a succeeding tenant for life could properly treat that as an open mine. I state my general view of this subject, but I doubt whether I have before me sufficient materials to enable me to come to a satisfactory conclusion on this point.

The opening also of a fresh pit may be, not the opening of a new mine, but only the more advantageous mode of working an old one, and may possibly be done without any injury to the inheritance, if the surface of the spot where it is opened be of no or little value to the estate. I am of opinion, therefore, that as to the mines, it may become necessary to direct an inquiry to the effect I shall presently state.

Again, on the subject of the timber, it does not necessarily follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, i.e., every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land to which the tenant for life would [518] be entitled. So, also, I apprehend that proper and regular thinning of a wood, for the purpose of improving the rest of the trees within certain limits, would not amount to a waste. In one case (*Pidgeley v. Rawling* (2 Coll. 275)), the Lord Justice Knight Bruce held that the cutting of larch trees twenty years old, for this purpose, was legitimately done by the tenant for life, and did not amount to waste. On the subject of the timber felled I am also left in the dark by the evidence, and on this subject also I am of opinion that it may be proper to direct an inquiry, the terms of which I will presently state, unless by arrangement a different course can be adopted.

The next question argued before me relates to the mode in which the tenant for life should be made to account for the minerals improperly won by him, and also for the timber improperly cut by him. Two periods are insisted upon by the counsel for the Plaintiff, during which the timber was cut and minerals were won, which is, as they contend, governed by different principles, viz., the timber cut and minerals won before the 24th of January 1847, when the Plaintiff was born, and the timber cut and minerals gotten subsequently to that period. With respect to the former period, they contend that the Plaintiff is entitled to the interest of the money derived from those sources; and with respect to the latter period, they contend that he is entitled to the money itself derived from the same, inasmuch as the Plaintiff was the first tenant in tail *in esse* when it was cut.

With respect to the claim of Egerton Arden Bagot, the tenant for life who cut

the timber. I held in [519] *Lushington v. Boldero* (15 Beav. 1), following *Garth v. Cotton* (3 Atk. 751; 1 Dick. 185, and 1 Ves. sen. 524), and many other cases, that the tenant for life could not derive any benefit from the timber improperly, knowingly and wilfully cut by him. Upon reviewing the authorities I still retain that opinion, but at the same time, in considering the cases, it appears that, after a long time has elapsed before the bill has been filed, the Court has usually endeavoured to deal with the tenant for life in a very liberal manner, considering, and as I think justly considering, that, in most cases, it would not be for the benefit of the parties concerned to go into a long and expensive inquiry as to the nature of the timber cut and the circumstances under which it was cut. If this be a correct view as regards timber, it is manifest that the same consideration would apply to the getting of mineral, when there is such a complication of circumstances as exist in the present case, arising from the difficulty of deciding which were opened and which were unopened mines. Accordingly, in *Garth v. Cotton*, although the principle I have mentioned was broadly laid down by Lord Hardwick, he considered that, instead of any such inquiry, it would be better simply to give interest from the date of the death of the tenant for life, and a similar principle was acted upon in the case of *The Duke of Leeds v. Lord Amherst*.

Here, the tenant for life was in possession of the property from July 1806 till February 1861, a period of fifty-four and a half years; no complaint was made or any opposition offered to him, during the whole of that period, as regards his dealing with the property as he thought fit, although any one of the tenants for life in remainder, or even the trustees to preserve contingent [520] remainders, might have done so. It is true that this negligence, on their part, does not affect the Plaintiff, who was not born till 1847 and is still an infant; but still, taking into consideration the family relations between these persons (a circumstance which Courts of Equity, not merely in the case of family agreements, but in many other cases, treat as a matter of moment and one to be regarded in dealing with questions between relatives), and having regard to the fact that the father of the infant Plaintiff was one of the tenants for life, by whose desire, and I must also say properly, the present suit, I have no doubt, was instituted:—Taking all these matters into consideration, I am disposed to act rather on the course adopted in *Garth v. Cotton* by Lord Hardwicke, than to enforce the strict right of the parties, after the delay and expense which would be occasioned by prosecuting the enquiries I should be otherwise compelled to direct. If, therefore, the Defendants, the executors of the tenant for life, will consent to adopt the accounts furnished by them as conclusive against the estate of their testator, I will declare that the estate of the testator Egerton Arden Bagot is liable for £4330, 13s. 9d. for timber cut on both estates, and for the sum of £19,676, 13s. 6½d., in respect of minerals won from unopened mines, but that his estate is not liable in respect of the minerals from the dormant mines; and I will then direct interest at £4 per cent. per annum to be calculated on the two sums I have already stated (amounting in the whole to £24,007, 7s. 3½d.) from the day of the death of the testator, and charge his estate with that amount. Against this, the estate of the testator will be entitled to set off any incumbrance affecting the estate, which would not properly have been paid out of the estate, under and by virtue of the term of 1000 years created by the will of the Rev. Walter Bagot, deceased. I should then direct the [521] amount, when paid, to be invested as part of the settled estate, and the interest thereof to be paid to the Defendant, the Rev. Walter Bagot, during his life, on the assumption that the waste had not been wrongful to this extent, viz., that the inheritance had not been injured thereby, and declaring the Plaintiff absolutely entitled to the money, subject to the life-estate of his father therein.

If this be acceded to on the part of the advisers of the Plaintiff, I think that it would be proper, on the part of this Court, to accept this species of compromise on his behalf. If not, I should direct, first, an account of what minerals had been gotten and won by the late tenant for life Egerton Arden Bagot prior to the 24th January 1847, distinguishing between such of the minerals as were gotten from old mines remaining dormant and from mines newly opened by him. In taking such inquiry, I should ascertain for how long and under what circumstances such mines had remained dormant or unworked, also, whether, with respect to the new pits sunk or

opened, any were so sunk or opened for the purpose of facilitating the old workings or for the purpose of opening fresh mines, and I should also state the circumstances under which such fresh workings were commenced. I should then direct a similar account as to the timber, distinguishing it as to the timber felled prior to the 24th January 1847, and that felled subsequently, distinguishing also what parts of such timber, if any, were felled in the nature of thinnings, and whether any and what parts of such timber were properly felled with regard to the benefit of the estate, and also take an account of what parts of such timber, if any, were employed in the repairs of the settled estate.

Upon the coming back of that account I should direct what should appear to be the amount of all [522] timber improperly cut and minerals improperly gotten prior to the death of the Plaintiff to be invested as part of the settled estates, and the interest thereon since the death of Egerton Arden Bagot to be paid to the Defendant, the father of the Plaintiff. As to that improperly cut subsequently to the birth of the Plaintiff, I should declare the Plaintiff to be entitled to the proceeds, as the first tenant in tail, together with interest at £4 per cent. per annum on that amount, from the time when the same moneys were respectively received. As to all that which, on the inquiry, should appear to have been timber properly cut and minerals properly won, that is, by which the inheritance was not injured, but such as this Court would have directed, had an application been made to it by the tenant for life for that purpose, I should direct it to be invested as part of the settled estate, and treat Egerton Arden Bagot as entitled to the interest arising therefrom during his life, and, since his death, charge his estate with interest on it at £4 per cent. per annum, to be paid to the present tenant for life.

It is plain that it would be troublesome and probably most tedious and expensive to work out all these inquiries, and my opinion is that the course I have above suggested, as one to be adopted in lieu of such inquiries, would be the best for all parties, the more so as, after the great lapse of time, I should take the amounts and prosecute the inquiries in the manner most liberal to the deceased tenant for life, and where, from the difficulties occasioned by the delay, evidence was wanting, I should make all reasonable presumption in favor of his estate.

In either case, his estate will be allowed, in discharge, the incumbrances on the estate paid off by him and not provided for by the will of the original testator; but in [523] neither case will he be allowed anything in respect of the improvements he has made on the settled estates, whether they be lasting improvements or otherwise, nor will he be allowed anything in respect of repairs, except timber in the rough, which may have been employed for that purpose, nor anything in respect of the interest accruing on the incumbrances which it was his duty to keep down.

In intimating the course I should probably adopt if these accounts and inquiries were prosecuted, and by declaring the Plaintiff, the first tenant in tail, entitled to the *corpus* of the fund produced by the improper felling of the timber in his lifetime, I beg to be understood as not expressing any opinion that he would have been so entitled if he were (if I may be allowed the use of an expression which accurately conveys my meaning) only presumptively tenant in tail in remainder, instead of being, apparently, a tenant in tail in remainder, that is, if he had not been a person who, if he live long enough, must necessarily become entitled to the estates in possession. I by no means assent to the doctrine supposed to be laid down by some of these cases, but as I conceive erroneously so supposed, that if an estate be limited to six persons for life, in succession, with several successive estates tail to their first and other sons in succession, and the first tenant for life commits waste without collusion with anyone, the money arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life, because he happened to be the only tenant in tail then in existence, and that he could thereby deprive all the future sons of the prior tenants for life, who should be afterwards born, of the inheritance settled on them. If the prior tenant for life could do this, as to a portion, the principle would apply equally to the whole, and he might, provided there was [524] no collusion with the tenant in tail *in esse*, give an estate or a valuable part of it to a remote descendant, to the exclusion of many children, who, in the ordinary course of nature, would afterwards come into existence. I do not think that this

proposition is intended to be laid down in any of the cases referred to, and I am unwilling to do anything which might lead to the supposition that I considered this to be the law.

I have, I think, in the observations I have already made, disposed of the principal objections urged by the counsel for the executors of Mr. Egerton Arden Bagot; but I notice more especially one, from the pointed manner in which it was put, but which, I think, admits of a ready and conclusive answer. It was argued that the cutting of timber and the winning of minerals by Egerton Arden Bagot was either wrongful or not wrongful, in other words, that it was either wrongful or rightful; that if it was wrongful, it was a case for an action at law, and that if it was rightful, the money ought to be settled, and he was entitled to the interest of it. I assent to the proposition that, if it was rightful, the money ought to be settled, but I do not concur that, if not rightful, the Court ought to leave the parties to their remedy at law. In fact, the death of Egerton Arden Bagot, and the necessity of administering his estate, entitles anyone who seeks to make a claim against his assets to seek the aid of this Court for that purpose, and to compel the executor either to admit assets or to account for his estate accordingly.

Assuming that, in the case of *Legge v. Legge*, which came on to be heard with *Bagot v. Bagot*, and which is brought for the administration of the estate of Egerton Arden Bagot, a decree for administration of that estate shall be made, then I am of opinion that the parties to the latter suit, both the Plaintiff and Defendant his father, [525] are entitled, when the amount of their claims is settled in *Bagot v. Bagot*, to have a direction for leave to prove the amount due to them against the estate of the testator in the suit of *Legge v. Legge*.

In addition to the above decree which I have intimated, and which affects the estate of the deceased tenant for life, Egerton Arden Bagot, I am of opinion that it will be proper, having regard to the facts proved in this case, to direct an inquiry, to ascertain what mines and minerals are now in existence in the settled estate, and what is doing in respect of them, and whether it is for the benefit of the inheritance that any and which of such mines should continue to be worked, and also an account of all profits and moneys derived from the working thereof since the death of Egerton Arden Bagot, and by whom the same have been received, or how the same have been applied. And declare that the proceeds that have already arisen therefrom and may hereafter arise from the same ought to be invested as part of the said settled estates, and the dividends arising from the same, when so vested, be paid to the tenant for life for the time being of the estates. And if thought desirable, an inquiry may be taken, in like manner, as to the timber now standing on the estate, adopting for that purpose the form of order in the case of *Tooker v. Annesley* (5 Sim. 235), which I have usually followed in such cases.

With respect to costs, I must treat this as a proceeding necessary for the purpose of establishing a debt against the estate of a testator, the costs of which must be added to the debt to be proved. The Defendants, the executors of Egerton Arden Bagot, must be declared to be entitled to have their costs of this suit, as between [526] solicitor and client, out of the estate of their testator. Their conduct has been perfectly proper and regular in every step they have taken in this suit, the claims in which it was their duty to oppose, and in opposing to give all the information in their power respecting the matters complained of. They were bound to protect the estate, of which they are trustees, to the utmost of their power, but in doing so, to conceal nothing, and to submit to act in all respects as the Court might direct. This is the course they have adopted, and they are entitled to a perfect immunity from this Court for having so acted.

June 8. Mr. Osborne stated that the compromise suggested had been declined.

THE MASTER OF THE ROLLS said that the decree must be in the terms stated in his judgment. He also stated that the produce of the windfalls (contrary to the popular notion) did not belong to the tenant for life, but must be invested.

NOTE.—Upon appeal to the Lord Chancellor a compromise was effected.

[526] *Re BAKER. May 8, 30, June 2, 1863.*

[8 L. T. 566; 11 W. R. 792; 2 N. R. 151. Questioned, *In re Massey*, 1865, 34 Beav. 470.]

Upon a petition by a mortgagor to tax the bill of the mortgagee's solicitor, after payment, the mortgagee must be served.

A mortgagor seeking to tax the bill of the mortgagee's solicitor, as against the solicitor, stands in the position of the mortgagee himself, and if the mortgagee cannot tax it, neither can the mortgagor; but the mortgagor may tax it as against the mortgagee for the purpose of diminishing the amount of his claim.

This was a petition by a mortgagor for taxation of the bill of costs of the mortgagee's solicitor, after payment, under the third-party clause (6 & 7 Vict. c. 73, s. 38). The bill, amounting to £14, 5s., had been delivered on the 30th of January 1863. It had been paid [527] by the mortgagee on the 24th of February, and had been paid by the mortgagor to the mortgagee on redeeming the mortgage on the 9th of March. The mortgagee had not been served with the petition, and the question was, whether the petition could proceed in his absence.

Mr. G. O. Morgan, in support of the petition.

THE MASTER OF THE ROLLS [Sir John Romilly]. The mortgagee must be served with the petition. I have repeatedly had occasion to explain the rule, which commonly arises between a mortgagor and mortgagee. The rule is this:—A mortgagor may tax the bill of the mortgagee's solicitor exactly in the same manner as the mortgagee himself might do. But if the mortgagee has bound himself, as regards his solicitor, in such a manner as to prevent his taxing the bill, neither can the mortgagor tax it as against the solicitor. If the mortgagee has paid too much, the mortgagor can only tax it as against the mortgagee, for the purpose of diminishing the amount claimed by him. When a mortgagor seeks to have the bill of costs of the mortgagee's solicitor taxed, it is usual to have the mortgagee present as well as the solicitor. Take this example:—A mortgagee employs a solicitor with reference to the mortgage, and the bill of costs having been delivered, the mortgagee, after examining it, thinks fit to pay it without any pressure, although it is full of improper items. A year afterwards the mortgage is redeemed, and then the mortgagor says, "This bill is very improper, and I am entitled to have it taxed:" he is entitled to have it taxed, but not as against the solicitor; he is entitled to stand in the shoes of the mortgagee, and if the mortgagee cannot tax the bill as against his solicitor, so neither can the mortgagor, [528] and the taxation must take place as between the mortgagor and mortgagee.

The case is the same with respect to executors. Thus, when a residuary legatee comes against an executor for an account, the executor may say, here are five yearly bills of my solicitor, which I have paid, and I am entitled to be allowed the amount of them. The residuary legatee may have them taxed, but not as against the solicitor, because they have been paid for more than a year and cannot be taxed by his client.

Here, if the mortgagee can tax the bill, it is not necessary to have him here, if the case is put on that alone; but, if not, you must serve him.

May 30. The executors of the mortgagee having been served, the case was mentioned again. The bill amounted to £14, 5s., of which charges amounting to £5, 10s. were complained of as improper.

Mr. G. O. Morgan, in support of the petition, cited *Re Barrow* (17 Beav. 547); *Re Dawson* (28 Beav. 605).

Mr. Selwyn and Mr. Bates, for the representatives of the mortgagee.

Mr. Baggallay, for the solicitor.

June 2. THE MASTER OF THE ROLLS thought the charges for £5, 10s. could not be sustained, but that the violent imputations of fraud had been disproved. He said that he did not intend to send so trifling a matter to the Taxing Master, but that he

should direct the repayment of the £5, 10s., and that all the parties should bear their own costs.

[529] YOUNG v. NEILL. *April 23, 24, May 22, 1863.*

[S. C. 9 L. T. 9; 9 Jur. (N. S.) 976; 11 W. R. 1052; 2 N. R. 212.]

If the consignee of a cargo, by agreement with the owner, charter a ship, and expend the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the shipper of the cargo.

A. B. chartered nine vessels in England to fetch C. D.'s timber from Nova Scotia, under an agreement between them that he, A. B., was to be the consignee. C. D., in breach of the contract, consigned the cargoes to other persons, but A. B. arrested the produce of one of them in the hands of the consignee, by means of an injunction. Held, that A. B. could maintain a bill against C. D. and the consignee to enforce his lien on the produce of that cargo, and that such lien extended to all sums properly expended by him in respect of the nine ships and to all pecuniary losses and liabilities, but not to commission, consignee's profits or damages for breach of the contract.

The object of this suit was to make the proceeds of the cargo of a vessel called the "Cathinka" liable, in the hands of her consignees, for the moneys due to the Plaintiffs, under an agreement of agency and consignment entered into with one of them, by a person of the name of Crane, on behalf of the Defendants Neill and Gilbert. The questions in the cause were both of law and of fact, and arose under the following circumstances:—

In the years 1859 and 1860 the Defendant Gilbert, residing at Shediac, in the province of New Brunswick, carried on an extensive business as a lumberer, that is, in felling and floating pine timber and deals down the stream that leads to Shediac, there sawing these pines at his mill into the proper sizes and lengths, and then shipping them to England and elsewhere. The Defendant Neill also resided at Shediac, where he also carried on business as a merchant. In the beginning of the year 1860 the Defendant Gilbert was largely indebted to the Defendant Neill, and, in order to liquidate this debt, an arrangement was made between them, by which a large consignment of deals was to be made to London, of which the principal profit at least, if not the whole, was [530] to belong to Neill. The whole profit was, as Neill said, to go in liquidation of his debt. In order to effect the proper arrangement for this purpose, Joseph Crane was sent to this country, as the agent of both the Defendants, Neill and Gilbert. The instructions and authority given to Crane by Gilbert were by parol, and were only to be gathered from the evidence of both, which was not at variance. The authority given to Crane by Neill was in writing, and was to this effect:—It authorized Crane, when in England, to sell, on Neill's account, 3,000,000 superficial feet of deals, deliverable at Shediac in the ensuing spring, in the customary manner. For all not sold on contract, Neill authorized Crane to charter vessels to remove them.

When Crane arrived in this country, he was unable to sell the deals on contract, and he was obliged, therefore, to proceed on the latter part of his instructions, viz., to charter vessels to remove them. For this purpose he applied to the Plaintiff Young, to whom he had a letter of introduction, and with him he entered into the following arrangement:—Crane requested the Plaintiff to act as agent and consignee of the Defendants Gilbert and Neill for 3,000,000 feet of deals, and, on the 14th of February, he gave the Plaintiff a written authority to arrange, by sale or contract or charter, for the removal of the deals mentioned. He told the Plaintiff that the average value of the deals was 40s. per 1000 superficial feet, that the Defendant Neill was to be at liberty to draw to the extent of 30s. per 1000 feet, and that Gilbert

was to be at liberty to draw on the Plaintiff, against the estimated surplus produce, to the extent of £80 for each ship chartered by the Plaintiff and sent out to Shediach, and that the remainder was, subject to the commission and disbursements of the said Plaintiff, to belong to the Defendant Gilbert.

[531] The first question of fact in the cause was, whether the Defendant Neill was cognizant of and assented to this arrangement, and the Court, on the evidence, came to that conclusion.

The Plaintiff Young, together with the Plaintiff Lewin (who became his partner in May 1860), acted *bond fide* on the faith of the arrangement. In May 1860 Crane received from the Plaintiffs a written authority enabling Gilbert to draw £80 against each vessel to be chartered, and also a written authority to Neill to draw on them against the cargoes at the rate of 30s. per 1000 feet.

The Plaintiffs forthwith proceeded to charter the vessels and to make all the necessary arrangements for the purpose of executing their part of the agreement, in the course of which they had to make the usual disbursements, amounting in the whole to a considerable sum, and was said to be about £400, which the Court, for the purpose of the judgment, assumed to be proper to be allowed as between Neill, Gilbert and the Plaintiffs. The Plaintiffs chartered nine vessels for this purpose, one was lost, seven arrived at Shediach in the month of May 1860, the eighth, the "Cathinka," whose cargo was the subject of this suit, did not arrive at Shediach till July 1860. The first seven vessels were laden before the 23d of July, the bills of lading were sent by Gilbert to Neill, for the purpose of performing his part of the agreement, and for the purpose of having them sent to the Plaintiffs Young and Lewin. Instead of doing so, Neill sent the bills of lading of these seven vessels and consigned the vessels themselves to Messrs. Barnes & Son, of Bristol, who accordingly received the cargoes, and, after making the usual deduction, accounted for the proceeds to the Defendant Neill; but no part of [532] such proceeds had been applied towards repaying to the Plaintiffs the expenses incurred by them for chartering and insuring the seven vessels, or any expense incurred in respect of them.

When the Defendant Gilbert, at Shediach, found that the Defendant Neill had sent the bills of lading to Messrs. Barnes & Son and consigned these ships to them, he determined to send the bill of lading of the "Cathinka," the only remaining vessel, direct to the Plaintiffs, and he accordingly refused to deliver it to the Defendant Neill. Thereupon the Defendant Neill filed a bill against the Defendant Gilbert, in the Supreme Court of the province of New Brunswick, praying the delivery up to him of the bill of lading of the "Cathinka." After some contest and discussion in that suit, and on the 21st August 1860, an order was made by the Supreme Court of New Brunswick, by which the bill of lading was delivered to Mr. Stephen Wiggins, of the firm of Messrs. Wiggins & Son, of St. John, New Brunswick, with directions that they should send it and consign the cargo to their own correspondents in England, with directions to them to sell the cargo and to hold the produce thereof subject to the order of the Supreme Court. The Plaintiffs were no parties to this suit in New Brunswick, and the only question raised in that suit, as far as appeared from the judgment set forth in the bill, was a question of account between the Defendants Gilbert and Neill, on the taking of which and on the ascertainment of to which of them the balance was due, the right to the proceeds of the cargo was to depend. In pursuance of this order of the Supreme Court, the bill of lading of the "Cathinka" was sent and the vessel herself consigned to the Defendants Messrs. Boyson & Tagart. They sold the cargo, and, after paying themselves all their charges and expenses, there [533] remained in their hands a sum of £615, 10s. 11d., which was subject to the various claims upon it.

This bill was filed on the 8th February 1861 against Neill, Gilbert and Messrs. Boyson & Tagart, praying a declaration that the Plaintiffs were entitled to a charge or lien upon the proceeds of the "Cathinka" for what was due to them from Neill and Gilbert, under the agreement of agency and consignment made through Crane, and for an account of damages and also for the accounts and for payment. On the 15th April 1861 an injunction was granted by this Court, to restrain Messrs. Boyson & Tagart from paying over to anyone the proceeds arising from the sale of the cargo of the "Cathinka."

The first question was, whether Neill knew of and assented to the arrangement entered into, on his behalf, by Crane, with the Plaintiffs. The Court, on the evidence, held in the affirmative. The second question was, whether the Defendants Messrs. Boyson & Tagart had paid away the £615, 10s. 11d., the net balance of the proceeds of the "Cathinka" before the injunction had been issued. The Court, upon the facts, held that they had not, and that the £615, 10s. 11d. was still in the hands of Messrs. Boyson & Tagart, and that they were liable to produce and make good the same. The third question was one of law, and was whether, upon these facts, the Plaintiffs were entitled to have the produce of the "Cathinka" applied in making good what was due to them from Neill in respect of these transactions.

The bill had been taken *pro confesso* as against Gilbert.

Mr. Bagge and Mr. Welford, for the Plaintiffs, [534] argued that a valid and binding contract had been entered into by the Plaintiffs with the Defendants through their agent Crane, which had been adopted and acted on by Neill. That this contract gave to the Plaintiffs an equitable charge, on the proceeds of the cargo shipped under it, for their outlay made on the faith of it, and also for the expenses and damages incurred by the breach of it, and that such lien affected the moneys in the hands of Messrs. Boyson, and extended to the advances, &c., made in respect of all the nine ships.

Mr. Selwyn and Mr. Robinson, for the Defendant Neill, argued that there was no contract binding on him or to which he had assented. That the bill could not be supported, for that its object was for the specific performance of a contract which could never have been and was now incapable of being specifically enforced. That the other object of the bill was to recover damages for the breach of a contract, which was the proper subject for an action at law and not for a suit in equity. But that if the case rested on a claim for a lien, none existed, for there was no contract, no assignment, no possession of the bill of lading or of the proceeds of the cargo, and no custom to authorize it, and that the money itself had been paid over by Messrs. Boyson & Co., under orders of the Court in New Brunswick, prior to the injunction. Lastly, that the rights of the Plaintiffs, if any, were limited to their outlay in respect of the "Cathinka," and did not apply to the other ships.

Burn v. Carvalho (4 Myl. & Cr. 690); *Nickolson v. Knowles* (5 Mad. 47), were cited.

[535] Mr. J. H. Palmer and Mr. G. Long, for Messrs. Boyson & Tagart, in addition, argued that the money in their hands had been parted with by them prior to the granting of the injunction.

May 22. THE MASTER OF THE ROLLS [Sir John Romilly] (after stating the above facts and the questions arising in the cause):—On the first question of fact, viz., whether the Defendant Neill knew of and assented to the arrangement entered into on his behalf by Crane with the Plaintiffs, I have arrived at a conclusion favorable to the Plaintiffs. [His Honor carefully examined the evidence and proceeded:]—This body of evidence, combined with the probability of the case to which I have already referred, induce me to believe that the matter was fully and completely explained to the Defendant Neill in the end of May 1860, and that he allowed the whole matter to proceed as if he had fully assented to such arrangement. It was his duty, as soon as he resolved to reject the arrangement, to inform the Plaintiff of such his determination, which he never did. But, in addition to this, he has obtained all the advantage of the disbursements made by the Plaintiff for the eight ships, which, if they had been chartered by Messrs. Barnes & Son, in anticipation of the cargoes being consigned to them, would have been made by Messrs. Barnes & Son, and would have been deducted by them from the proceeds, before they were remitted to the Defendant Neill. Instead of which, on the 28th May 1860, he writes to Millidge, the agent of the Plaintiffs at New Brunswick, a letter in which he undertakes to forward to the Plaintiffs the bills of lading of the vessels.

I am of opinion then, on the first question of fact, [536] that the Defendant Neill knew of and is bound by the arrangement entered into by Crane on his behalf with the Plaintiff.

The second question of fact is, whether the Defendants Messrs. Boyson & Tagart had paid away the £615, 10s. 11d., the net balance of the proceeds of the "Cathinka," before the injunction was issued by this Court. I am of opinion that they had not,

and that the £615, 10s. 11d. was still in the hands of Messrs. Boyson & Tagart when this injunction was granted, and that they are liable to produce and make good the same, when and as this Court shall direct, if it shall give any directions on the subject.

The questions of fact being thus disposed of, the remaining question to be decided is one of law, whether, in the state of circumstances thus detailed, the Plaintiffs are entitled to have the sums arising from the cargo of the "Cathinka" made liable to make good what may be due to them from the Defendant Neill in respect of the transaction.

It is argued, on the part of the Defendants, that the Plaintiff must put his case for relief on one or the other of these grounds, all of which fail:—He comes here for the specific performance of a contract, or to obtain damages for a breach of contract entered into with him; or that he comes here claiming a lien on the proceeds of the cargo of the "Cathinka;" and that in no one of these characters can his bill be maintained.

I assent to this mode of putting the case, and I concur with that argument to this extent:—I am of opinion that this is not a bill for the specific performance of a contract, and that it cannot be maintained on [537] that ground. The contract entered into, if it ever could have been enforced in equity, is clearly one which cannot now be specifically performed. I am also disposed to accede to the view, that if this bill is to be regarded as merely seeking compensation, in damages, for the breach by the Defendant of an agreement entered into between him and the Plaintiffs, that the proper tribunal to determine that question is at law, and that he cannot properly, by this suit, seek that relief in this Court, but if, independently of the question of loss sustained by breach of the contract, the Plaintiffs are entitled to any lien on the cargo of the "Cathinka," it may be that they are entitled to add to such lien the damages really sustained by them, if they can be properly and accurately ascertained. It is on this ground, if at all, that this bill must be sustained by the Plaintiffs. I think that it is clear that, unless the Plaintiffs are entitled to some charge, in respect of something, on the cargo of the "Cathinka," their case must fail.

I proceed, therefore, to consider whether the Plaintiffs are entitled to a charge for anything, and if so, in respect of what, on the proceeds of the cargo of the "Cathinka," and I think that they are so entitled. I consider the case, in the first instance, as if the "Cathinka" had been the only vessel engaged in the transaction. The case then would stand thus:—The agent of the Defendant Neill agrees with the Plaintiffs that they are to charter and send to New Brunswick the "Cathinka," and to expend the money necessary and proper in order to enable her to go thither, in consideration of the vessel and her cargo being consigned to them. Neill knew of and assents to this contract, he loads the vessel, takes the benefit of the outlay, and sends the vessel and her cargo to others. I assume that, to some extent, this outlay by the Plaintiffs was proper and necessary, in [538] order to enable the vessel to proceed on her voyage. If so, the outlay must have been made by someone, and if by the consignee of the vessel and cargo, he would clearly have been entitled to a lien on the proceeds for the advance so made.

I am equally of opinion that where a person, who is not the consignee, has made this advance, and has made it *bonâ fide* and with the sanction of the person who is the owner of the cargo, and who is thereby enabled to obtain and does obtain the benefit of that advance, by the shipping of the cargo by that vessel, the person who has made such advance, in such circumstances, is entitled to a lien on the proceeds of the cargo, if he can arrest them before they come into the hands of the shipper of the cargo, subject, of course, to all the proper deductions to be made thereout in favour of the consignee of the cargo. If this were not so, there would obviously arise the greatest injustice. The Plaintiffs, by the consent and at the instance of the Defendant Neill, through his agent, have contributed money and money's worth towards earning for him the proceeds of this cargo, if not contributed by them, it must have been by the consignees of the cargo, if by the consignees then they would have deducted the amount from the proceeds of the sale, and the proceeds to be remitted to the Defendant would have been lessened to that extent. I am of opinion that the Defendant Neill cannot take these proceeds and refuse to pay that amount, and that the Plaintiffs are entitled to the aid of this Court to stop the payment of these proceeds to him until this sum, so disbursed, has been repaid to the Plaintiffs. In all this I assume,

of course, that the proceeds belong to and are the property of the Defendant Neill; if they are the property of the Defendant Gilbert no question arises, [539] for then Neill has no interest in them, and Gilbert does not dispute the claim of the Plaintiffs.

This is how the matter, in my opinion, would stand if the "Cathinka" had been the only vessel concerned in this transaction. But this is not so, the "Cathinka" is one only of nine vessels included in the same arrangement, entered into in the manner I have stated, between the Plaintiff and the Defendant's agent. The same principle would apply to the proceeds of all the other cargoes, if they were within the control of this Court; but the Court does not sever and apportion the various parts of a contract. If the outlay by the Plaintiffs had been £50 for each vessel, amounting in the whole to £450, the Court would not marshal the sums against the proceeds of each cargo, and if one cargo had only produced a net balance of £20, have mulcted the Plaintiffs of the remaining £30, while the other cargoes had produced sufficient to pay the whole. If I am right in the conclusion of fact to which, as I have already stated, I have come, it was one entire contract binding the Defendant Neill, and one in which he has had the benefit of all the outlay made by the Plaintiffs on all the vessels which have contributed to the earning of what he has obtained from the cargoes of the other vessels, the proceeds of which have been severally increased *pro tanto* by the outlay made by the Plaintiffs. The consequence is, that in my opinion the Plaintiffs are entitled to stay any portion of the proceeds of any one of the cargoes which can be identified in specie, and that they are entitled to be paid out of such proceeds, as against the Defendant Neill and, subject to the claims of consignees and others who have contributed to earn these proceeds, the amount of all the advances and disbursements properly made by [540] them, the Plaintiffs, under the agreement so entered into with them.

I am also of opinion that they are entitled to tack to that lien all loss and damage which they have sustained by reason of that contract having been broken by the Defendant Neill, and that having a lien on a fund belonging to him, by virtue of which this Court has stopped the payment of it to him, the Plaintiffs are entitled to require that the amount shall not be released until the amount of their claims against the Defendant Neill, fairly arising out of the same transaction, have been satisfied. But I must define what I mean by the words "all loss and damage;" by these words I mean all pecuniary loss and damage, and, for this purpose, I think that the provisions of Sir Hugh Cairns' Act are not necessary, though they remove any doubt that might otherwise have been entertained on the subject. But, by these words "pecuniary loss or damage," I do not mean to include any profit which the Plaintiffs might or would have made, in case the contract had been fully and *bonâ fide* performed by the Defendant Neill. To give that is not, in my opinion, within the province of this Court, if I were to give that, it would be, as was fairly argued by the counsel for the Defendants, an attempt to give specific performance of an agreement or damages for the breach of one no longer capable of being performed: if the Plaintiffs required that, they should have gone to law. It is to give effect to the lien, to which, as I have stated, I consider them entitled, that they come into this Court, and that lien is confined to proper advances, to which may be added pecuniary losses, but to which unearned profits cannot be added until they have obtained a judgment at law for them, which they have not done in this case and which they cannot now do.

[541] The costs must follow the event, as regards the Defendant Neill. As regards Messrs. Boyson & Tagart, had they simply held the funds as mere stakeholders, I should have given them their costs out of the funds, but they have thought fit to side with the Defendant Neill, to argue and support his case and to endeavour to withdraw the fund in their power from the controul of this Court. They, therefore, must take the consequences which usually follow where a trustee or stakeholder adopts the cause of one of his *cestuis que trust*, and the decree against them must be made without costs on either side.

The decree will be to this effect:—Make the injunction perpetual. Order Messrs. Boyson & Tagart to pay into Court the sum of £615, 10s. 11d., together with interest after the rate of £4 per cent. per annum from the 5th day of May 1861, within fourteen days after service of the order to be now made. Declare that the Plaintiffs are entitled to a lien on the sum so paid into Court for all sums of money properly

paid and disbursed by them for the purpose of enabling the nine ships in question to proceed to Shediac in New Brunswick, and which have not been repaid to them, and also for all pecuniary losses or liabilities sustained by them, with reference to and connected with the arrangement entered into by and between the Plaintiff and Crane, on behalf of the Defendants Gilbert and Neill. Take an account of all sums of money, &c. (following the words of the declaration). But, in taking such account, no credit is to be given for any commission or profits which would have been realised by the Plaintiffs, in case the said vessels or any of them had been consigned to them. Tax the Plaintiffs' costs of the suit and declare that the Plaintiffs are entitled to add thereto whatever shall be found to be due to them on taking the [542] account aforesaid, and to have the same paid out of the fund in Court. No costs to Defendants Boyson & Tagart. Reserve further consideration, liberty to any party to apply.

[542] SELLAR v. GRIFFIN. April 15, 16, 1863.

[S. C. 33 L. J. Ch. 6 ; 9 Jur. (N. S.) 612.]

A collector of parish rates, appointed by one set of overseers, held accountable to their successors in office for moneys received prior to the appointment of the latter. An account was directed against the collector, not disturbing accounts settled with the predecessors, with liberty to surcharge, and the Defendant, who resisted the account, was ordered to pay the costs to the hearing.

In 1858 the overseers of the poor of the parish of Saint Mary, Battersea, appointed the Defendant Mr. Griffin to be collector of the south-western district of the parish, to collect the rates payable under the 18 & 19 Vict. c. 120. By a bond, dated the 25th of March 1858, the Defendant and two sureties became bound to Benjamin Edginton and five others (the overseers) conditioned to be void if (amongst other things) the Defendant should duly account to and pay over all money unto the obligees "or to their successors in office for the time being." The Defendant continued in office down to the 22d of February 1862, when he resigned.

This suit was instituted by Sellar and five other persons, who were the present overseers of the poor, but all of whom were different persons from those in office in 1858, against Griffin alone. The bill prayed an account of the rates made by the overseers for the time being of the parish prior to the appointment of the Plaintiffs as overseers, and received by the Defendant, and that the Defendant might be ordered to pay the amount. It also prayed that the Defendant might deliver over to the Plaintiffs the rate books, &c.

The Defendant said he had been appointed by the former overseers and not by the Plaintiffs, and that he [543] had resigned his office before the Plaintiffs had been appointed overseers. He submitted that an agent was only responsible to the person or persons by whom he was appointed. He said that he had duly accounted to the satisfaction of his employers for the time being, and that a large sum was due to him, and he refused to account to the Plaintiffs.

Mr. Hobhouse and Mr. Nalder, for the Plaintiffs. The Defendant is accountable to the parish authorities for his receipts while collector, and he has by contract agreed to account to the successors in office. He is also bound to deliver over the books which he holds merely as agent; *Lady Beresford v. Driver* (14 Beav. 387, and 16 Beav. 134). Having resisted the accounts he ought to pay the costs down to and including the hearing; *Collyer v. Dudley* (Turn. & R. 421); *Anon.* (4 Mad. 273).

Mr. Selwyn and Mr. A. E. Miller, for the Defendant. This bill cannot be maintained; an agent is accountable only to his principal, to whom alone he is responsible; *Lockwood v. Abdy* (14 Sim. 437); *Maw v. Pearson* (28 Beav. 196); *Robertson v. Armstrong* (Ib. 123); *Attorney-General v. The Earl of Chesterfield* (18 Beav. 596); and the Defendant is the agent of and accountable to the former overseers only. The form of the condition of the bond to account with the "successors" does not enable the Plaintiffs, as successors, to sue upon the bond. Overseers have no succession, as in the case of a corporation; *Co. Litt.* (9 a. n. l.); and a bond given to two church-

wardens and their *successors* does not enable the successors in office to sue upon it; Dyer's Rep. (48 a., pl. 15). But the Defendant has already accounted to the persons [544] by whom he was employed, and cannot be called upon by the Plaintiffs to account again. They also referred to *Farr v. Hollis* (9 Barn. & Cr. 315); 7 & 8 Vict. c. 101, s. 61; 18 & 19 Vict. c. 120, s. 161; 25 & 26 Vict. c. 102, s. 14.

THE MASTER OF THE ROLLS [Sir John Romilly] (*ex relatione*). The Defendant says that he is not liable to account to the Plaintiffs, on the ground that he is not their agent; and secondly, that he has duly accounted to the persons to whom he was liable to account, and that he is not bound to account over again to the Plaintiffs. I adopt the principle of the cases cited on the part of the Defendant, that an agent, as agent, is only liable to account to his principal; but it is also clear, from those cases, that any person who has got trust or charity property into his own hands is liable to account for it to the persons who are interested in those funds. There is a peculiarity in this case, which it is necessary to refer to. It can be best illustrated by suggesting such a case as this:—Suppose an executor and trustee, entitled to receive property of the testator, employs an agent to get it in, and that, on the death of the executor, the agent has a considerable sum of money in his hands; can anybody contend that the residuary legatees would not be entitled to call on that agent to account, or that they could only get the account through the legal personal representative of the executor, which executor may have died insolvent, so that nobody would take out administration to his estate; and though the executor may have duly accounted to the residuary legatees for everything he received; but his agent may have received large sums of money, in addition, which remain in his hands? Can the agent be allowed to say to the persons entitled, "I am not liable to account to [545] you, because I am not your agent, and all the accounts that have been made to the executor were quite satisfactory to him, and he has said I have properly accounted to him?" Assuming even that there had been an account between him and the executor, and even that it had been a settled account, still, although the Court would not disturb the settled account, it would, on proper evidence, give leave, as it always does, to surcharge and falsify, and to shew that the agent had received a sum of money which he had not entered in his account, and although the account might be perfectly good as far as it stood, and you could not quarrel with any of the items in it, yet you might introduce fresh items with perfect correctness.

I confess I do not think the case turns very much on the nicety of the law respecting overseers. It has been said that the present overseers cannot now call on the late overseers to account, and that the law makes it impossible for them to do that at this moment, and requires that this should be done within a certain time; but if that be so, and if the Defendant can only account through them, is it an answer to these Plaintiffs for the Defendant to say that he has duly accounted to the late overseers, and are they not to be at liberty to see if these accounts are correct or not? It would obviously be the right of the residuary legatee, in the case of collusion between an executor and his agent, whom he had appointed to collect money. If the residuary legatee says to the executor, "The agent has received a large sum, has he duly accounted to you for it?" and the executor answers, "Yes, and he has received nothing more," the residuary legatee would be entitled to have all the books of account and papers fully tested by the examination of the agent; and if there appeared to be anything like collusion, he would be entitled to [546] make him a party to the suit also, if it appeared that he had trust money in his hands which he had not paid over, then there would be another ground for making him a party to the suit.

Of course, in considering this question of account, I assume, although I am bound to state the evidence would lead to a contrary conclusion, that there is a sum of money in the Defendant's hands, and I am bound to test it by this:—What would the Court do, in case it were established that there was a sum of money due from the Defendant, that is to say, a sum of money received in respect of rates not paid over by him, and now in his hands? And accordingly, in the course of the argument, I asked—whether, supposing the Defendant had £100 in his hands, to whom is he to account for this sum? It appeared, from the answer given, to have been an embarrassing question; the liability to account to somebody was admitted, and it was

admitted he could not keep the money in his hands, and that it would be very difficult to say that he was liable to account to the old overseers, because the matter had been settled between them, and they had discharged him. But it was said that he could not be liable to account to the new overseers, because he was not their agent. I then asked whether he might keep the money? In answer to which I was told that the case suggested was not the case made by the bill, the fact being, that he has duly accounted, and has paid over everything. But how is the Court to tell that? It never allows a decree for account to depend on any statement, whether the balance is due one way or the other. The Defendant says the balance is due to him, it may be so, or there may be a balance against him. My opinion is, that he must account for the rates which he has received during that period of time.

[547] The Defendant then says that he has duly accounted, but from the evidence it appears that he did not duly account, but that all he did was to furnish a mere statement of names and sums of money received, with a banker's receipt for the amount of the sums added up: there was nothing in that to shew that he might not have received more. Though I have no doubt that the Defendant is an honest man, who has paid every penny due from him, and that all this litigation arises out of the squabbles in the parish, yet I must look at the case strictly, and as if there was money to be accounted for by him.

I must therefore direct an account to be taken, without disturbing any settled account between the Defendant and the former overseers, but, at the same time, where there is a settled account, the Plaintiffs must be at liberty to surcharge and falsify, as in every ordinary account, and all just allowances must be made to the Defendant. But, in all the accounts already passed between him and the parish, I shall assume that all the items are correct, and that they have been duly vouched. If there is an account which is not settled, then it must be taken over again in the ordinary way.

The Defendant must also deliver up the books, they are the property of the overseers for the time being, but he must have full and complete access to them, at all reasonable times, for the purpose of making out his accounts.

The Defendant must pay the costs up to the hearing.

[548] KNIGHT v. POOLE. May 5, 1863.

Bequest to A., and at his death (with certain exceptions) to B., and "at her decease" to be divided amongst four named persons, "or as many of them as may be living." Held, that those only took who survived both A. and B.

The testatrix, Ann Lochner, by her will, made under a power, proceeded as follows:—

"Also I bequeath all the property settled on me at my marriage to my husband William Conrad Lochner, which property, at his death (excepting the house No. 5 West Street, Finsbury Circus, and £300 in the £3 per cent. consols, which I leave to John Christopher Lochner, of Forty Hill, in the county of Middlesex), I leave to my sisters Mary Fox, at her decease to be divided amongst the surviving brothers and sisters named in this will, Elizabeth Poole or her children, Jane Bridger, my brothers Peter Copeland and William Copeland, to be equally divided amongst them, *or as many of them as may be living*, for their own use, excepting William Copeland's share, which must be placed in trust for him to receive the interest of it monthly or quarterly."

The testatrix died in 1846, Mary Fox, the second tenant for life, died in 1855, and William Conrad Lochner, the first tenant for life, died in 1861.

The testatrix's brother William Copeland died in 1860, in the lifetime of William Conrad Lochner. The Plaintiff, who was his legal personal representative, by this bill, claimed a share of the property, consisting of two leaseholds, which sold for £800, a sum of £600 £3 per cents. and £3000 cash.

The Defendants demurred.

[549] Mr. Selwyn, Mr. Southgate, Mr. C. C. Barber and Mr. Fookes, in support of the demurrers. The Plaintiff, as representing William Copeland, has no interest; for, first, William Copeland took for life only, the bequest was intended for his personal enjoyment only; *Banks v. Braithwaite* (32 L. J. (Ch.) 198). Secondly, the class consisted of those who survived two particular persons and were living at a particular time. The survivorship has reference to the period of distribution, namely, the death of the surviving tenant for life. It is to be "divided," and no division could take place until that period; *Cripps v. Wolcott* (4 Madd. 11); *Daniell v. Daniell* (6 Ves. 297); *Hudson v. Bryant* (1 Collyer, 681); *Neathway v. Reed* (3 De G. M. & G. 18).

THE MASTER OF THE ROLLS. I have no doubt on the first point, that William took an absolute and not a life interest.

Mr. Kenyon and Mr. Eddis, in support of the bill. This differs from the ordinary case, for here there are two tenancies for life prior to the gift to the brothers and sisters, and the division is to be "at her decease," namely, at the decease of Mary Fox. The survivorship has, therefore, reference to her death, and as William Copeland survived her, he became entitled to a share in the property. They cited *Watson v. England* (15 Sim. 1).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am clear that no person took except those who survived the period of division. There is gift of a property to A. for life, and at his death (with certain exceptions) to B., and at her decease it is to be divided between [550] the surviving brothers and sisters, who are named. The case of *Cripps v. Wolcott* clearly applies, and only those who survived both A. and B. could take. The property is to be "divided," and nobody was to take who was not living at the period of division. If I were to adopt the argument of the Plaintiff, the division would take place on the death of the husband, though Mary Fox might be still living.

I am of opinion that the words in question have relation to the period of division, and that the Plaintiff takes no interest in the property. The demurrers must therefore be allowed.

[550] WELLS v. MAXWELL (No. 2). May 28, 1863.

[See S. C. 32 Beav. 408; 55 E. R. 160 (with note).]

A purchaser is liable to pay interest on his purchase-money from the time when he could prudently take possession; but held, that he could not prudently take possession at the time a good title was shewn, if he had no assurance that a person having a charge on the property would join in the conveyance.

This case was put into the paper to be spoken to on the minutes. (See *ante*, p. 408.)

The contract, dated the 26th of May 1862, was for the sale of some bare land producing no rent, and the 6th clause provided as follows:—

"That if, from any cause whatever, not occasioned or arising from the default of the said William Wells, his heirs or assigns, the said purchase shall not be completed on the said 1st day of July, the said William Maxwell shall pay interest, after the rate of £4 per cent. per annum, on the said sum of £2000, from that day until the purchase shall be completed, and shall, from the same day, be entitled to the possession of the said land and the rents and profits (if any) from the said 1st of July until the day of the completion of the purchase."

[551] The contract was not completed on the 1st of July 1862, the delay having arisen from the non-compliance by the vendor with two requisitions, the first related to the removal from the register of a *lis pendens* affecting the property, but which had been satisfied, and the second to the release of a drainage charge on it, which had not been effected until February 1863. The bill was filed in January 1863, and the Defendant insisted that he had put an end to the purchase by notice; but the Court directed the specific performance of the contract.

Mr. Selwyn and Mr. Jessel, for the vendor, now argued that the Defendant was

bound to pay interest on the purchase-money from the 1st of July 1862, under the sixth condition, there having been no wilful default attributable to the vendor. That such a condition had been held to be operative where the delay was the result of accident and could not have been guarded against by the vendor; *Sherwin v. Shakespeare* (17 Beav. 267, and 5 De G. M. & G. 517).

Secondly, that independently of the special contract, the general rule was applicable, which was, that interest must be paid from the time a good title was shewn, which, in this case, was on the 25th of August, or from the time at which the purchaser could safely take possession; and that, considering the nature of the requisitions, this was on the 1st of July 1862; *Dart's Vendors* (p. 407 (3d edit.)); *Sugden's Vendors* (p. 630 (14th edit.)).(1)

[552] Mr. Baggalay and Mr. Batten were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the vendor is not entitled to interest from the time he claims it.

It is said that interest is payable from the time when the purchaser could have prudently taken possession, that he could take possession when a good title was shewn, and that the joining of a mortgagee is a question of conveyance and not of title. All that is true, but in my opinion it mixes several things up together which cannot be properly united. I admit that the rule is, that interest is to be given from the time when the purchaser could prudently take possession, but I do not think a purchaser could prudently take possession on the title being perfectly well shewn, if it appeared that the property was mortgaged to its full amount, and that there was no assurance that the mortgagee would join the conveyance, and it was not known whether the vendor could get him to join. It is true that this is a matter of conveyance, but the purchaser does not know that you can get the mortgagee's consent to it. This question occurs:—Is a condition of this sort to be so treated, that if a good title be not shewn on the exact day stipulated, then, though there is but a simple matter in dispute, the whole condition is at an end, and the purchaser may be guilty of any species of delay and to loiter over the matter as much as he pleases, and yet that he is not to be subject to any of the consequences arising from it? I am of opinion that is not so. But, on the other hand, the vendor cannot derive any benefit [553] from his own carelessness. I think that there was a considerable amount of delay in this case on the part of the vendor, that he did not shew, as he might, various things, and that he cannot excuse himself by saying that the official liquidator was out of the country at the time. Having regard to all these matters, I think that he was negligent in this respect, and although I do not think that it deprived him of the benefit of his contract, still I think he ought not to be allowed interest from the 1st of July under it; but, if not from that time, it is difficult to say from what other time he ought to be allowed interest.

I am of opinion that the purchaser could not prudently have taken possession, for he could not make certain of having his conveyance, and the decree must stand as it was, without giving any interest to the vendor.

NOTE.—On the appeal, the Lords Justices gave the Plaintiff interest from the 9th of April 1863, the date of the decree.

[554] DAVIS v. TURVEY. May 8, 1863.

An infant being entitled to one-ninth of a real estate, and it being for her benefit, the Court, instead of directing a partition, declared the costs a charge on the infant's share, and ordered a sale of the whole estate.

This was a petition suit, and the parties, who were entitled in ninths, were desirous,

(1) See *Esdaile v. Stephenson*, 1 Sim. & St. 122; *De Visme v. De Visme*, 1 Mac. & G. 336; *Wallis v. Sarel*, 5 De G. & Sm. 429; *Litchfield v. Brown*, 23 L. J. (Ch.) 176; *Robertson v. Skelton*, 12 Beav. 363; *Coupe v. Bakewell*, 13 Beav. 421; *Sherwin v. Shakespeare*, 18 Beav. 527, and 5 De G. M. & G. 517; *Carrodus v. Sharp*, 20 Beav. 56; *Vickers v. Hand*, 26 Beav. 630; *Denning v. Henderson*, 17 Law J. (Ch.) 8; *Tewart v. Lawson*, 3 Sm. & Giff. 307; *Bannerman v. Clarke*, 3 Drew. 632.

in order to save expense, that a sale should take place instead of a partition, but one of the parties, Florence Matilda Scholar, was an infant and could not consent.

Mr. Everitt, for the Plaintiff, asked that the costs of the suit might be declared a charge on the property. See *Cox v. Cox* (3 Kay & J. 554); and that thereupon the estate might be sold and the produce divided. He said that this course had been pursued by Vice-Chancellor Wood in *Thackeray v. Parker* (1 New Rep. 567). But see *Griffies v. Griffies* (8 L. T. 758); *Calvert v. Godfrey* (6 Beav. 97); *Johnson v. Baber* (8 Beav. 233).

Mr. Freeling, for the Defendants, concurred.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think I can do it, considering the smallness of the property and the number of the shares.

ABSTRACT OF DECREE.

"The Plaintiffs and Defendants (other than the Defendant Florence Matilda Scholar) not desiring a partition of their shares, but that the same shall be sold as hereinafter directed: His Honor doth declare that it is for the benefit of the infant Defendant, Florence Matilda Scholar, and of the other parties interested, that the entirety of the said hereditaments and premises, including the one-ninth of the said infant therein, should be sold. And it is ordered that the said hereditaments and premises be sold accordingly," &c.

"And His Honor doth declare that the costs of the infant Defendant Florence Matilda Scholar of this suit, up to the hearing, in respect of her one-ninth share of the said hereditaments and premises, are properly chargeable upon her share."—Reg. Lib. 1863, A. fol. 1112.

[555] REDE v. OAKES. May 29, 1863.

[S. C., reversed 4 De G. J. & S. 505; 46 E. R. 1015; 34 L. J. Ch. 145; 11 L. T. 549; 10 Jur. (N. S.) 1246; 13 W. R. 420. See *Hiatt v. Hillman*, 1871, 25 L. T. 56; *Dance v. Goldingham*, 1873, L. R. 8 Ch. 913; *Morris v. Debenham*, 1876, 2 Ch. D. 540; *In re Cooper & Allen's Contract*, 1876, 4 Ch. D. 803; *Tolson v. Sheard*, 1877, 5 Ch. D. 25; *Dunn v. Flood*, 1885, 28 Ch. D. 592.]

Properties held by several trustees under several trusts and for different persons were sold together, in one lot, for one undivided sum and with special conditions, as to part, limiting the title. Held, that the purchaser could not resist the specific performance of the contract, on the ground of the mode in which the trust property had been sold. Held, also, that the Court, if necessary, would apportion the purchase-money.

This was a bill by vendors against the purchaser, for the specific performance of a contract, under the following circumstances:—

On the 8th of March 1862 the Defendant, Mr. Oakes, agreed, by private contract, after an attempt to sell by public auction, to purchase some landed property for one undivided sum of £16,650. This property was held under three distinct titles, and belonged to three sets of persons, and the purchase-money was for one gross sum for the whole. The first portion belonged to Mrs. Rede in fee; the second was vested in the trustees of her marriage settlement, who had a power of sale; and the third, which had originally belonged to the four daughters of Robert Rede Rede, as tenants in common, was now vested in four sets of trustees of these settlements, who had powers to sell with the consent of the four daughters and their husbands, and to give good receipts for the purchase-money.

It was stipulated, by the conditions of sale, that the title to Mrs. Rede's portion of the property should commence at different periods for different parts, varying from 1803 to 1845.

This bill was filed by Mrs. Rede, the trustees of her settlement, and the four daughters of Robert Rede Rede and the trustees of their respective settlements (twenty-two persons in all) against Mr. Oakes, praying the specific performance of the contract.

[556] After the sale, the Plaintiffs had executed an agreement, by which they apportioned the purchase-money and agreed that £140 should be considered the value of Mrs. Rede's portion of the property; £352 the value of the portion subject to her marriage settlement; and that the remainder, being £16,158, should be considered as the value of the part of the property belonging to the four daughters and the trustees of their settlements.

The Defendant objected to complete his contract, on the ground that trust property, held under different titles, ought to have been sold separately, and not together for one undivided sum, and that the sale was, therefore, invalid.

Mr. Baggallay and Mr. F. J. Turner, for the Plaintiffs, argued that a valid contract had been entered into, which the Defendant was bound to perform. That the case was governed by the decision in *Clarke v. Seymour* (7 Simons, 67), and that the purchase-money might be apportioned either by agreement or by a reference, as was done in that case. That the Defendant would obtain a good title by a conveyance executed by all the Plaintiffs, and that if the *cestuis que trust* complained, their remedy would not extend to the estate, but would be limited to the purchase-money and the personal liability of the trustees.

Mr. Selwyn and Mr. J. Humphrey, for the Defendant. When distinct trustees join in selling three estates, mixed up together, in one lot and at one price, it is plain that they do not, as they ought, exercise any discretion as to the price accepted for their own portion [557] of the whole. Infants and unborn persons may hereafter become interested in the produce of the sale, and such a contract involves a breach of trust, in which case this Court will never interfere: *Mortlock v. Buller* (10 Ves. 292); *Thompson v. Blackstone* (6 Beav. 470).

It is the duty of each set of trustees to sell their own trust property by itself, at the best price they can obtain for it, and the very fact that, in this case, the £16,158 was afterwards apportioned, proves that there was no previous determination as to the amount they would each take. If a field, a house, and a mine, held by three distinct sets of trustees, and for three different sets of persons, were sold together, leaving it to mere hazard how the purchase-money was to be divided, it could not be supported.

There was no authority to these trustees to sell the property held by them in trust combined with other property, and with a power to partition the purchase-money; and such a sale is especially objectionable where the properties are different in quality and different in title. Here there was a stipulation as to part that the purchaser should take a seventeen years' title. The law imposes severe penalties on those who mix their own property with that of others; thus if A. mixes his corn with B.'s, so that it cannot be severed, the whole mass belongs to B. (*Warde v. Eyre*, 2 Bulst. 323; *Fellows v. Mitchell*, 1 Peere Wms. 83, and 2 Vernon, 516.)

Secondly. The difficulty is increased by the special condition as to title; part is sold with a sixty years' title and part with only thirteen. On what principle [558] can the purchase-money of property so situated be apportioned? Such a contract as the present is not binding on the *cestuis que trust* under the marriage settlements of the daughters.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think there is nothing in these objections. If two persons are together the owners of an estate, but in such a manner that it is very difficult to distinguish what the share of each is, they may join together and sell the property, and make a perfectly good title to the purchaser, who cannot complain of the way in which the vendors afterwards divide the purchase-money. All that the purchaser has to consider is, whether he gets a perfectly good title to the land which he has contracted to buy. I will first treat the case as if there had been no special conditions of sale, and a contract had been entered into by two persons to sell the property to a purchaser. Suppose the vendors were tenants in fee-simple of the lands, the boundaries of which were so inextricably mixed up and confused that nobody could tell where they really were, and that if unsold a suit would become necessary for settling the boundaries. In that case, those two persons might undoubtedly join in a sale of the whole to A. B., who could not, after he had got his conveyance, complain of the manner in which the sellers had divided the purchase-money. If they went to law about the manner in which it should be divided, he,

having got a complete title by the conveyance to him from each of his share, could not be mixed up or concerned in their dispute. Now, if that be good in the case of two vendors, of course it is good in that of any greater number, and if a person who enters into such a contract for the purchase of land gets a good title, he, having got a conveyance from all the claimants, is safe, and must be satisfied.

[559] Then suppose, instead of there being two owners in fee-simple, that part of the property is vested in trustees for other people. If the trustees have a power to sell, and join with the other owners in fee-simple in selling the whole property, I am of opinion, even if the trustees should consent to take less than their proper share of the purchase-money, and might therefore be liable to the *cestuis que trust* for a breach of trust, still that the purchaser would not be affected by it, he having obtained a conveyance from both sets of owners. The division of the purchase-money could not affect him, unless he had notice beforehand that there was a corrupt contract between the vendors, by which the *cestuis que trust* were to be defrauded of a portion of their property, in which case a different question would arise. But no such case is suggested in the case before me. If any such case exists, it will be open to the purchaser to take that or any other objection before me in Chambers. But if no such case exists, then the circumstance that the purchase-money is to be apportioned does not constitute an objection. If the parties cannot agree on the division of the purchase-money, then, I apprehend, after a decree for specific performance, it is the duty of the Court to determine in what manner the purchase-money is to be divided, and when this Court has determined how it is to be divided, the *cestuis que trust* are bound by that decision. After this no question of breach of trust can arise in which the purchaser can in any degree be implicated. In this case, I am of opinion that the Court has full power to determine the question of the division of the purchase-money, and to make a reference, similar to that made in *Clark v. Seymour* (7 Simons, 67), that is: to inquire how and in what proportion the purchase-money ought to be divided.

[560] Then comes the question, how this case is affected by the particular conditions of sale. It appears to me that the purchaser has assented to certain conditions, by which he gets a sixty years' title for part of the property, and only seventeen years' for another part of the property. I do not enter into the question whether the Defendant is entitled to have these portions of the property distinguished, that is not the question now before me; it would be singular if he were not, for his title would not be clearly made out, if the vendors did not specify the parcels to which each title belongs. That, however, is a matter to be settled in Chambers. But the question now is, whether, having entered into this species of contract, and having agreed to take a seventeen years' title for a part of the property instead of a sixty years' title, the Defendant can afterwards raise a question as to the division of the purchase-money. I am of opinion that he cannot, and that the Court will, if necessary, determine how the purchase-money is to be apportioned.

I am of opinion, therefore, on this point also, that no objection can be made to the relief asked. I do not intend to make any special direction, but I propose to make a decree for specific performance of the contract in the usual terms, and direct the usual reference as to title, and an inquiry when the title was first shewn. And if it shall appear that a good title can be made to the property, then let there be an inquiry among whom and in what shares the purchase-money is to be apportioned and divided, and reserve further consideration and costs.

[561] *Re THE FIRE ANNIHILATOR COMPANY.* April 18, May 2, 7, 1863.

[See *In re Gold Company*, 1879, 11 Ch. D. 717.]

Where the proceedings in a voluntary winding up, under the Act of 1856, were dilatory and unsatisfactory, and had not come to a conclusion at the end of five years, the Court, upon the petition of a shareholder, directed a winding up under the Court.

This company was registered in 1856, under the 19 & 20 Vict. c. 47.

In 1858 the company passed a special resolution requiring the company to be wound up voluntarily, and the secretary was appointed official liquidator. These proceedings were, however, tardy and unsatisfactory, and the winding up had not yet been completed. The property had not been wholly disposed of, calls had been made, further liabilities had been incurred, the accounts had not been rendered from year to year, and general meetings had not been called to consider them, as required by the 19 & 20 Vict. c. 47, s. 104 (12).

Under these circumstances, a petition was presented by a shareholder for the compulsory winding up of the company.

Mr. Baggallay and Mr. Roxburgh, in support of the petition.

Mr. Wickens, *contra*, for the official liquidator. The Court has no jurisdiction to interfere pending a voluntary winding up, and a shareholder has no right to apply for a compulsory winding up after the company has duly resolved that it shall be wound up voluntarily. The 19 & 20 Vict. c. 47, s. 105, says that a voluntary winding up "shall not prejudice the right of any creditor of such company to institute proceedings for the purpose of having the same wound up by the Court." This [562] exception, in favor of creditors, shews that contributories have no such right. The 20 & 21 Vict. c. 14, s. 19, is merely supplemental, and only refers to proceedings by creditors, and not to those of contributories. He also referred to the 19 & 20 Vict. c. 47, s. 67. He defended the proceedings of the liquidator, and argued that no good could result to anyone from a compulsory winding up.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not at present see anything which takes away the power of a contributory to have the company effectually wound up by the Court. The petition had better stand over, in order to enable the Petitioner to examine the accounts and for the official liquidator to furnish further information as to the proceedings.

The accounts and information furnished proved unsatisfactory and the application was renewed.

Mr. Baggallay and Mr. Roxburgh, in support of the petition.

Mr. Wickens, *contra*.

THE MASTER OF THE ROLLS held that the 105th section of the Act 1856 did not exclude the right of a contributory to present a petition for winding up a company compulsorily, after a resolution to wind up voluntarily. He said that if the contrary were held, then the effect would be, that an official liquidator might go on for years, and that there would be no end of the proceedings in the winding up. That, before the Winding-up Acts, [563] every partner had a right to have the partnership accounts taken in this Court, and that the statutes were only intended to remove the preliminary difficulties in obtaining a decree where the partners were numerous, and were never intended to deprive partners of their right to have the partnership wound up.

That, considering the unsatisfactory explanations offered, the usual compulsory order must be made, under which the official liquidator must account.

The registrar objected to draw up the order, unless petition were intituled in the Act of 1862 (25 & 26 Vict. c. 89).

May 7. Mr. Roxburgh applied that the order might be drawn up without amending the petition. He relied on the 25 & 26 Vict. c. 89, s. 207, which enacts, that "where previously to the commencement of this Act," &c., "a resolution has been passed for winding up a company voluntarily, such company shall be wound up, in the same manner and with the same incidents, as if this Act were not passed, and, for the purposes of such winding-up, such repealed Acts or Act shall be deemed to remain in full force." He cited *In re The West Silver Bank Mining Company* (*ante*, p. 226).

THE MASTER OF THE ROLLS said the order might be drawn up under the Acts of 1856 and 1858.

[564] PALAIRET v. CAREW. Feb. 17, 18, 1863.

[S. C. 32 L. J. Ch. 508 ; 8 L. T. 139 ; 9 Jur. (N. S.) 426 ; 11 W. R. 449.]

The Defendant was one of two trustees for sale of an estate, the produce of which was divisible amongst persons *sui juris*. He refused to concur in a sale agreed upon by his *cestuis que trust*, until he had been furnished with deeds, &c., relating to another and an independent trust, and to which the Court held he was not entitled. He also refused to retire from the trusts to facilitate the sale. Upon a bill by the other trustees and the persons beneficially interested, he was removed from the trusts and ordered to pay the costs of the suit.

By an indenture dated in 1839, and made between Mr. and Mrs. Bateman and Palairet and Carew, after reciting that there were eight children of Mr. and Mrs. Bateman (specifying them), certain real estates were conveyed to Palairet and Carew, upon trust, with the consent of Mrs. Bateman, during her life, and afterwards of their own authority, to sell and hold the produce on certain trusts for Mr. and Mrs. Bateman, and after their deaths in trust for their children.

Down to 1856 nothing had been done as to effecting a sale, but in that year Palairet and the parties beneficially interested, after a valuation, entered into a verbal agreement for the sale of the property for £1980, subject to the approval of Carew. They applied to Carew for his concurrence, who, fearing to be involved in some future liability, placed the matter in the hands of a solicitor, who stated that Mr. Carew was "satisfied with the valuation, and content that the estate should be sold in accordance therewith." A formal contract was prepared, but Mr. Carew then required copies of deeds and information relating to trusts unconnected with the trusts of the deed of 1839, and said, "Until I see my way clear, I cannot enter into any contract." An angry correspondence ensued. Mr. Carew refused to concur in the sale until the documents had been produced.

Mrs. Bateman died in 1857, and the matter was renewed, but without any result. Mr. Bateman died in 1859, and the matter of the sale was again renewed, an [565] irritating correspondence went on ; Carew still refused his concurrence therein down to 1861, when the parties beneficially interested signed a written contract for the sale of the property. Carew still held out and refused to concur in it, and the beneficiaries, who were all *sui juris*, requested him to resign his trusteeship, and wrote to him as follows :—"27th Nov. 1861.—As your refusal to concur in the contract we have entered into with Mr. Stone for the sale of Skybborwen, &c., must involve us in litigation and loss, and as the motive you allege for such refusal is :—lest you should, by acting, endanger yourself and your family, and incur responsibilities which, as you truly observe, no one would covet, and few would incur. We, the undersigned, being all the beneficiaries for whom you are trustee, and all *sui juris*, are desirous of relieving you of your trust, and to nominate another person in your place, who will act in concurrence with your co-trustee, and we are willing to execute to you a release and indemnity on your resigning, a step which we earnestly hope you will not now decline to take.—Jane Palairet ; J. G. Palairet, for myself and as agent for my son Gwalter ; Robert Bateman ; Sarah Kelson ; Reginald Bateman ; Thomas Bateman."

Mr. Carew still refused to do this without having all the documents and information he had previously required furnished him, and to which he still claimed to be entitled, in order to be exonerated from all responsibility. This, he said, "would not be the case, if he should decline to commit a breach of trust, but resign in order to enable his successor to do so." (See *Webster v. Le Hunt*, Vice-Chancellor Kindersley, June 1860, and Lord Chancellor, July 1861.)

Mr. Carew still refusing to concur in the sale, this suit was instituted in March 1862 by Mr. Palairet [566] (his co-trustee), and the parties beneficially interested against Mr. Carew alone, and the bill prayed that Mr. Carew might be removed from being a trustee, that the sale, if proper, might be carried into execution, and that Mr. Carew might concur therein and pay the costs of the suit.

Mr. Baggallay and Mr. Cracknall, for the Plaintiff.

Mr. Selwyn and Mr. Dickinson, for the Defendant.

Uvedale v. Ettrick (2 Chanc. Cas. 130); *Jones v. Lewis* (1 Cox, 199); *Hampshire v. Bradley* (2 Coll. 34); *Price v. Loaden* (21 Beav. 508) were cited.

Feb. 18. THE MASTER OF THE ROLLS [Sir John Romilly]. I am sorry I cannot find any justification for the course of conduct which the Defendant has thought it his duty to pursue. In the year 1839 he undertook to perform certain trusts—[His Honor stated them]—and these appear to have been very plain and simple. There is a trust to sell the property, and to invest the proceeds for the benefit of the persons mentioned. Nothing was done in the matter of trusts until 1857. In that year, Mrs. Bateman being still alive, it was thought that an eligible sale could be effected, and thereupon the parties applied to the Defendant to consent to such sale. The course which he adopted, in the first instance, was as fit and proper as could be. He proposed to appoint a solicitor, on his behalf, to ascertain whether it was a proper sale, and to satisfy himself with respect to the valuation and the concurrence of the other parties beneficially interested. The Defendant got alarmed appa-[567]-rently from the circumstance of the loss which Mr. Bateman had sustained by not having performed certain trusts relating to another matter. He thought that he could not safely act without examination, not into the trusts of the deed of 1839, but into another trust, which related to the marriage settlement of Mr. and Mrs. Bateman, which was recited in the deed of 1839, and to property in Ireland and the West Indies. But the trusts of the marriage settlement were perfectly distinct from those of the deed of 1839, and the Defendant, in my opinion, was not justified in requiring to have a full explanation of all the trusts and of all the deeds, documents and papers relating to the different descriptions of property and premises, for the purpose of determining what were the trusts which he had accepted, or which had devolved upon him, under the deed of 1839, before he entered into this contract. His trusts, under that deed, were simply to sell and stand possessed of the proceeds for the benefit of the parties named. In no possible way can I (after anxiously endeavouring to find some excuse for his conduct) find any reason why he should not have acceded to the request of the parties. The Defendant declined to do so during the life of Mrs. Bateman; she died in January 1857, and thereupon the matter was renewed and the negotiations were continued during the life of Mr. Bateman, and he died in 1859. It was renewed again, the Defendant still resisted, and matters so continued down to the year 1861, when the parties concerned in the matter applied to him to give up the trust and have some other person appointed. He declined to do this without seeing all the documents and papers relating to the other trusts, upon the ground that, if a trustee surrendered up a trust to a person who committed a breach of trust, he might be made liable for the consequences which might arise from the misconduct of the new trustee. That, no doubt, is correct [568] to this extent:—If a trustee be called upon to commit a breach of trust and refuses, and his *cestuis que trust* say, "There is A. B. who will; will you resign and surrender your trust to him?" and the old trustee accede to that proposal, and transfers the property to the new trustee, for the purpose of enabling him to commit a breach of trust, in that case the old trustee would probably be visited very severely by the Court. But here the trustee is merely asked to perform the trust which he has undertaken, and which he refuses to do, and then he is asked to resign, in order that someone else may perform the trust which he has undertaken to perform and which he refuses to do, and thereupon, he still refuses either to perform the trust himself or to allow any other person to do it.

It is suggested that the proper course would have been to have called upon Mr. Carew to sell the property himself in such a way as he might think proper; but that is not the usual course, nor was it necessary to do so, nor, indeed, did he require that this should be done. The usual course, in such cases, is for *cestuis que trust*, who are the persons most interested in the matter and who have the strongest motive for obtaining the highest possible price, to enter into a conditional contract of sale, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed to be given for it is the value of the property, ought to sanction a sale which is beneficial for the persons for whom he is trustee. That is all the Defendant was required to do, and all that he ought to have done; but he has continually resisted

this down to the time of filing the bill, and has insisted upon mixing up this trust with two other trusts which had nothing at all to do with it.

It has been argued that, since the institution of the [569] suit, the Plaintiffs have furnished the Defendant with copies of the deeds which he required, and that they might have furnished them before. It is unnecessary to enter into this; for I am of opinion that he had no right to ask for them, for they were in no way connected with the trusts he had to perform. The parties might have expected that the trustee would go on making further requisitions, and it may well have been, that they expected, after those copies had been furnished, that some other demand would be made by Mr. Carew, which he would be as little justified in making, and which they would have been equally justified in refusing. It is not necessary for *cestuis que trust* to yield to an unreasonable demand, but if he does so, he does not thereby lose any of his rights. It is enough to say that it is the duty of the trustee to perform the trust which he has undertaken, and that if he compels his *cestuis que trust* to come to this Court, to compel him to do so, he must take the consequences of not having performed his duty. Here it is obvious that the Plaintiffs have shewn very considerable forbearance, and have tried to avoid coming to this Court.

I have endeavoured to arrive at a conclusion which might relieve me from the necessity of making the Defendant bear the costs of the suit, but I am of opinion that the Defendant has rendered this suit necessary, and that he must pay the costs of it up to and including the hearing.

I will appoint a new trustee and direct a conveyance, and then stay all further proceedings against him.

[570] THOMPSON v. JAMES. Feb. 19, March 6, 1863.

[See *White v. Toms*, 1867, 37 L. J. Ch. 207.]

Hoops of whalebone, cane and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies. The Plaintiffs took out a patent for using, for the same purpose, hoops made of steel watch springs. Held, that this was not an invention which could properly be made the subject of a patent.

The Plaintiffs were assignees of an English patent granted on the 22d of July 1856, of a French invention of a flexible petticoat or sous-juppe, now commonly called "crinoline." It consisted of a number of circles or hoops made of steel watch spring; these were attached to pieces of tape or riband, and suspended by them from a band fastened round the waist.

This bill was filed against the Defendants to restrain the infringement of the patent, and to recover profits and damages. The validity of the patent was contested by the Defendants, on the ground of want of novelty, that the very article had been imported from France and in use prior to the date of the patent, that the invention could not be made the subject of a patent. The nature of the latter objection is clearly set forth in the following paragraphs of an affidavit filed on behalf of the Defendants:—

"I say that the principle of making a skeleton skirt composed of hoops or circles suspended by tapes was not new at the date of the Plaintiffs' letters patent, the same having been practised, with circles of wadding and of whalebone and of cane and of linen or cotton cord over wire. And I say that, so long ago as in the last century, ladies' hoops were made of circles suspended or fastened together by tapes thus forming a skeleton skirt. An instance of this description of skirt may be seen in the well-known picture by Hogarth, forming the seventh in the series illustrative of Industry and Idleness."

[571] "The properties of steel as a flexible substance were perfectly well known before the date of the said letters patent, and steel had been applied to ladies' caps, to the sleeves of ladies' gowns, to ladies' stays, and in various other ways in which distension with flexibility was desired to be attained."

"I am advised and believe, for the reasons above stated, that the said letters patent are invalid, not only because of the prior use in England of the actual article

patented, but also because steel had been previously employed for purposes so analogous to the purposes for which the patentee applied steel, that the principle of a skeleton skirt composed of flexible circles, suspended by tapes being old, the mere application of steel for the hoops or circles, in substitution for cane or whalebone, would not constitute an invention for which a patent could, by law, be sustained."

A motion was now made for an injunction.

Mr. Baggallay and Mr. Locock Webb, for the Plaintiffs.

Mr. Selwyn and Mr. Fookes, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. As at present advised, I must say I do not think that this is or that it can be made the subject of a patent. I do not conclude the Plaintiffs by what I am going to say now, as they will have an opportunity of trying it in another place. The Plaintiffs do not claim the number of hoops or the fact of using hoops for this purpose, and it is admitted that if they were made of whalebone or cane or any other substance except watch-spring steel, it would be no violation of the Plaintiffs' patent. The claim seems to be limited exclusively to the use of steel springs in combination with suspending tapes or [572] bands, making this form of petticoat. If the articles manufactured by the Defendants had been made of whalebone, and in exactly the same form and suspended in precisely the same manner as the Plaintiffs, it would be no violation of their patent. So if they were made with iron hoops or steel hoops, providing they were not springs, as far as it appears it would be no violation of the Plaintiffs' patent. The patent seems to be a mere substituting of steel springs in the place where other elastic materials were used before.

That hoops were worn in this country by our ancestors, as, by our grandmothers and great-grandmothers, is, I apprehend, a fact of which one has knowledge historically, which is not necessary to have established by evidence. But the writings of authors of that time might be referred to as proving their use. I have some lines in my head from Alexander Pope's "Rape of the Lock," (1) which would go a great way to shew that instruments of this sort were used for dresses at that time. Well, then, if the Plaintiffs' claim is simply to use steel springs in a position where formerly whalebone was used, that does not appear to me to be the subject of a patent, there is no invention and nothing that can properly be called an invention in that, and nothing which can properly form the subject of a patent.

Without referring to those cases, of which there are so many, which have been so lately before me and com-[573]-mented upon in *Spencer v. Jack* (Master of the Rolls, 5 June 1862), and several other cases, I may state that, to constitute the subject of a patent there must be some real novelty in the invention, either by a new combination of old existing materials, or else by the discovery of something that did not exist before. I express no opinion whether this could have been registered under the Act for the Registration of Useful Designs (5 & 6 Vict. c. 100; 6 & 7 Vict. c. 75; and see *ante*, p. 200); but as the subject of a patent, it does appear to me that it can be entertained.

I think it desirable to express my opinion clearly upon the subject, because these patent cases lead to great expense, and it is much better for the parties to know at once what my view of the case is. Still I think that the Plaintiffs ought not at present to be precluded by my opinion. I shall make no order upon this motion, but will not deprive the Plaintiffs of an opportunity (subject to what I may hear from the Defendants) of trying the matter at law.

March 6. The Plaintiffs now asked for an issue to try the validity of the patent. The 25 & 26 Vict. c. 42 was referred to. But after some argument,

(1) Probably the Master of the Rolls referred to the following lines in Canto II:—

"To fifty chosen sylphs of special note
We trust th' important charge, the petticoat.
Oft have we known that seven-fold fence to fail,
Though stiff with hoops, and armed with ribs of whale,
Form a strong line about the silver bound,
And guard the wide circumference around."

THE MASTER OF THE ROLLS said that he would find everything in favor of the Plaintiffs, which could be found for them by a jury if an issue were directed, viz., that the substitution was new and useful, and that the specification was sufficient; but that still he must determine, as a Judge, that the substitution of steel wire for whalebone was not the subject of a patent. He refused the application.

[574] W—— v. B——. B—— v. W——. *March 13, 17, 1863.*

A daughter joined her father in covenanting to surrender a copyhold, by way of mortgage to A. B. for a sum of money lent by him to the father. Part of the consideration was the permission of the father to allow A. B. to continue his visits to the daughter, whom he was seducing or had seduced. Upon a bill to enforce the deed and a cross-bill to cancel it, the Court at first considered that it could not interfere for either party, but ultimately ordered the deed to be cancelled, and that A. B. should pay the costs of both suits, except those of the father.

In 1852 a copyhold estate stood limited to Mr. B. for life, with remainder to his children equally, of whom there were five, viz., C. and four others.

In 1852 Mr. B. mortgaged his life-estate to his brother-in-law, Mr. T., for £1000, who also advanced him a further sum of £100. In 1853, by a deed endorsed on the last mortgage, Mr. B. and his children (three of whom were infants) covenanted to surrender the copyholds to Mr. T. to secure two sums of £300 each, for which he was surety.

In 1855 scandalous reports got abroad in the town where the parties were resident, as to an improper connection between the Plaintiff, Mr. W., a married man of considerable age, having a family, and Mr. B.'s daughter C. Mr. T. remonstrated with Mr. B., his brother-in-law, on the subject, and stated that if Mr. W.'s visits to Mr. B.'s house were allowed to continue, all communication between Mr. T. and Mr. B. must cease.

At this time the amount due to Mr. T. was £1700, and, according to W.'s statement in his answer, Mr. T. was then pressing for payment of his debt, and threatening to sell the estate, and he, W., "finding Mr. B. unable to procure money elsewhere, offered at length, one day, to relieve him and his family from the prospect of having the estate taken from them, by advancing the necessary amount to pay off T."

[575] Accordingly, by an indenture dated the 20th August 1855, Mr. B. and his children covenanted to surrender the copyholds to Mr. W., by way of mortgage, for securing £1700.

This deed was executed by Mr. B. and his daughters M. and C., but not by the other children, and no surrender had been made. The money was applied in paying off T.

It appeared that W. succeeded in seducing the daughter C., and that an illicit connexion continued between them for some time afterwards.

The first suit was instituted by W. against Mr. B. and his daughters M. and C., to foreclose.

The second suit was instituted by Mr. B. and his two daughters, praying to be relieved from the deed of the 20th of August 1855, and that the same might be cancelled. It alleged that the Plaintiff W. had, under gross and scandalous circumstances, seduced the daughter C., that the advance by mortgage, in 1855, was made to enable him to carry on a criminal intercourse with her, and also that the deed had been executed under undue influence and parental control, and without receiving any consideration or independent proper advice. (See B—— v. W——, 31 Beav. 342.)

The cause was heard in private, part of the evidence being of a grossly indelicate nature, but the Court gave its judgment in public.

Mr. Selwyn and Mr. Dauney, for Mr. W.

[576] Mr. Baggallay, Mr. C. Hall, and Mr. Rowcliffe, for the Defendants in the first suit.

The following authorities were cited :—As to parental influence : *Archer v. Hudson*

(7 Beav. 551, affirmed 15 L. J. (Chanc.) 211); *Espey v. Lake* (10 Hare, 260); *Maitland v. Irving* (15 Sim. 437). As to the immoral nature of the contract: *Evans v. Carrington* (2 De G. F. & J. 481); and see *Baity v. Chester* (5 Beav. 103); *Benyon v. Nettlefold* (3 Mac. & Gor. 100, n. (c)). As to the daughters, as sureties, being relieved by reason of the infant children not having executed the mortgage when they came of age as was intended: *Evans v. Bremridge* (2 Kay & J. 174, and 8 De G. M. & G. 100).

March 17. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a case which has caused me considerable pain; but I can state very shortly why I think that this deed cannot be supported.

There are two suits, one to enforce a deed of the 20th of August 1855, by which, in consideration of £1700 lent by the Defendant Mr. W. to Mr. B., Mr. B. and his five children (two only of whom were adult) covenanted to surrender copyholds for securing that amount. The second suit is instituted by B. and his two daughters to set that deed aside.

The case is a very painful one in this respect:—It appears that Mr. W. seduced C., one of Mr. B.'s daughters, and that in June 1855 Mr. T., a brother-in-law of Mr. B., had pointed out to him the [577] attentions paid to his daughter by Mr. W., that it was a matter of notoriety in the town in which they resided, and that it was essential to put a stop to it. At the same time Mr. T. told him he should require the money due to him to be repaid, which consisted of £1100, and two sums of £300 each for which he was surety. When T. required the money to be repaid, Mr. B. applied to Mr. W. for an advance. A day or two after, in June 1855, in consequence of the strong remonstrances of Mr. T. and of Mrs. T., who was the aunt of this young lady, Mr. B. wrote a letter to Mr. W., in which he told him, that in consequence of the reports, he must discontinue his visits to his house. In answer to this, Mr. W. wrote that there was no truth in the suggestion, but that he acquiesced in the propriety of the refusal to allow a continuance of his visits. On the following day after writing this letter, Mr. W. wrote to Mr. B. and told him that he would advance the money required by Mr. B., and a treaty took place, and it was arranged that the advance should be made, and it was effected on the 20th of August 1855, about two months after.

It is impossible to read the letters and the evidence in this case and not come to the conclusion that a part of the consideration for the advance of the money by Mr. W., and for the security which was given, was a promise that W. should be at liberty to continue his visits to the daughter. It is impossible that the father should not have been aware, after all the representations made to him by Mr. T. and by the public talk, that Mr. W. had, at that time, actually succeeded in seducing, or that he was attempting to seduce, his daughter. It is impossible to doubt the fact that the money was given, in order that Mr. W. [578] should be allowed to continue his attentions to the daughter, whether successful or not.

I am of opinion, in that state of the evidence, that no person can come into a Court of Equity and ask that effect should be given to a deed, the consideration for which was of that character. The Court is compelled to look at the whole of the consideration, and cannot execute the deed in part. And I am of opinion that no person can, on such evidence and facts as are here established, require this Court to give any assistance to either party concerned in such a transaction.

It occurred to me that I could leave the matter there, but, observing that others besides the parties to the corrupt bargain are affected by this deed, I am of opinion that I ought not. I am also influenced by this consideration, that, upon an action on the deed, the same defence would be open at law, and I think that I should not act properly if I did not, as far as I am able, put an end to this painful case. Without saying anything as to what might be done in an action at law to recover the money lent, I shall order the deed to be delivered up to be cancelled.

The grounds on which I decide this case make it unnecessary for me to enter into the consideration whether proper protection was afforded to the two young ladies in this matter; but it would be difficult to see how either of these deeds of 1853 and 1855 could be supported in this Court as against them.

I cannot part with this case without saying a few words as to this unfortunate young lady herself. When I consider that she was of very tender age, subjected to

[579] the attentions of a married man with a family, who was old enough to be her grandfather; that his correspondence shewing his regard for her, in the first instance, assumed a paternal character, and that his attentions were directed to the improvement of her intellectual and personal accomplishments, and that she had not during that time the vigilant superintendence and care which she ought to have had from her own parents; when I consider that she was assailed by a man skilled, by an active and accumulated experience of forty years, to find out every weak point, to detect every failing moment, and ready to take advantage of it, if a young lady so circumstanced, so deprived of the assistance of her father, falls,—I cannot but say that compassion enters largely into the just censure with which we must reprove her conduct.

Mr. W. must pay all the costs of both suits, except those of Mr. B. The suit of W— v. B— must be dismissed with costs, except those of Mr. B. (Reg. Lib. 1863, B. fol. 576.) And in B— v. W—, the deed of 1855 must be ordered to be delivered up to be cancelled, and with costs, except those of Mr. B., so far as such costs can be separated from the costs of the other Plaintiffs. (Reg. Lib. 1863, A. fol. 537.)

[580] *Re PARKER'S TRUSTS. May 2, 1863.*

Application for the appointment of a new trustee in the place of a tenant for life with power to appoint new trustees, who had been found lunatic, refused until a committee had been appointed and had been served with the petition.

A tenant for life, who had a power to appoint new trustees, had been found lunatic by inquisition, but no committee had as yet been appointed.

A petition was presented by some of the *cestuis que trust*, under the 13 & 14 Vict. c. 60, s. 32, for the appointment of a new trustee in the place of the lunatic.

Mr. Baggallay and Mr. G. Simpson, in support of the petition.

Mr. Selwyn and Mr. S. Percival, for the other trustee and some of the persons beneficially interested, referred to the 16 & 17 Vict. c. 70, s. 137, which provides that where a power is vested in a lunatic in the character of a trustee, and it appears to the Lord Chancellor expedient that the power should be exercised, the committee, under an order of the Lord Chancellor, may exercise the power.

They submitted that the jurisdiction was in the Lord Chancellor, and that it could not be exercised in the absence of the committee. They referred to *In the Matter of Bowmer* (3 De Gex & Jones, 658); *Webb v. The Earl of Shaftesbury* (7 Ves. 480).

Mr. Baggallay, in reply. The Court is exercising its jurisdiction under the Trustee Act, and not executing the power, the statute cited is therefore inapplicable.

[581] THE MASTER OF THE ROLLS [Sir John Romilly]. I think this is a proper case to appoint a new trustee (*Re Davies*, 3 Mac. & Gor. 278), but I cannot do it in the absence of the committee.

Mr. Baggallay. The committee will be appointed on Wednesday.

THE MASTER OF THE ROLLS. Then let the petition stand over until Friday to serve the committee.

[581] *Re THE TORQUAY BATH COMPANY. May 2, 4, 1863.*

[S. C. 8 L. T. 527; 9 Jur. (N. S.) 633; 11 W. R. 653.]

A company, registered under the Act of 1856 (18 & 19 Vict. c. 47), but not under the Act of 1862 (25 & 26 Vict. c. 89), may be wound up voluntarily, under a resolution passed after the latter Act came into operation.

The words "unregistered company," in the 25 & 26 Vict. c. 89, s. 199 (2), mean a company not registered under any Act, and not a company unregistered under that Act.

This company was formed under the 7 & 8 Vict. c. 110, and had only been registered under the Act of 1856 (18 & 19 Vict. c. 47).

The Companies Act, 1862, came into operation on the 2d of November 1862, after which this company, without re-registering under that Act, passed a special resolution, requiring the company to be wound up voluntarily. To this course there was but one dissident, who presented the present petition, praying that the company might be wound up compulsorily under the Court.

[582] Mr. J. Napier Higgins, in support of the petition, argued that the resolution to wind up voluntarily was ineffectual, inasmuch as a company not registered under the Act of 1862 could not be wound up voluntarily. That the 25 & 26 Vict. c. 89, s. 199, defined the term "unregistered company," by declaring that all companies "not registered under this Act, and hereinafter included under the term 'unregistered company,' may be wound up." That division (2), which followed, was precise, that "no unregistered company shall be wound up under this Act, voluntarily or subject to the supervision of the Court." That the words "unregistered company," in this section, meant companies not registered under that Act; *In re The Waterloo, &c., Company* (31 Beav. 586); *Re Minima Company* (8 L. T. (N. S.) 109).

Mr. Cracknall, for the company, in opposition to the Petitioner. The words "unregistered company," in the 199th section, mean companies not registered at all, and not those which have been duly registered under former Acts. Part 6 of the Act of 1862 shews that that Act applies to companies already registered, and it refers to the application of that Act "to companies registered under the prior Joint Stock Companies Acts;" thus the 176th section says that the last Act (1862) shall apply to companies registered under the former Acts in the same manner as if such company had been formed and registered under this Act (1862). The effect, therefore, of the 175th and 176th sections is to give to this company the same powers and privileges as companies registered under this last Act (1862). Prior to the last Act, it is clear that this company might have been wound up voluntarily, and to hold that it cannot now be so wound up would be to deprive it of an "existing [583] right or privilege," which is saved by the Act (see 25 & 26 Vict. c. 89, s. 206 (3)). He observed that the *Waterloo case* turned on its being an insurance office, and that the point in question had not really been decided in the *Minima case*. He added that this company was still willing to register under the last Act, if thought necessary.

May 4. THE MASTER OF THE ROLLS [Sir John Romilly]. The only question arising on this petition is as to the construction of the 25 & 26 Vict. c. 89, and is this:—whether, under the 199th section, this is a company which can be wound up voluntarily without being re-registered under that Act. One of the shareholders objects to the voluntary winding up, and he brings the matter before the Court by this petition.

The objection made is, that, under the 199th section, clause 2, "no unregistered company" is to be wound up voluntarily, and it is argued that this means "no company not registered under the Act of 25 & 26 Vict. c. 89," and that this company cannot be so wound up, as it has only been registered under the Act of 1856. The first part of the 199th section is referred to to shew the construction to be put on those words. They are these: "subject as hereinafter mentioned," any company "not registered under this Act and hereinafter included under the term unregistered company, may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to such company, with the following exceptions and additions."

From this it is contended that the words "not registered under this Act" define the words "unregistered [584] company," and establish that a company registered under former Acts is included in the term "unregistered company." I am of opinion that this is not the right construction of the words of the Act, because, if so, there would be no reason why the clause should go on to say, "and hereinafter included under the term 'unregistered.'" I think the expression refers to those not registered under this Act, and those thereafter defined, that is, companies which have not been registered under this Act or under any other Act, of which companies there were many, as insurance companies. I think that the words "unregistered companies" cannot be limited to the confined sense contended for by the Petitioner. *Prima facie*, the words "unregistered company" mean those not registered under any Act, and to put any restriction upon them I must find something in the Act itself to justify me

This company has been registered under the Act of 1856, and I find nothing in the Act, and I have read all of it which has any application to the subject, which shews any intention to repeal the effect of the prior registration. It is true that the Act of 1862 repeals the Act of 1856 (a. 205); but it does not invalidate "anything duly done under any Act thereby repealed;" nay, more, it reserves any "right or privilege acquired" under such prior Acts, one of which is, the right arising from registration. Then why should not the registration under the Act of 1856 have its full effect? If this previous registration under the former Act was to go for nothing, the last Act would have expressed it.

But when I refer to the clauses in Part VI. of the Act of 1862, I think it quite clear that it applies to companies already registered, and this was one of them. The 176th section says that this Act shall apply to companies already registered, in the same manner as if they "had [585] been formed and registered under this Act," and if I were to hold that "unregistered companies" meant only those registered under the Act of 1862, I should be repealing this section. Besides this, the 177th section adds that this Act of 1862 "shall apply to companies registered but not formed under" the previous Act.

No doubt this is an important question, but the more I consider it the more I feel satisfied that the Act of 1862 contains nothing which repeals the effect of the prior registration, and that it is not necessary to go through the ceremony of re-registration, in order to enable a company to wind up its affairs voluntarily. That mode is not always the best, unless the proceedings are carefully watched; but as before the last statute the shareholders of a registered company had a right to have it wound up voluntarily, so in my opinion they have still the same powers without a re-registration under the Act of 1862.

This petition must be dismissed, but without costs.

[586] BEAUMONT v. CARTER. CARTER v. BEAUMONT. May 23, 25, 1863.

[S. C. 8 L. T. 685.]

On Tuesday, an intended husband, who was an infant, wrote to the trustee of the intended wife, "that he especially wished his wife's property entirely settled on herself," and that the wedding was to take place on Saturday. They married, unknown to the trustee, on Wednesday, without any settlement. Held, that this letter contained no settlement or agreement for a settlement binding on the husband or wife.

In June 1856 Mr. Beaumont was sole trustee for his cousin Miss Morton of £1180, 19s. 9d. consols, to which she was entitled under her father's settlement, to her separate and inalienable use, and to £424, 5s. 6d. consols, to which, together with a reversionary interest in certain Irish estates, she was absolutely and unconditionally entitled under her father's will.

In May 1861 Miss Morton, who was about thirty-two years of age, accepted a proposal of marriage from Mr. Carter, who was then not quite twenty years old. The marriage appeared to be approved of by the father and mother of the bridegroom, but not by the relatives of the bride.

On Tuesday, the 7th of May 1861, Mr. Carter wrote from Cornwall to Mr. Beaumont in London as follows:—

"As you have already heard, I am about to be married to your cousin Mina Morton, who has acquainted me with the fact that you are her executor and guardian, I therefore address you as such, and beg that you will, as speedily as possible, arrange matters concerning her little property. *I especially wish it entirely settled on herself*, lest her friends might think I had pecuniary reasons in marrying her," &c., &c., &c. "I hope, therefore, you will raise no objection likely to delay our wedding, which is to take place on Saturday next, as I am anxious to return again to my studies."

[587] This letter was received on the next day (the 8th of May 1861), and on the same day Mr. Beaumont answered as follows:—

“With regard to the matter of a settlement of my cousin’s little property, no doubt it ought to be settled, and I quite appreciate your honorable feeling in the matter. Of course, as to this again, the short notice causes much difficulty; in truth I have not been able to attend it to-day and with difficulty find time for this letter, and yet, though without any instructions from her on the subject, I feel that I must manage to arrange something satisfactory in the course of to-morrow. It will, however, necessarily be only in the form of an agreement, to be concluded in more complete form after the marriage, and being without any precise instructions, it will have to be in only a very loose and general form. Perhaps you will be kind enough to let my cousin (to whom I cannot write to-day, and from whom I have not heard a word) see this letter. With my best love to her and again urging upon you the propriety of delaying the marriage, even if it be only a week or two, I am,” &c.

On the 9th of May 1861, and before any more formal agreement could be prepared by Mr. Beaumont in accordance with the letter of the 7th May 1861 from Mr. Carter, Mr. Beaumont received another letter from the Defendant as follows:—

“May 8th, 1861.—Sir,—Since writing to you yesterday, circumstances have caused us to alter our plans, and Catty and I were united this morning.—Yours very sincerely,
GEORGE CANNING CARTER.”

The parties were, as stated, married on the 8th of [588] May 1861, and no settlement whatever was executed on their marriage. On the 30th of May 1861 Mrs. Carter informed Mr. Beaumont that she wished her little property to be settled, but nothing was done in the matter.

Mr. Carter came of age on the 14th of July 1862, and Mr. Beaumont, the trustee, hesitated, in consequence of Mr. Carter’s letter prior to the marriage, as to whether he ought to pay over the fund. He ultimately instituted this suit, in 1862, against Mr. and Mrs. Carter, submitting that Mr. Carter ought to be decreed to make and execute such settlement of the unsettled property of Mrs. Carter as this Court should think fit to direct, in pursuance of the aforesaid ante-nuptial agreement to that effect, and the bill prayed accordingly.

A cross-bill was filed by Mr. and Mrs. Carter to compel payment of the trust money.

Mr. Hobhouse and Mr. E. F. Smith, for Mr. Beaumont.

Mr. Selwyn and Mr. G. Hastings, for Mr. and Mrs. Carter.

May 25. THE MASTER OF THE ROLLS [Sir John Romilly]. The principal question raised and argued before me was whether Mr. Carter’s letter of the 7th of May 1861 created any settlement binding on the husband or the wife. I entertain no doubt that this letter created no settlement or agreement for a settlement binding either the husband or wife. The utmost that could be [589] said of it is:—That it might raise a question of sufficient doubt to justify a trustee in refusing to part with the funds in his hands until the opinion of the Court had been obtained on that subject, for until Mr. Carter attained twenty-one, he was incapable of giving any receipt or expressing any binding opinion on the matter. It is true that on the 30th of May 1861 Mrs. Carter informed Mr. Beaumont that she wished her little property to be settled, but this expression of a married woman amounted to nothing. The letter of Mr. Carter, even if he had been adult, would have been no agreement for a settlement, and being an infant, as he was, it amounted literally to nothing. Mr. Beaumont might certainly, with perfect security, have paid the income of Mrs. Carter’s trust property to her on her separate receipt until Mr. Carter came of age on the 14th of July 1862.

Unfortunately, Mr. Beaumont took a very exaggerated view of his duties as trustee; he paid, since the marriage, two sums, one of £14 and the other of £25, but he declined to pay any more, unless, by personal communication with Mrs. Carter, unfettered by the presence of her husband, he could be satisfied that she was not

acting under any compulsion from him. The result of all that was, that on the 4th of August 1862 the Plaintiff, Mr. Beaumont, filed his bill in *Beaumont v. Carter*, and on the 5th of August 1862 the Defendant filed his bill in *Carter v. Beaumont*.

His Honor (after referring to an arrangement which he thought ought to have been acted on, and to some affidavits brought forward by the Plaintiff from a lodging-house keeper, disclosing, and as it appeared to the Court aggravating, certain matrimonial discussions between the Defendants), said these affidavits could [590] not but be viewed with great dissatisfaction by the Court. When an application is made to the Court that a fund belonging to a married woman, and not subject to any settlement, should be paid out, the Judge takes what pains he can to ascertain that it is the free and unbiassed wish of the lady that it should be paid to the husband, instead of its being settled on herself and her children, and he would attend to any suggestion made by or on behalf of the trustee, or indeed by any relative of the wife, and he would take the greatest pains he could to ascertain that this was the unbiassed wish of the lady, and to be as sure of this as the nature of such things will admit; but if this Court were to permit, under such circumstances, the trustee to enter into a detail of the conduct of the husband and wife to each other, and to make charges of cruelty and misconduct against the husband, this Court must, in that case, permit the husband to answer and disprove those allegations, and this Court would be involved in discussions suitable only to the tribunal which is specially devoted to the determination of matrimonial causes, and which could rarely influence the application of the lady's money. In my opinion this Court should express its disapprobation of such a course at the earliest time and in the strongest manner.

His Honor directed the dividends of the £1180, 19s. 9d. consols to be paid to Mrs. Carter on her separate receipt, and said he would order the £424, 5s. 6d. consols either to be settled or paid as she should direct upon a separate examination, but he gave no costs on either side.

NOTE.—See *Page v. Horne*, 9 Beav. 570, and 11 Beav. 227.

[591] *Re THE BATTERSEA PARK ACTS. Re ARNOLD. May 30, 1863.*

[S. C. 8 L. T. 623; 11 W. R. 793.]

Commissioners having compulsory powers to purchase lands, gave notice to an owner of freeholds of taking them and to treat. He, in reply, stated the price he was willing to take, but he died before the acceptance of the offer. The purchase was afterwards completed at that price. Held, that the real estate had not been converted into personalty at the death of the owner, and that the purchase-money belonged to his heir at law.

By the Act of 9 & 10 Vict. c. 38, the Battersea Park Commissioners were empowered to take lands compulsorily, for the formation of the park, six months after notice (s. 15). By the 19th section, the Commissioners were empowered to treat and agree for the purchase of the necessary lands, and to enter into contracts for that purpose. By the 22d section, within one month after notice, the persons interested are to deliver a statement of the particulars of the estate claimed by them, and of the amount they are willing to receive for the value of such estate, and, by the 23d section, in case of disagreement, then the amount is to be assessed by a jury.

What occurred in the present case was as follows:—Mr. Jas. Arnold was seised in fee of some lands required by the Commissioners, and on the 30th of September 1846 the Commissioners gave the usual notice that they required these lands, and requiring a statement of his claim. On the 27th of October 1846 Mr. Arnold sent a letter requiring £1250 for the land. No answer was returned to this on the part of Commissioners, and nothing further was done during the lifetime of Mr. Arnold. He died on the 10th of November 1846, intestate, leaving a widow and four children. The eldest son, Taylor Arnold, was then an infant, but he attained twenty-one on

the 18th of September 1861. After the death of the testator, negotiations were renewed between the Commissioners and the family, but no new contract was entered into. All parties ultimately [592] appeared willing that the £1250 should be the amount of compensation, and on the 23d of March 1863 the Commissioners (whose compulsory powers had expired on the 7th of August 1853) paid the £1250 into Court. This sum was now claimed both by the personal representatives and by the heir at law of Mr. Arnold, and this petition was presented by the administrator of Mr. Arnold for payment to him of the fund.

Mr. Selwyn and Mr. A. E. Miller, for the Petitioner. The notice given by the Commissioners to treat, followed by a claim of £1250, which was not rejected, amounted to a valid contract between Mr. Arnold and the Commissioners, and it converted the property from realty into personalty, or, at least, it was tantamount to a binding contract. This case differs from *Haynes v. Haynes* (1 Drew. & Sm. 426), where nothing had been done beyond giving a notice to treat. The contract now existing, under which the money has been paid into Court, must be that entered into in the intestate's lifetime; for otherwise there could be no power to purchase, as the compulsory powers of the Commissioners have long since ceased. Where a public company or Commissioners, having compulsory powers, give notice that they intend to take certain lands, they are bound and may be compelled to take them; the land is theirs, and nothing remains to be done but to settle the amount of compensation under the Act, either voluntarily by arrangement, or by a jury. The land thenceforth belongs to the company, and the compensation, when determined, to the landowner. They cited *Walker v. The Eastern Counties Railway Company* (6 Hare, 594); *The Regent's Canal Company v. Ware* (23 Beav. 575); *Marquis of Salisbury v. The Great Northern [593] Railway Company* (7 Rail. Cas. 175); *Pinchin v. The London and Blackwall Railway Company* (1 Kay & J. 34, and 5 De Gex, M. & G. 857); *Hedges v. Metropolitan Railway Company* (28 Beav. 109); *Sugden's Vendors* (pp. 66, 160 (13th edit.)); and see *Gardner v. The Charing Cross Railway Company* (2 John. & Hem. 248).

Mr. Southgate and Mr. Lewis, for the heir at law, were not called on.

Mr. Hanson, for the Commissioners.

THE MASTER OF THE ROLLS [Sir John Romilly]. Where there is a binding contract between parties for the sale of real estate not subject to any settlement, either under an Act of Parliament or otherwise, the property sold is converted from the real into the personal estate of the vendor: the land ceases, in equity, to be his real estate, and on the death of the vendor before the completion of the contract, his legal personal representative is entitled to the purchase-money. Although these Acts create some difficulty, by reason of the compulsory powers given by them, still the principle applicable to such cases is the same, and unless at the death of the owner of the land, there be a valid and subsisting contract which can be enforced against the heir, the land itself and the money ultimately payable for it belongs to the heir.

The only question I have to consider is, whether, in this case, there really was, at Mr. Arnold's death, a binding contract which the Battersea Park Commissioners could have enforced against him and his heir. [594] It is established that as soon as the company gives notice that they intend to take the land, if nothing further takes place, the person to whom the notice is given may compel them to take it. But it is equally certain that, unless something more be done, there is no contract in existence which can be enforced against the heir; that is explained by Vice-Chancellor Kindersley in the case of *Haynes v. Haynes* (1 Drewry & Smale, 426), who points out that, in such a case, you could not file a bill for specific performance, for nothing is settled and the price must be fixed, without which it is impossible to say that there is any binding contract.

If there had been no Act of Parliament, and A. B. had said to the company, "I will sell you my land for £1250," it is clear that, if no answer had been sent until after the death of A. B., his heir would not have been bound by the offer of his ancestor or compelled to complete. He might say, "I will not sell the land at all, you ought to have accepted the offer in the lifetime of my ancestor, but now it is not binding upon me." The question here is, whether the case is varied by the Act of Parliament, which entitles the Commissioners to give notice to take the land

compulsorily. The Commissioners gave notice to Mr. Arnold to take his land ; within a month he wrote to say, I want £1250 for it ; the Commissioners took no notice of this offer until after his death. On his death they were not bound to give £1250 for the land ; they might still dispute the price, and have it settled by a jury or by arbitration. If, then, the Commissioners were not bound, how could the heir be bound, and how can there be a contract, unless the terms are ascertained, the most important of which is the amount of the purchase-money ? If there was no con-[595]-tract which the company could enforce by means of a bill for specific performance against the heir, there was not, in my opinion, any contract binding on the heir.!

I repudiate altogether the distinction attempted to be drawn between a binding contract and something tantamount to a binding contract. I think no such distinction exists, anything tantamount to a binding contract is itself a binding contract ; but an offer not accepted in the life of the owner cannot create a binding contract, and this is, if anything, stronger in the case of a company acting upon its compulsory powers.

That being my view of this case, I am of opinion that there is no contract binding on the heir, and that, if he thought fit, he might resist the amount proposed to be paid to him, and have the value ascertained by a jury. I do not think that the case of *The Marquis of Salisbury v. The Great Northern Railway Company* bears out the Petitioner's proposition.

I am of opinion that the judgment of Vice-Chancellor Kindersley presents an accurate view of the law on the subject, and I shall follow it. If I were to hold otherwise, I see no means of avoiding this dilemma : I must either hold that, when notice to treat has been given, the property is converted from the date of the notice, or that there is no binding contract until the terms of it have been settled, in such a manner as to bind the contracting parties, just as if they were not acting under the compulsory powers conferred by statute.

I am of opinion that, in this case, there was no con-[596]-tract until the amount of the purchase-money had been ascertained, which was not done in the lifetime of Mr. Arnold.

I am therefore of opinion that, at the death of the intestate, this was real estate, and that his heir is now entitled to the purchase-money.

[596] ATTORNEY-GENERAL v. CLIFTON. May 22, 23, 1863.

[S. C. 9 L. T. 136 ; 9 Jur. (N. S.) 939. See *Attorney-General v. St. John's Hospital, Bath*, 1876, 2 Ch. D. 573.]

The Court having inferred, from reference to the parish church in the deed of endowment, that a school, founded in 1601, was a Church of England school, held that the trustees and the schoolmaster also (if possible), ought to be members of that Church, but that the instruction was open to scholars of every religious denomination.

The Court, though holding a trustee to have been originally improperly appointed, declined to remove him.

Residence within a parish being a necessary qualification of trustees on their appointment, held that their removal out of the parish after their appointment, to such a distance as to make it impossible to attend to their duties, would be a vacating of their office.

A charitable trust was created by an indenture dated the 24th of April, in the 43d year of Elizabeth (1601). It was made between Thomas Dowse of the one part, and eight of the inhabitants of the town of Broughton, in the county of Southampton, of the other part. It commenced with the following recital :—

"Forasmuche as there are verry manye people dwellinge within the towne and mannor of Broughton and Bossington, in the countye of Southt, and manye children and youth doth there dayly encrease, which, for want of teachinge and instruccon, are bred upp in rudenes and ignorance, the cause of muche error and enormity in the common wealthe, WITNESSETH therefore these presents, that the said Thomas Dowse,

to and for the maintenance and contynuaunce forev^r hereafter of a schoolmaister, for the instruccoon and teachinge of the [597] children and youth of th' inhabitants within the said parrish of Broughton, *to reade, write and cast accompts*, to th' entent thereby, they may be the better enabled to knowe and serve Almyghtye God, obey their Sov^raigne Prince and parents, and maye be more apte and readilye prepared either for schooles of higher learninge, or otherwyse to serve and be bound as apprentice in some lawdable trades and scienee, or els be employed in husbandrye or other good labour and course of lyef for gettinge of there lyvinge, and in consideracon of the some of twelve pence of lawfull English money to hym the said Thomas Dowse in hand paid by the said inhabitants."

Dowse then conveyed certain hereditaments at Broughton and elsewhere to the eight trustees, upon trust to receive the rents, "for and to the maynteynaunce and contynuaunce of suche a meete and fitt schoolmaister as the said Frauncis Harris, Thomas Tutt, John Thrustinge, John Howtett, Henry Kelsey, Robert Ecton, Frauncis Bedford and Augustyne Leefe, or the more part of them for the tyme beinge, shall place, lymitt or appoynte, to be residente and abydinge within the said parishe of Broughton, for the teachinge and instructinge of the children of such as shall inhabite within the towne and mannor of Broughton and Bossington or within the pishe of Broughton aforesaide to reade, write and caste accompts as aforesaid."

He then ordained and appointed that whensover the trustees should "growe olde or fewe in number," that then the same lands should be passed "to other such psons of goode credite, truste and honestye of the said pish of Broughton, and their heires."

The deed then stated that Thomas Dowse had [598] resolved to acknowledge the deed in Chancery, "and that one parte thereof shalbe committed to the custody and safe keepinge of the *churchwardens* for the tyme beinge of the said pish of Broughton, and shalbe there entred and remayne, for memory, in the booke of the said pishe, commonly called the booke of chrisenings and burials." It provided, that if there should at any time be no schoolmaster provided, "and notice thereof publiquelye given in or forthwith after the tyme of divyne service to be said in the pishe church of Broughton aforesaid, at or in two severall sondayes," then that he (the founder) might receive the rents until the trustees appointed another schoolmaster.

The income of the property was now about £80 a year.

This information was filed by the Attorney-General, with the approbation of the Charity Commissioners, against the six present trustees. The matters complained of were that one trustee had never resided in the parish; that three of them resided at a distance, and that one was a Dissenter; that the late schoolmaster, who died in 1862, had been a Dissenter, and that the trustees had allowed him to discontinue the use of the Church catechism in the school and to delegate his office, and to make and enforce a rule that no boy should be admitted to the school who was unable to read.

That, in consequence of the aforesaid acts and defaults of the trustees, the school had fallen into disrepute, and that the number of boys attending at such school for instruction had gradually diminished from forty, which was the number in the year 1835, to thirteen in the year 1861.

[599] The information prayed a scheme, the removal of the trustees who were disqualified, and an injunction to restrain the trustees from appointing a new schoolmaster, and from dealing with the property.

Mr. Cole and Mr. Kay, in support of the information.

Mr. Selwyn and Mr. Townsend, for the trustees.

Mr. Cole, in reply.

The points argued were, whether this was a Church of England school, and whether Dissenters could have the benefit of it, or be appointed trustees or schoolmasters of it, and whether any of the present trustees ought to be removed.

Attorney-General v. Calvert (23 Beav. 248); *Re Ilminster School* (2 De Gex & Jones, 535); *Baker v. Lee* (8 H. of L. Cas. 495); *Attorney-General v. The Earl of Stamford* (1 Phill. 737); *In re Chelmsford Grammar School* (1 Kay & J. 543); *Attorney-General v. The Governors of the Sherborne Grammar School* (18 Beav. 256); *In re Stafford Charities* (25 Beav. 28); *Attorney-General v. Cullam* (1 Y. & C. C. C. 411); 23 Vict. c. 11, were cited.

May 23. THE MASTER OF THE ROLLS [Sir John Romilly]. On carefully reading

over the whole of this deed of endowment, I am satisfied that this was a Church of England charity, and that the founder, who was a member of [600] the Church of England, intended to promote the instruction and teaching of the children of the inhabitants of the parish generally. I infer this not only from the time when the instrument was executed, which was towards the end of the year 1601, when there was very little dissent, but also from the repeated references to the parish church, in which place many things were to be done relating to the charity.

That being my opinion, I must refer to the distinction taken by me in the case of *The Attorney-General v. Calvert* (23 Beav. 248), between the three species of charity, viz., religious charities, educational charities and eleemosynary charities. This is clearly an educational charity, in regulating which you must attend to these three things, viz., the persons to be constituted trustees, the masters who are to instruct, and the pupils who are to receive the instruction. I am clear that this is not a charity the benefit of which is to be confined to members of the Church of England. Pupils of all denominations are entitled to have the benefit of the instruction. But as the charity is a Church of England Charity, members of the Church of England must be appointed its trustees, in order to prevent any perversion of its funds, though persons not belonging to that Church may participate in the advantage to be derived from the charity. Provision must therefore be made that, in affording religious instruction, it must be done in such a manner as not to exclude persons who are not members of the Church of England.

As to the schoolmaster, I do not think it is necessary that he should be a member of the Church of England, though I am of opinion, *ceteris paribus*, that [601] he ought to be a member of that Church. At the same time the trustees would not, in my opinion, commit a breach of trust by appointing a Dissenter to be schoolmaster, but the circumstances must be peculiar to justify it.

With regard to the trustees: There is, as to qualification, a great difference between appointing them in the first instance, and removing them when once appointed. Lord Cottenham takes that distinction in *The Attorney-General v. The Earl of Stamford* (1 Phill. 748), and I intend to follow his ruling on this occasion. I do not think that the trustee, who is a Dissenter, ought now to be removed, but I think that the appointment of the trustee, who was not an inhabitant of the parish at the time, was not a proper appointment. If the others have removed from the parish since their appointment to such a distance as to make it impossible for them to attend to their duties, this would be vacating their office. But on looking at the books, I find that three, four or five out of six have always attended the meetings, and I see no reason to doubt that they have, to the best of their ability, attended to the affairs of the charity, except with respect to the schoolmaster. They appear to have appointed an improper person to be schoolmaster: and this merely because his father had been schoolmaster before him. Whereupon, the charity being founded to teach children "to read, write and cast accounts," he laid down a rule that no one should be admitted who could not read. This was obviously an improper resolution, and the effect of it was to reduce the number of scholars to one-third of what it had previously been. This schoolmaster is dead and no person has as yet been appointed to his place. I do not think it desirable on account of what [602] has occurred as to the schoolmaster to remove the present trustees.

I propose to fill up the original number of trustees, and to direct that, in doing so, regard be had to the instrument of endowment, and to provide that they shall be members of the Church of England. I shall direct a scheme to be settled for the future management of the charity, and, in settling it, to have regard to any other means of instruction which may exist at present in the parish. All parties will have their costs out of the charity funds; I shall order them to be taxed, but make no order for their payment at present. A sinking fund must be provided for this purpose.

[602] FISHER v. BRIERLEY (No. 4). June 1, 1863.

A testatrix directed a church to be built, and as soon as built she gave £5000 for the endowment of the minister, "but without any interest in the meantime." The building of the church was delayed several years by litigation, and no minister had been appointed. The Court declined to decide, in the absence of the minister, whether any interest was payable on the legacy, but intimated that the interest before an appointment of a minister would not form part of the capital.

This case, reported *ante* (30 Beav. 268), again came before the Court, the decision of the Lords Justices (1 De G. F. & J. 643) having been affirmed by the House of Lords (10 H. of L. Cas. 159).

The testatrix, who died in 1857, gave £5000 to the Bishop of Chester, to be paid when a church had been erected "but without any interest in the meantime," the income of which was to be paid to the minister of the church. In consequence of the protracted litigation no church had been erected, and the legacy had not yet been paid.

The question whether interest was payable on the [603] £5000 and on legacies of £1500 and £500 given to provide for the schoolmaster and books was again argued by

Mr. Hobhouse, Mr. Dickenson, Mr. Fischer, Mr. Selwyn, Mr. C. C. Barber and Mr. Shapter. They cited *Pulteney v. Warren* (6 Ves. 92); *Grant v. Grant* (4 Russ. 598); *Attorney-General v. The Bishop of Chester* (1 Bro. C. C. 444).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think it premature to determine the point, as at present no minister has been appointed, and I think the legacy ought to be accumulated until one is appointed, and then I shall have the proper person to contest the point.

I am of opinion that the interest in question is not capital and never will be capital. The testatrix has given £5000 at a particular period, and the income of it to the officiating minister. I have a difficulty in deciding the present point in the absence of the officiating minister. I propose to carry the three sums of £5000, £1500 and £500 to the account of these legacies, and direct them to be invested and accumulated; but such carryings over are to be without prejudice to the question, if any interest is payable and from what time it is payable.

[604] DOMVILLE v. TAYLOR. June 1, '2, 1863.

[S. C. 8 L. T. 624; 11 W. R. 796; 2 N. R. 258.]

A testator, by his will, said, "I give to my wife all my household furniture, plate," &c., "and other effects of the like nature, and all wines," &c., "which shall, at my decease, be in or about any dwelling-house then occupied by me." Held, that, in construing the bequest, the sentence ought to be divided into two, and that the qualification as to his dwelling-house applied only to the latter part. Held, therefore, that it passed plate at the testator's bankers, family plate in the possession of the testator's father as tenant for life, and to which the testator was entitled absolutely in remainder, and also the produce of family plate wrongfully sold by the tenant for life, and furniture, &c., deposited for safe custody at a warehouse.

Compton Charles Domville died in 1852, leaving his father Sir Compton Domville and the Plaintiff, his widow, surviving him.

By his will dated in 1847 he bequeathed as follows:—

"I give to my said dear wife Isabella Maria Domville the sum of £500 for immediate use, to be paid or retained out of the first moneys which shall come to the hands of my trustees and executors. And I also give to my said wife all my household furniture, plate, jewels, plated articles, linen, china, glass, books, pictures, musical

instruments and other effects of the like nature, and all wines, liquors, fuel, house-keeping provisions and other consumable stores which shall, at my decease, be in or about my dwelling-house then occupied by me."

The question upon the special case was, what passed under the bequest under the following circumstances. It appeared that the testator's grandfather had bequeathed his family plate to the testator's father, Sir Compton Domville, for life, with remainder absolutely to the testator Compton Charles Domville, and that Sir Compton Domville had sold a portion of it to the value of £894. The residue remained in his father's possession until his death in 1857, after which it was sold for £1097.

It also appeared that the testator, at the date of his [605] will in 1847, "resided in a house in Worcestershire rented by him as tenant from year to year; he had resided there for about two years, and continued to reside there until he started for Nice. A few months before his death he went to reside at Nice for the benefit of his health, in a furnished house which he rented, and there he died in March 1852. At the time of his decease he had no dwelling-house except that at Nice. All his plate (other than that which came to him under his grandfather's will) was deposited at the banking house of Messrs. Coutts, his bankers in London, and he had a quantity of wine, household furniture, linen and books packed up in cases and deposited at Messrs. Tilbury's warehouse in London."

The questions for the opinion of the Court were:—

1. Who was entitled to the sum of £894, 8s. 7d. which had been paid by the executors of Sir Compton Domville to the Defendants?

2. Who was entitled to the plate deposited with the bankers of Compton Charles Domville, and to the £1087, 10s. 6d. the produce of the sale of the plate bequeathed by his grandfather, and remaining in specie at the death of Sir Compton Domville?

3. Who was entitled to the household furniture, linen and books deposited at Messrs. Tilbury's warehouse?

Mr. Hobhouse and Mr. Martelli, for the widow, argued that the property in question passed to the widow; that the plate was not limited to that in the testator's dwelling-house, but extended to all the plate in which the testator was in any way interested; that the family plate passed together with the produce of that which had been sold, for the tortious act of the father could not affect the dispositions of the son. [606] Secondly. That if the property was not actually in the dwelling-house, still it passed, the words being merely descriptive of the things; *Shaftesbury v. Shaftesbury* (2 Vern. 747); *Land v. Devaynes* (4 Bro. C. C. 536); and see *Spencer v. Spencer* (21 Beav. 548). They referred to Lindley Murray (tit. "Conjunctions" (55th edit.)) to shew "that conjunctions very often unite sentences when they appear to unite only words," and that the present was an instance of distinct gifts, in distinct sentences, in which the qualification only affected the last.

Mr. E. F. Smith, for the executors. There are two bequests only, one of £500 and then a distinct one commencing with "and." It is to be observed that the word "and" following the words "of the like nature" commences with a small "a," and not with a capital letter. This shews that the sentence runs on, that the latter is but one gift, and that the whole of it is restricted by the words "what shall be at my decease in or about my dwelling-house then occupied by me." Therefore only those articles so situate at his death passed. Again, only that part of the plate which was for "domestic use" passed; *Le Farrant v. Spencer* (1 Ves. sen. 97); and this excludes the family plate, which, in addition, could not be properly termed "my plate," as, at that time, it belonged to his father. The £894 could only pass as money and not as "plate."

Mr. Hobhouse, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. As to the £894 there is not much difficulty. The wrongful act of the father could not alter the rights.

[607] June 2. THE MASTER OF THE ROLLS. I have had some difficulty in coming to a satisfactory conclusion in this case. But, on the whole, I am of opinion that I must read this will as if the testator had meant to make a division between these articles. I must read it thus:—"I give to my wife all my household furniture, plate," &c., "and other effects of the like nature," and put a stop there, and then as if he had continued, "I also give her all my wines," &c., "which shall,

at my decease, be in or about any dwelling-house then occupied by me." The only mode in which I can explain the will is, that the testator meant two sentences.

Accordingly the bequest is to be read as if there were three gifts, first of the £500, the second of "all his household furniture, plate," &c., and the third of "all wines," &c. This carries all the plate, including that in his father's house, and the produce of that which had been sold, and that at the testator's bankers, and also the furniture, &c., at Tilbury's.

NOTE.—Reg. Lib. 1863, A. fol. 1120.

[608] DE GARAGNOL v. LIARDET. June 4, 5, 1863.

[S. C. 2 N. R. 296.]

The word "survivor" cannot be construed as "others," where the gift over is partly to persons whose interests are not given over.

A testator gave legacies to each of his four daughters for life, with remainder to their children; and he provided that if either of the daughters should die without children, her share should go over to the survivors of his sons and daughters. Held, that "survivors" could not be read "others," in consequence of the gift over being to a different class from those whose shares were to go over.

The testator had two sons, Henry and Peter, and four daughters, Mary Ann, Jane, Phoebe and Elizabeth.

By his will he bequeathed £8000 to Mary Ann for life, with remainder to her issue. And he directed the residue arising from the sale and conversion of his real and personal estate to be divided into seven equal parts, and he gave two-sevenths to his son Henry absolutely, two-sevenths to his son Peter absolutely, one-seventh to trustees for his daughter Jane for life, with remainder to her children or issue, and similarly one-seventh each in trust for Phoebe and Elizabeth respectively for life, with remainder to their children.

The will contained the following clause:—

"And I do hereby declare it to be my will and mind, that in case any one or more of my said several daughters, Jane, Phoebe, Elizabeth and Mary Anne shall happen to depart this life, not having had any child of her or their body or respective bodies who shall live to attain the age of twenty-one years, or shall die under that age without leaving issue of his or her body living at the time of his or her decease, then and in every such case I do hereby order and direct that the three several seventh parts or shares of the residue of the said moneys to arise as aforesaid and hereinbefore bequeathed to my said trustees, for the separate use of my daughters Jane, Phoebe and Elizabeth, and also the said sum of £8000 hereinbefore bequeathed to [609] my said trustees for the benefit of my daughter Mary Anne, shall go to and be divided amongst the survivors of them my said sons and daughters, in such parts, shares and proportions, as the residue and remainder of the moneys arising from the sale of my said real and personal estate is hereinbefore by me given and bequeathed, and that the respective parts and shares of such surviving daughter or daughters therein shall immediately become vested in my said trustees," upon like trusts for their respective lives, and after their decease, respectively, for their respective issue, and payable, and with the like benefit of survivorship, and subject to the like powers, &c., &c., as their original sevenths.

The testator died in 1829.

In 1862 Jane died without having been married, and her seventh share went over. Her two brothers and her sister Jane survived her, but Mary Anne had died in 1848 without having been married, and Elizabeth had died in 1860, leaving one child only, viz., the Plaintiff Madame De Garagnol.

The question submitted for the opinion of the Court, upon this special case, was as follows:—"Who, upon the death of the testator's daughter Jane without issue, became entitled, and in what proportions, to her one-seventh share of his residuary estate?"

Mr. Hobhouse and Mr. Surrage, for the Plaintiff Madame Garagnol, argued that the word "survivors" ought to be construed "others," so that the Plaintiff would participate in the share of Jane. They argued that this construction was warranted by authority, and that it would prevent an intestacy, in the event of the last [610] survivor, if a daughter, dying without issue. They cited *Cole v. Sewell* (4 Dru. & War. 1, and 2 H. of L. Cas. 186); *Smith v. Osborne* (6 H. of L. Cas. 375); *Aiton v. Brooks* (7 Sim. 204); *Eyre v. Marsden* (2 Keen, 564, and 4 Myl. & Cr. 231).

Mr. Jones, in the same interest.

Mr. J. Hinde Palmer and Mr. Rowcliffe, for the sons, argued that the word "survivors" must be construed strictly. *Leeming v. Sherratt* (2 Hare, 14); *Wilmot v. Wilmot* (8 Ves. 10); *Winterton v. Crawford* (1 Russ. & M. 407); *Holland v. Allsop* (29 Beav. 498); *Greenwood v. Percy* (26 Beav. 572).

Mr. Hobhouse, in reply.

June 5. THE MASTER OF THE ROLLS [Sir John Romilly]. On looking at the cases, I entertain no doubt that, in this instance, the word is to be construed strictly, and that it means survivors. There are many difficulties in all these cases, and if you adopt Sir Wm. Grant's suggestion, and read the word as the others of those before mentioned, it cannot be so read here, because the gift over is to a different class. If he had given shares to his children, and said, "If any of them should die without issue at their deaths, then I give their shares to the survivors of the children and of A. B." a perfect stranger, it is clear that, in that case, you could not read "survivors" as "others," for others is confined to the others of the class whose shares are to go over. Here are four daughters, and if their shares had been given over to the survivors of them, it would then have [611] been possible to read "survivors" as "others," but if the shares are given over to the survivors, not of them but of the daughters and their brothers, that construction cannot be admitted. To do so, the gift over must be to the others of the particular class, on the failing of the issue of one of whom his share is given over, and is to take effect for the benefit of the others of the same class.

Even if the word had been written "others," I do not see how the brothers could have taken. If the testator had said, "I give the share of any daughter dying without leaving issue to the others of my sons and daughters," then others would not be a proper expression.

Where a person gives property in shares to three or four persons, and says that on failure of issue of any one his share is to go over to the survivors, it may be read others; but if he says survivors of a different class, the word "survivors" must be read strictly.

I do not find any case where "survivors" has been read "others" when the gift over is to a separate and distinct class. I am of opinion that it is here given over to a separate and distinct class, and as much so as if it had been given to the survivor of the daughters and of the children of A. B. a stranger. I am of opinion that "survivors" in this will must be read strictly, and that Jane's share must be divided between her two brothers and Phoebe.

I think the share is divisible into five parts that the sons will each take two-fifths and the surviving daughter will take the remaining fifth, but on the same trusts as her original share. That construction might possibly lead to an intestacy, but that is not so serious a consequence as altering the words of the will.

[612] COVENTRY v. COVENTRY. June 12, 1863.

A covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but such a covenant of the husband and wife does. Such a covenant to settle does not bind property over which a wife is deprived of the power of disposition.

Covenant by husband and wife to settle all after-acquired property, "not being already settled for her separate use:" Held, not to bind property subsequently bequeathed to the wife for her separate use.

Upon the marriage of Mr. Coventry with Miss Catherine Seton, in 1842, a settle-

ment was executed, by which some of the lady's property was settled in trust for her separate use, without power of anticipation, during the coverture, and, subject to the life interests of their parents, for the children of the marriage. The deed contained the following agreement to settle the after-acquired property of the wife:—

"And it is hereby further agreed and declared, and they the said Catherine Seton and John Coventry do hereby, for themselves respectively and their respective heirs, executors and administrators, covenant and declare, promise and agree, with and to the said John Mort Wakefield and George Leroux Wilson, their executors, administrators and assigns that in case any estate, real or personal, shall, at any time or times after the solemnization of the said intended marriage, descend or come to, or devolve upon, or be given, devised or bequeathed to, or in trust for, her the said Catherine Seton, *and not being already settled for her separate use*, they the said Catherine Seton and John Coventry respectively," &c., will at the request of the said John Mort Wakefield and George Leroux Wilson, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time, "make, do and execute, or cause and procure to be made, done and executed, all and every such lawful and reasonable acts, deeds, matters and things as by" the trustees shall be required "for conveying, assigning and assuring all such future or [613] additional fortune, or other real or personal estate of the said Catherine Seton unto" the trustees, upon the trusts hereinbefore expressed.

The Rev. E. Waller died in 1859, having bequeathed two legacies of £1000 and £2000, and (subject to the life interest therein of his two sisters) the moiety of his residuary estate to Mrs. Coventry; and he declared that these bequests should be for her separate use independent of her husband.

By a deed in 1860, Mrs. Coventry had assigned this property to trustees, in trust "for her sole and separate use," independent of Mr. Coventry.

This bill was filed by Mrs. Coventry against her husband and children, praying a declaration that the bequests were not included in, or subject to, the trusts of the settlement of 1842.

Mr. Bristowe, for the Plaintiff, argued that this property was excluded from the operation of the covenant, it being already settled to Mrs. Coventry's separate use.

He cited *Willoughby v. Lord Middleton* (2 John. & Hem. 344); *Ramsden v. Smith* (2 Drew. 298); *Brooks v. Keith* (1 Drew. & Sm. 462); *Thornton v. Bright* (2 Myl. & Cr. 230); and said that this case was distinguishable from *Milford v. Peile* (17 Beav. 602).

Mr. Jolliffe, for the trustees and the husband.

Mr. C. Chapman Barber, for the children. This property is bound by the settlement; the covenant is on [614] the part both of the husband and wife, and, therefore, binds both. It is argued that the words "not being already settled for her separate use" are in the nature of an exception out of the covenant; but that is not the proper construction. These words are descriptive of the property "already settled" (i.e., by the settlement itself) to her separate use.

Secondly, the deed of 1860 made it subject to the settlement, by placing it in her own power.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this property is not included in the settlement, and that if I were to adopt Mr. C. Barber's argument it would render the exception ineffectual. It is quite settled that a covenant by the husband alone to settle the after-acquired property of the wife does not bind her separate property, but that if the covenant be by both then it does bind it. Again, this Court can only settle property over which the wife has a power of disposition, for if it is settled by an instrument which prohibits anticipation, the covenant to settle would be inoperative. Supposing the £1000 had been settled on this lady for life without power of anticipation, with remainder to her children, no power of hers could alter the trusts of the will or bring the property within the trusts of this settlement, for the donor has said that it shall not come within the covenant. I think that the words "and not being already settled for her separate use" cannot mean such a settlement as this Court says is a proper settlement, namely, on the parents for life, with remainder to their children: that cannot be the meaning.

[615] I agree that these words are part of the description of the property to be

bound by the covenant in this way:—the agreement is to settle all the property which, after the marriage, shall devolve upon her, except that not “already settled for her separate use.”

I am of opinion that property subsequently given her for her separate use, so that she has the absolute controul over it and her husband has none, is not to be included in this settlement. That is the only way in which the covenant can be carried into execution, and that, in my opinion, is the true construction.

I do not think that what she has done since the testator's death makes any difference. She has thought fit to place the property in the hands of trustees of her own, to enable her to deal with it, and this is a mere mode to carry into effect the will of the testator.

[615] BULL v. HUTCHENS. June 8, 1863.

[S. C. 8 L. T. 716; 9 Jur. (N. S.) 954; 11 W. R. 866. See *Bell v. Holby*, 1873, L. R. 15 Eq. 193; *Laurie v. Lees*, 1880, 14 Ch. D. 260; *In re Highett & Bird's Contract* [1902], 2 Ch. 219; [1903], 1 Ch. 287.]

By the conditions of sale relating to leaseholds, it was stipulated that the production of the last receipt should be conclusive evidence that all the covenants had been performed. Held, that the production of such a receipt prevented the purchaser from taking the objection that the lease had been forfeited by reason of the dilapidated state of the premises.

A registered *lis pendens* does not create a charge or lien on the property, nor does it excuse a purchaser from completing his contract. It merely puts him upon an inquiry into the validity of the Plaintiff's claim.

A registered order of the Court of Probate does not create a charge on lands.

The Plaintiff put some leasehold property up for sale by auction, and the Defendant on the 11th of June 1862 became the purchaser for £378. The sale was made subject to certain conditions. The 6th condition of sale provided as follows:—

“No purchaser shall be entitled to call for the production of, or investigate or make any objection or requi-[616]-sition respecting the title, prior to or the right to grant the said leases and under-leases respectively, and the production of a receipt for the last payment of rent accrued previously to the completion of any purchase shall be conclusive evidence that all the covenants and agreements in the lease or under-leases, under which the property included in such purchase shall be held, have been performed and observed up to the completion of such purchase. The nature of the covenants and conditions may be ascertained from copies thereof which will be produced at the sale, and any purchaser shall be deemed to have full notice thereof.”

Two objections were taken to the title, the first was as follows:—“The original lease under which the premises are holden contains the usual covenant to keep the same in repair, and a proviso for re-entry in default. The purchaser has ascertained that the premises are in a ruinous state, consequently it is competent for the lessor to re-enter at any time, as the breach is continuing. The premises must be reinstated, and a waiver of the cause of forfeiture procured from the lessor or his representatives, before the vendor can be in a position to give a title to the property. It has also been ascertained that the garden wall, separating the garden of this house from that adjoining, has been pulled or has fallen down. This must be reinstated and a waiver obtained, as it is also a breach of the covenant to repair.”

As to this objection, the vendor proposed to remove it by the production of the last receipt for the rent under the 6th condition of sale.

The second objection arose under these circumstances:—By an order of the Court of Probate, made on the 5th of February 1861, it was ordered that the [617] Plaintiff should pay one of the Defendants an annuity of £25 during her life. This order was duly registered at the office of the Senior Master of the Common Pleas under the 1 & 2 Vict. c. 110. The annuity was afterwards assigned to Mr. Pratt, who on the 12th of September 1862 filed his bill to have it declared that the annuity was a charge on the leasehold property of the Plaintiff Bull; but a demurrer was allowed by the Vice-

Chancellor Stuart on the 19th of November 1862 (*Pratt v. Bull*, 4 Giffard, 117), which was affirmed by Lord Westbury on the 23d of January 1863 (*Pratt v. Bull*, 1 De Gex, J. & Smith, 141). The suit of *Pratt v. Bull* was registered as a *lis pendens*.

This bill was filed for the specific performance of the contract on the 20th of September 1862.

Mr. Baggallay and Mr. Hardy, for the Plaintiff.

Mr. Selwyn and Mr. Kay, for the Defendant.

Nott v. Riccard (22 Beav. 311); *Pyrke v. Waddingham* (10 Hare, 1); *Wells v. Maxwell* (32 Beav. 408) were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a bill for the specific performance of a contract, which is resisted on two grounds. The first is, that there has been a forfeiture of the lease by reason of the property being out of repair. This is met by the 6th condition of sale, which provides that the production of a receipt, for the last payment of rent accrued previous to the completion of any purchase, shall be conclusive evidence that all the covenants have been performed up [618] to the completion of such purchase: therefore the purchaser knew perfectly well that the production of the last receipt would be a waiver, on his part, of any objection as to the state of the repairs of the property: consequently, when the purchase is completed, the receipt for the last rent must be produced and that will remove this objection.

The more important point is that which was raised in *Pratt v. Bull*, and was, whether a registered order of the Court of Probate was a charge on this property. At this moment it is established, by the decision of Vice-Chancellor Stuart and the Lord Chancellor, that it creates no such charge. It is therefore clear that the Plaintiff is entitled to a specific performance of the contract, it being admitted that the title is accepted except on these points.

The next question is, whether the Plaintiff is entitled to the costs of the suit. It has been argued, first, that the *lis pendens* creates an incumbrance, and, secondly, that the claim of Pratt was of such a nature that if the Vice-Chancellor and the Lord Chancellor had not determined the question, this Court would not compel the specific performance of the contract. I am of opinion that the *lis pendens* is merely notice of some claim, made in respect of the property which is the subject of the suit, but that it does not, of itself, create an incumbrance, apart from the equity on which the litigation is founded. If it were otherwise, a *lis pendens* having nothing to do with the matter might create an incumbrance. It was notice of the existence of a suit in Chancery, and required all persons dealing with the property to look at the proceedings to see whether it did affect the property or not. Here the *lis pendens* was no incumbrance if Pratt had no right against the [619] property, for it depended on the validity of his claim, for if his claim were idle, it could not create any incumbrance on the property. A man might file a bill claiming property, alleging that sixty years ago his ancestor was seised in fee, and that although he had sold the property, yet he had no right to do so. The Plaintiff might register this as a *lis pendens*; but could anybody say that this was an incumbrance on the property, or a reason why a purchaser should not complete his purchase? All that the registration of a *lis pendens* does is to require persons to look into the claims of the Plaintiff who registers it.

I think the case before Vice-Chancellor Turner of *Pyrke v. Waddingham* (10 Hare, 1) has been carried, in the argument before me, much further than he intended. I have repeatedly expressed my opinion that it is the duty of this Court to decide questions of law which arise in determining the validity of titles. Lord Eldon repeatedly determined questions of law and compelled purchasers to take a title depending upon them. It is difficult to draw the line and to lay down any rule as to the extent of uncertainty prevailing in the mind of the Court, which shall induce it to refuse specific performance of a contract, on the ground of an objection to the title, which the Court thinks, if the persons principally interested in supporting it had been before the Court, could not have been sustained. In any case it is an imputation on the Court to say that it is incompetent to declare the law on a point fully and adversely argued before it. The Vice-Chancellor did not, I think, intend his observations to extend so far as to lay down that wherever there was a reasonable

doubt as to the validity of an objection, the purchasers should not be compelled to accept the title.

[620] When I come to the nature of the objection, it appears to me to be an untenable one. It amounts to this:—Lord Campbell's Act said that an order of the Superior Courts should be an incumbrance, and the question was, whether that was to be prospective and apply to the orders of all Superior Courts which might afterwards be created. If the Legislature had intended that such an order should be an incumbrance on lands, nothing was easier than to embody such a clause in the Act. But the Act establishing the Court of Probate is silent on this subject. It is now made clear by the decisions of the Vice-Chancellor and the Lord Chancellor.

It follows, as a general rule, that where a decree is made the costs follows the event. Here the case is much stronger, for the decision of the Lord Chancellor was in January 1863, and yet, after that, the Defendant has required the suit to be brought to a hearing.

I am of opinion that the Plaintiff is entitled to the specific performance and to the costs.

[621] *Re FORD*.(1) June 12, 1863.

[S. C. 33 L. J. Ch. 180; 8 L. T. 625; 9 Jur. (N. S.) 740;
11 W. R. 845; 2 N. R. 349.]

A husband deserted his wife immediately after her marriage in 1846, and she was supported by her sister. In 1848 an annuity was bequeathed to her for her life, which the trustee accumulated until 1862, when the wife obtained a decree for a judicial separation. In 1863 the Court, on the petition of the wife and her sister, ordered the whole accumulations, amounting to £1315 stock, to be paid over to the sister to the exclusion altogether of the husband.

On the 26th of February 1846 the Petitioner Elizabeth Furnivall (then Elizabeth Hedgcock) intermarried with Thomas Furnivall, who, two days afterwards and ever since, had deserted her. She had not received from him any pecuniary or other assistance whatsoever, but had been, until the 29th of April 1862, wholly supported by her sister, the Co-petitioner, Sarah Anne Hedgcock, otherwise Hamilton.

The testator, William Ford, died in 1848, having by his will and codicil, dated respectively in 1838 and 1843, bequeathed an annuity of £100 to Elizabeth Hedgcock for life, which (in the event of her surviving her sister) was to be increased to £250 a year.

The trustee of the will, upon ascertaining that she was a married woman, declined to pay the annuity to her without having the receipt of her husband. She refused to say who her husband was, and the trustee invested the annuity in consols, and accumulated it, and it now amounted to £1315, 12s. 10d. stock.

In 1861 Elizabeth Furnivall instituted a suit in Her Majesty's Court of Divorce and Matrimonial Causes for a judicial separation from Thomas Furnivall; and on the 31st of January 1862 the Judge Ordinary pronounced and declared a judicial separation between them, by reason of his desertion without reasonable excuse.

[622] After this decree the trustee paid the annuity to Mrs. Furnivall as it became due, but he paid the accumulations into Court under the Trustee Relief Act.

This petition was now presented by Elizabeth Furnivall and her sister Sarah Ann Hedgcock, praying "that the £1315, 12s. 10d. Bank £3 per cent. annuities, or a competent part thereof, might be transferred to Sarah Anne Hedgcock, otherwise Hamilton, for her own use and benefit, or that the same Bank annuities, or the residue thereof (as the case might be), might be settled and secured for the sole and separate use of Mrs. Furnivall, or otherwise for her benefit, excluding Thomas Furnivall, as this honorable Court should think fit."

Mr. Selwyn and Mr. Schomberg, in support of the petition, relied on *Guy v. Pearkes* (18 Ves. 196); *Wells v. Malbon* (31 Beav. 48); and see *Atherton v. Nowell* (1 Cox, 229); *Coster v. Coster* (1 Keen, 199).

(1) *Ex relatione*.

Mr. Fischer, for Thomas Furnivall, argued that there was no evidence that any misconduct on his part caused the separation. That there was, therefore, no ground for depriving the husband of his marital right over the arrears of the annuity. That the Court never settled the whole of a fund when the wife was already amply provided for, as in this case, by an annuity for life. In *Coster v. Coster* (9 Sim. 597), the husband had misconducted himself, still the Court only settled three-fourths of the fund. In *Re Erskine* (1 Kay & J. 302), the fund was paid to the husband.

[623] Again, the wife has no equity to a settlement out of a life interest; *Tidd v. Lister* (10 Hare, 140, and 3 De Gex, M. & G. 857); *Re Duffy's Trust* (28 Beav. 386).

That the sister's claim for a voluntary expenditure upon her sister could not be supported as a lien on the fund. If, however, the Court thought that anything ought to be settled, it ought not to exceed one-half of the fund, and that the other half ought to be paid to the husband. He also cited *Carter v. Taggart* (5 De Gex & Sm. 49, and 1 De G. M. & G. 286); *Barrow v. Barrow* (4 Kay & J. 409); 20 & 21 Vict. c. 85, ss. 16, 25.

THE MASTER OF THE ROLLS [Sir John Romilly]. So far as the case depends on me, the husband cannot be permitted to receive any part of the fund. When a man deserts his wife two days after his marriage, he cannot be expected to be listened to when he says that the separation was voluntary. In such a case it must be assumed that the fault was the husband's. The claim of the sister depends upon the bounty of the wife, who asks that the fund may be paid to her sister; I shall, therefore, make the order as prayed.

NOTE.—See the cases, 29 Beav. 582, n.

[624] FORSTER v. DAVIES. June 12, 19, 1863.

The costs of suit were ordered to be taxed as between solicitor and client, and paid out of the trust funds. It was held that the costs of a consultation with Queen's Counsel, as to the frame of the bill, ought to be allowed, notwithstanding, by his advice, a part of the relief sought by the draft bill was abandoned, and never became the subject of the suit.

This was a petition to review the taxation of a bill of costs.

It appeared that differences had existed between Mr. and Mrs. Forster, on the one side, and the trustees of their marriage settlement on the other, and the latter having declined to retire, instructions were given to junior counsel to settle a bill to have them removed. Counsel thought that the suit ought also to seek for the reformation of the settlement, and he so advised and settled the bill accordingly. The Plaintiff's solicitor, feeling great difficulties, deemed it expedient and necessary that the bill should be settled in consultation with Mr. B., a Queen's Counsel, cognizant generally with the circumstances of the case. At the request of the junior counsel the bill was laid before Mr. B. in consultation, who advised that it would not be expedient to raise the question of rectification of the settlement. The bill was settled accordingly, omitting that part. At the hearing the Plaintiff, Mrs. Forster, did not succeed in removing the trustees, and it was ordered that the costs of all parties should be taxed, as between solicitor and client, and paid out of the trust funds.

In the taxation the Taxing Master disallowed items to the amount of about fifteen guineas, which related to the consultation with Queen's Counsel, thinking that those costs were incurred in a different matter from that adjudicated upon in this suit.

[625] Mr. Selwyn and Mr. Bovill, for the Plaintiff, in support of the petition, referred to *The Downing College case* (3 Myl. & Cr. 474), where three counsel had been allowed.

Mr. Hardy, for Mr. Forster, the Plaintiff's husband.

Mr. Baggallay and Mr. Gardener, for the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a matter of importance, and I shall therefore take a little time to consider it, but my present impression is that these costs ought to be allowed. I do not think that the fact that the result of

the consultation with the Queen's Counsel was, that the suit was restricted to a particular point, and that, therefore, his advice was taken upon a point which was not ultimately embraced in this suit, can properly be taken into consideration upon the question of whether the costs ought to be allowed or not.

To illustrate the case, I remember, shortly after I had the honor of being made a Queen's Counsel, settling a bill in consultation upon which there was a question respecting the specific performance of an agreement for a partition. It was obvious that there was a very considerable inequality in the division, and I suggested, upon the facts laid before me, that, in addition, it should be stated that, although there was much inequality in the division, still that there was in addition a difficult question of right, which was compromised between two brothers, which constituted a family arrangement, upon which the agreement might be supported. That advice was adopted, and the suit was extended in consequence. But suppose the bill had been originally so framed, and that I had been of opinion that the par-[626]-tition could not be supported as a family arrangement, and that I had suggested that the passages relating to that portion of case should be struck out, could any reasonable difference be drawn, upon a taxation, between the result of the two pieces of advice? Upon the facts of the case, Queen's Counsel in one instance suggests an addition to the bill, and in the other case he suggests a restriction of the bill. It is obvious that if the costs ought to be allowed in the one case, they ought to be allowed in the other; if not, you would have the most technical points argued in every such case, as to whether the bill was or not in conformity with the advice given.

Suppose that, after the consultation with Queen's Counsel, his advice had not been followed, but the parties had determined not to restrict this suit, would not the expense of obtaining his advice be properly allowed as costs between solicitor and client? The way in which it strikes me is this: Supposing A. B. determines to institute a suit, he applies to Mr. Rogers, through his solicitor, to frame a bill for him. Mr Rogers says, I think this is a matter of considerable difficulty and request your client to let me have a consultation with Mr. Bacon, for the purpose of seeing whether this is right or not. The client assents to that, and thereupon the suit is framed accordingly. I do not care what the result of the suit is, that is of no consequence, but the solicitor is entitled to have his costs of the suit, as between solicitor and client against his client. The expense of procuring the advice of Mr. Bacon is clearly part of those costs. It is obvious they are not charges and expenses which trustees and executors are sometimes entitled to in the proper sense of the term, as distinguished from the costs of the suit. If they are any costs at all which the client is bound to pay, they are costs of the suit in the proper and technical sense of [627] the term, and costs of the suit are distinguished from "charges and expenses" which have only remotely and collaterally relation to the proceedings in the suit.

It is always to be borne in mind that this is not a question as to costs between party and party, in which case these costs would not be allowed, but whether the term "costs of the suit as between solicitor and client" does not mean such costs of the suit as the client would have to pay to his solicitor? I think that these are costs which the client would have to pay to his solicitor under the technical term costs of the suit, and that as such they come within the order.

It is no doubt a matter of considerable importance, because in my experience it has been the practice of draftsmen, in cases of difficulty, to take the opinion of the leading counsel as to how they should frame the suit. I remember, in the case of *Trevor v. Trevor* (1 H. of L. Cas. 239), having a consultation with Mr. Jacob as to the mode in which the bill should be framed, and in consequence of his advice, the bill was framed so as to take the opinion of the Court on the construction of a will, on the Master's report instead of on the original hearing. I apprehend that the expenses of procuring that advice were properly costs of the suit, and would have been allowed in a taxation as between solicitor and client.

My present impression is, although I wish to consider the matter a little further, that these are costs which ought properly to be allowed under an order directing payment of the costs of the suit as between solicitor and client.

[628] June 19. THE MASTER OF THE ROLLS. The further consideration I have given to this subject has confirmed me in the view I took of it on the hearing of the

petition. I am of opinion that the costs incurred in the consultation with the Queen's Counsel, and incidental to his settling the bill, are proper to be allowed in the taxation of the costs of the suit as between solicitor and client, and that this is in no degree affected by the circumstance that the bill, as originally prepared, sought additional relief, which, on the advice of the Queen's Counsel, was omitted, and formed no part of the suit as actually constituted.

[628] PHILLIPSON v. KERRY. *June 9, 20, 1863.*

If a voluntary deed fail to carry into effect the intentions of the parties, it cannot be reformed, except with the consent of the donor.

Voluntary deed set aside after the deaths both of donor and donee.

This suit was instituted by Charles G. W. Phillipson, the executor and the legatee of Miss Courtail, against the executors of his uncle Charles Burton Phillipson, to set aside a deed of gift dated the 7th of January 1857, from Miss Courtail in favor of Charles Burton Phillipson.

Mr. Selwyn and Mr. Kay, for the Plaintiff.

Mr. Baggallay and Mr. Bevir, for Mr. Kerry.

Mr. G. L. Russell, for the other executor.

Mr. Selwyn, in reply.

Toker v. Toker (31 Beav. 629) was cited.

[629] *June 20.* THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit to set aside a voluntary deed executed by Elizabeth Sophia Courtail, on the ground that the nature and effect thereof were not properly explained to her when she executed it.

In the year 1851 a sum of £4275, 4s. 9d. £3 per cent consols, being the residue of the estate of Isabella Susanna Frances Albert, was transferred into the name of the Accountant-General, the trusts of which were to pay the dividends thereof to Elizabeth Sophia Courtail for her life, and after her death, to be divided amongst her children, and in default of children, as she should by deed or will appoint, and in default of appointment, to her next of kin.

At this time she was unmarried and about forty years old: at this time she was also residing with Mrs. Mary Burton Phillipson, and she continued to do so until the death of that lady, after which she resided with Charles Burton Phillipson, the son of her friend. The instrument complained of bears date the 7th of January 1857, it purports to be and is a deed of gift of all the sums of stock above mentioned to Charles Burton Phillipson. The mode by which it was effected was this:—She executed two deeds-poll of that date; by the first she exercised the power of appointment given to her by the will of Susanna Frances Albert in favor of herself. The second deed, which is that complained of, after reciting that, by virtue of the will of Mrs. Albert and the appointment, Miss Courtail was entitled for life to the residuary estate and to it absolutely in case she should die without leaving any child, and that the residue consisted of the £4275, 4s. 9d. consols in Court, proceeded in the following terms:—

"Now know ye and these presents witness that the [630] said Elizabeth Sophia Courtail doth hereby give and grant the said sum of £4275, 4s. 9d. £3 per cent. consolidated Bank annuities, so standing in the name of the said Accountant-General of the High Court of Chancery as aforesaid and absolutely appointed to the said Elizabeth Sophia Courtail under the deed of appointment bearing even date herewith, to Charles Burton Phillipson, of 8 Euston Place, New Road, in the county of Middlesex, gentleman, his executors and administrators, for his and their own absolute use and benefit."

After the execution of this deed, Miss Courtail continued to reside with Charles Burton Phillipson and his family until his death, which took place on the 26th July 1861. Shortly after this, Miss Courtail went to reside with Mr. Phillipson's widow, she then made a will in favor of the Plaintiff Charles G. W. Phillipson, and she gave

instructions to Messrs. Lovell & Co. to file a bill to set aside the deed in question, and she died on the day on which it was filed, viz., the 17th of November 1862. She received the dividends on the stock up to the date of her decease. The present bill was filed by the Plaintiff, as her legal personal representative.

The question is, whether this deed of gift of the 7th January 1857 can stand. There is this singularity in this case, which I do not remember to have met with in any of the numerous cases which have come before me on this subject: it is that not merely the donor but the donee also is dead, and that consequently the account of the transaction given by each of them is wanting. I think, however, that the death of Miss Courtail cannot, in the circumstances of this case, affect the decision of this Court. It is, no doubt, a matter of importance, and one which has great weight with the [631] Court, whenever it appears that the donor has continued, throughout her life, cognizant of what she has done, and has evinced no regret for the act she has done, or expressed any desire to disturb it. But here the evidence is distinct that this was not the case with Miss Courtail, and that, in October last, she complained of the deed she had executed, and in November 1862 took steps to annul it. I think, therefore, that I am compelled to regard this matter in the same manner that I should have done if she was herself the Plaintiff seeking to avoid the transaction.

If I am right in this, then the ordinary rules which apply to transactions of this description must be applied to this case, and the burthen of proof to sustain the validity of the deed rests on those who seek to maintain it. There is not, I think, in this case any proof of undue influence, in the ordinary sense in which that term is used. It is true that Mr. Charles Burton Phillipson and his family were strangers in blood to Miss Courtail; but she had long resided with them, and there is evidence that she was desirous to exclude her own near relations from any benefit to be derived from her inheritance. I think also, on the evidence, that the first motion in this matter proceeded from herself. It is true that she did not apply to the gentleman who had acted as her solicitor in the preparation of a will she has made some years before, and which was made in favour of the Plaintiff, then a boy of eleven years of age; but on the evidence of Mr. Kerry, which I see no reason to doubt, she voluntarily applied to him to prepare the instrument in dispute. The only question therefore is, whether the deed fully expresses the nature of the arrangement she wished to make, and whether its full purport and effect were clearly and distinctly made known to her. All this rests on the evidence of Mr. [632] Kerry alone, which, as I have already stated, I see no reason to doubt, and it is on the consideration of this evidence that the validity of this deed must rest.

It happens that Mr. Kerry is a Defendant, but this is merely accidental. Charles Burton Phillipson made his will on the 8th of April 1859, and appointed Mr. Kerry one of his executors, and it is in this character only that he is made a Defendant.

The account he gives of the transaction is contained in paragraphs 16 to 23 of his answer, and is in these words:—"On the 22d day of December 1856 I received from Elizabeth Sophia Courtail a letter dated the previous day, which was as follows:—

'Dear Sir,—Will you oblige Mrs. Phillipson and me with a visit (professional) to-morrow at two or three o'clock; but if you are engaged we must wait until Tuesday, at the same hour mentioned above. We should prefer to-morrow (Monday) as matters of business should always be arranged with promptitude.'

"17. I accordingly, on the 22d day of December 1856, called upon Elizabeth Sophia Courtail at No. 8 Euston Place, Euston Road, and had a long interview with her, at which Mary Burton Phillipson and the wife of Charles Burton Phillipson were also present. At such interview, Elizabeth Sophia Courtail expressed to me, verbally, her desire to execute, in favour of Charles Burton Phillipson, a deed of gift of the sum of £4275, 4s. 9d. £3 per cent. consolidated Bank annuities."

"18. I thereupon prepared the draft for the necessary deed of gift by way of appointment, for the purpose of vesting the said sum of stock in Charles Burton Phillipson, and on the following 26th day of December 1856 attended Elizabeth Sophia Courtail therewith at [633] No. 8 Euston Place, and fully explained to her the nature of the instrument which she was about to execute. I pointed out to her, that by such deed, she would part with her property, and I asked her to let me insert in such deed a power of revocation, but she refused to do so and stated that

she had perfect confidence in Charles Burton Phillipson, and that she should not wish to alter the disposition of the sum of Bank annuities intended to be thereby made."

"19. I clearly understood the object of the said Elizabeth Sophia Courtail, in wishing to execute such deed or gift in favour of Charles Burton Phillipson to be, that he should have the said sum of Bank annuities thereby disposed of, without having to pay any legacy or succession duty thereon, and that she had full confidence in Charles Burton Phillipson, that he would allow her to receive, until her death, the dividends of the said annuities, notwithstanding that such annuities had been disposed of in his favour."

"20. At the last-mentioned interview Elizabeth Sophia Courtail fully and absolutely approved of the said draft deed of appointment in favour of Charles Burton Phillipson, and refused to allow the same to be altered, as suggested by me, and the same was afterwards engrossed; but it was never executed by her, for the reason that, after such engrossment had been made, it occurred to me that the object and desire of Elizabeth Sophia Courtail would be better and more properly effected by her first executing a deed of appointment of the said Bank annuities in her own favour, and then a deed of gift of the same Bank annuities in favour of Charles Burton Phillipson."

"21. In accordance with such view and in consequence thereof, I, on the 27th day of December 1856, waited on Elizabeth Sophia Courtail, at No. 8 Euston [634] Place aforesaid, and explained the matter to her, and she thereupon, then and there, verbally instructed me to prepare such deeds as I thought would be necessary and proper to carry out her wish to vest the said Bank annuities absolutely in the said Charles Burton Phillipson as aforesaid."

"22. I accordingly prepared the drafts of such two deeds, namely, a deed of appointment of the said Bank annuities to herself, Elizabeth Sophia Courtail, and a deed of gift of the same to Charles Burton Phillipson, which were afterwards engrossed; and on the 6th day of January 1857 I waited upon Elizabeth Sophia Courtail, at No. 8 Euston Place, aforesaid, with such engrossments, and she then and there executed the same in my presence, the deed of gift in favour of Charles Burton Phillipson being executed after the execution of the deed of appointment in her own favour."

"23. Before the execution of the said deed of gift, I, at the interview lastly hereinbefore mentioned, asked Elizabeth Sophia Courtail if she knew what she was about in executing that deed. She replied, 'Yes.' I thereupon asked her if she knew that she was parting with all power over the property comprised in it. She said 'Yes.' I then questioned her as to whether the deed was her own voluntary act, and she answered, 'Quite so.' At the time of putting these questions to her, I wrote them and her replies thereto, in pencil, on the fly-leaf of the draft of the said deed of gift, where the same still are, and to which I refer."

Some important considerations arise on this statement. I pass by the consideration whether, by the instrument first proposed, the life interest of Miss Courtail would have been disposed of, but the end of [635] the 18th and 19th paragraphs contain a very material statement, shewing that she considered that she should be able, during the rest of her life, to enjoy the dividends on the stock, but that her doing so would depend on the honor and integrity of Charles Burton Phillipson. If so, it was a part of the arrangement that he was to allow her to have the dividends on the stock during her life, and this circumstance is confirmed by the fact that she did so receive them, and also by the evidence of his widow, but this part of the arrangement is not only not expressed in the deed, but, in various events which might have occurred, it would have been impossible to secure the receipt of them to her. If Charles Burton Phillipson had become bankrupt, the whole of the stock would, if the deed were valid, have passed to his assignees. If Charles Burton Phillipson died before her in insolvent circumstances, the stock would have been assets of his for the payment of his creditors, and even if neither of the events occurred, but Charles Burton Phillipson had died intestate, the whole would have passed away from her; nay, even if he made a will, unless he provided for her right to receive the dividends on the stock, she could take nothing, unless by the permission of those who took the fund, and if they were infants, such permission could not be

given. I do not find, on Mr. Kerry's evidence, that any part of this most material result of the deed was pointed out or explained to her. On the contrary, she seems to have been content to allow her receipt of the dividends to rest on Mr. Phillipson's honor; but it was the duty of Mr. Kerry to explain to her that circumstances might arise which would preclude Mr. Phillipson from so acting, however strongly he might be inclined to do so.

The events which have actually occurred point out, strongly, how important it was that this explanation [636] should have been given to her. Charles Burton Phillipson made his will on the 8th April 1859, upwards of two years after this deed of gift. In it, he made no mention of this stock, but simply disposes of all his property in favour of his wife and children, and he died on the 26th July 1861 leaving Miss Courtail surviving him. If this deed was good, she was then at the mercy of Mrs. Phillipson, and could only receive the dividends on the stock at her will and pleasure. In November 1862 Miss Courtail died, not at an advanced age, being then only fifty-one years of age. Assume, for the purpose of testing this matter, that Mrs. Phillipson had died in that month, leaving Miss Courtail her survivor; Miss Courtail would, in that event, have been left destitute. The infant children of Charles Burton Phillipson could have had no power to permit Miss Courtail to receive the dividends, nor could their guardian have permitted her to do so. These dividends were the sole source of income she possessed, and she would, therefore, in that event, have become literally penniless, and could only have been maintained by private generosity or parochial relief.

Was this explained to her? I think it clear that it was not. Was this result contemplated by her? I am equally clear that it was not. If there was an honorable understanding between her and Mr. Charles Burton Phillipson, that she was to receive the dividends during her life, it was his duty to fulfil the understanding on his part, as far as it was in his power to do so. But he has not done so, for his will is silent on the subject. Could he, or can those who represent him, insist on the validity of the deed, without performing the honorable engagement which, though not expressed, formed a part of the agreement. I am of opinion that he could not, and that they cannot.

[637] It is not sufficient to say that he was younger than Miss Courtail, and that all parties anticipated that he would survive her. In a matter so uncertain as human life, this contingency ought to have been provided for.

It is said that the deeds were put in this form in order to avoid the payment of succession duty, but there is no excuse, or indeed any explanation, for the omission of so material a provision, the want of which might have reduced this lady to beggary. It would have been easy to provide against the contingency. Mr. Phillipson might have covenanted to pay this lady an annuity for her life, equal in amount to the dividends which she received. Various modes might have been adopted by which the income, or an equivalent for the income, might have been preserved for her, without incurring the liability to pay either legacy or succession duty on her death; but none of these were done; and yet it is obvious that this was intended. Not only does Mr. Kerry say so in the paragraph 19 of his answer, which I have read, but the fact is confirmed by the receipt of the dividends by this lady during Mr. Phillipson's life, and it is still more strongly confirmed by the fact that, on his death, Mr. Kerry treated his interest in this stock as merely reversionary, and proved it accordingly, estimating the value of his estate on that principle.

If this had been a transaction where stock had been sold for a valuable consideration, then, possibly, the instrument might have been reformed, and so modified and rectified, on proof of the intentions of the parties, as to have carried these intentions into effect; but in a voluntary gift, this is impossible. The instrument is either good or bad; it cannot be modified to suit former [638] intentions, unless the donor consent to make a new and distinct instrument.

Throughout the evidence, I am unable to see any intention, on the part of this lady, to leave herself wholly destitute, notwithstanding the favourable disposition towards her of the donee of her stock. I see no evidence of any belief, on the part of the donee, that she was to be so left; on the contrary, I see an intention, on both sides, that something should have been done which was not done, and which cannot now be done.

I am of opinion, therefore, that this deed cannot stand, and that the Defendants have not performed the burthen which falls on them, and which is essential for the support of such an instrument.

I must, therefore, make a decree that the deed be delivered up to be cancelled; but it is not, in my opinion, a case for costs. With the exception that Mr. Phillipson's will does not provide for any receipt of the dividends by Miss Courtail, which admits of more than one explanation, and which is erroneous only on the supposition that he considered that this act was unnecessary to enable Miss Courtail to receive the dividends, I see no misconduct on his part. It is not he who insists now on the validity of the deed of 7th January 1857; and the Defendants, in the circumstances of this case, having regard to the interests of the infants, which they were bound to support, could not help resisting this suit to the utmost of their ability. The Defendants, no doubt, will get their costs out of Mr. Phillipson's estate, but that will be in another proceeding, and not in this suit.

The decree will be as I state it, but without costs.

NOTE.—Upon appeal to the Lords Justices, the decision was affirmed.

[639] WARDEN v. PEDDINGTON. *June 20, 1863.*

Practice as to requiring a Defendant to make a further affidavit as to documents. Where, after a Defendant has made a sufficient affidavit as to documents, the Plaintiff amends his bill, introducing new matters, he is entitled to have from the Defendant a further affidavit of documents as to the amendments.

This bill was filed in January 1862, and the Defendant made the usual affidavit of documents, which was not complained of. He afterwards filed his answer.

The bill was amended in May 1862, and contained a charge that the Defendants had in their possession documents relating "to the matters aforesaid," &c.

An application was now made for the production of documents already admitted, and that the Defendant might make a further affidavit of documents.

Mr. Selwyn and Mr. F. W. Everitt, for the Plaintiffs, cited 15 & 16 Vict. c. 86, s. 18; *Richards v. Watkins* (6 Jur. (N. S.) 168); *Willett v. Thiselton* (1 N. R. 42); *Noel v. Noel* (32 L. J. (Chanc.) 676).

[THE MASTER OF THE ROLLS. If the Defendant's affidavit is perfect in form, I cannot order him to make a further affidavit.]

The affidavit was sufficient having regard to the statements in the original bill, but it does not extend to the matters contained in the amendments.

Mr. Bromehead, for the Defendant. The authorities cited do not apply, for, in those cases, the first affidavit itself disclosed the fact that the Defendant had other documents in his possession besides those admitted. [640] Here the Defendant has made a perfect affidavit; he can do no more.

THE MASTER OF THE ROLLS [Sir John Romilly]. The question is whether, as to the new matter, the Defendant ought not to make a further affidavit, or that the Plaintiffs should have liberty to file interrogatories on the subject.

I think that in respect to the new matter, he ought to make a further affidavit. When the affidavit is in form sufficient, I do not think that it can be touched; it is a matter between the Defendant and his conscience. Here the Plaintiffs have amended their bill, and state that the Defendants have documents in their possession relating to their amendments; they might require an answer, but that would only increase the expense. I think the Defendant must, in that state of the case, make a further affidavit as to documents.

Lord Justice Turner, in the case cited, said he saw nothing in the statute which tied the Court down to a single affidavit as to documents. If it appears from the Defendant's affidavit that there are additional documents in his possession, I think the Plaintiff may have a further affidavit, even assuming the first affidavit to be in form sufficient as to the matters stated in amended bill.

NOTE.—Order the Defendant to make an affidavit "whether he has or has had in his

possession or power any, and if any what, documents relating to the further matters mentioned in the written amendments and accounting for the same."—Reg. Lib. 1863, B. fol. 1487.

[641] HOGG v. COOK. June 20, 1863.

Bequest to the testator's grandchildren and nephews and nieces. The testator had no brothers or sisters, and therefore no nephews and nieces: Held, that the nephews and nieces of his wife were entitled.

The testator, Archibald Hogg, by his will dated in 1860, after gifts to his son William Hogg and his granddaughter Christina Hogg, and a legacy of £50 "to his kinsman, the Rev. Alexander Rutherford," bequeathed the residue of his estate and effects "equally amongst such of his grandchildren, and his nephews and nieces, living at his decease, as being sons should attain the age of twenty-one years, or being daughters should attain that age or be previously married; and if there should be only one such child, the whole to be in trust for that only child."

The testator died a widower in 1861. He left one son, the Plaintiff Wm. Hogg, and one grandchild, the Plaintiff Christina Hogg, but he had no brothers or sisters, and, therefore, no nephews or nieces.

He left a number of nephews and nieces of his deceased wife, including the Rev. A. C. Rutherford, the legatee, who was her nephew.

Mr. Baggallay and Mr. Cracknall, for the Plaintiffs.

Mr. Wm. Morris, for the illegitimate nephews and nieces of the testator's wife.

Mr. Southgate, for the nephews and nieces of the wife, was not heard.

[642] Mr. Jessel and Mr. C. Roupell, for some of the same class.

Mr. Taylor, for the executor.

THE MASTER OF THE ROLLS [Sir John Romilly]. I must give some meaning to the words "nephews and nieces." In common parlance, no distinction is made between nephews and nieces of the husband and those of the wife.

I am of opinion that, in this case, all the nephews and nieces of the wife are included, but that if there are any who are legitimate, the bequest cannot include those who are not.

Mr. Jessel asked that the costs of proving the pedigree might be allowed.

THE MASTER OF THE ROLLS. If they were required to prove their title instead of its being admitted, they must have their costs of proving their pedigree.

NOTE.—*Hussey v. Berkeley*, 2 Eden, 194; *Smith v. Lidiard*, 3 Kay & J. 252.

[643] PINNEY v. SIR WILLIAM MARRIOTT. June 19, 20, 22, 1863.

Devise of all the freehold and real and leasehold estates in the counties of Lincoln and Cambridge (except such as I have hereinbefore disposed of) "and all the leasehold lands" at S., in the "county of Dorset, and elsewhere, which I can dispose of by this my will." Held, that it passed freeholds in Norfolk and elsewhere wherever situate.

The testator, Sir John James Smith, Baronet, by his will devised and bequeathed as follows:—"And I devise and bequeath all the freehold, copyhold or customary and real and leasehold estates, and shares of freehold, copyhold or customary and real and leasehold estates, in the counties of Lincoln and Cambridge (except such as I have hereinbefore disposed of), and all the leasehold lands, tithes and estates, and shares of leasehold lands, tithes and estates, at and near Sydling, in the said county of Dorset, and elsewhere, which I can dispose of by this my will, with the appurtenances, unto and to the use of the said Edward Berkeley Lord Portman, William Pinney, Edmund Henry Dickenson and Felix Vaughan Smith, their heirs, executors, administrators and assigns, according to the nature and quality thereof respectively," upon the trusts hereinbefore mentioned.

The only lands or interest in lands of which the testator could, at the time of his

death, dispose by will were lands situate in the counties of Lincoln, Cambridge, Norfolk and Dorset.

The question was, whether the lands in the county of Norfolk, which were partly of freehold and partly of copyhold tenure, passed under the words "and elsewhere."

The Plaintiffs submitted that under the devise hereinbefore set forth the whole of the testator's lands in the county of Norfolk passed to the Plaintiffs upon the trusts of the will.

[644] The Defendant Sir William Marriot Smith Marriott, the heir at law to the said testator, maintained that the testator died intestate as to all the lands in the county of Norfolk and, as such heir at law, he claimed such of the testator's lands in the county of Norfolk as might be adjudged to be of a freehold tenure.

The Defendants, the customary heirs under the tenure of gavelkind to such of the testator's copyhold lands as were situated in the county of Norfolk, maintained that the testator died intestate as to all his lands in that county, and they, as customary heirs, claimed such of the testator's lands in the county of Norfolk as were of a copyhold tenure.

The case was argued by Mr. Hobhouse, Mr. Selwyn, Mr. C. Hall, the Solicitor-General (Mr. R. Palmer) and Mr. Parke.

June 22. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon the fullest consideration I could give to this case, I have come to the conclusion that the Plaintiffs' view is correct. It is a question of the slightest possible dimensions, viz., what is the grammatical effect of the word "elsewhere" in a sentence of a dozen lines?

Upon the general scope of the sentence itself, I think "elsewhere" must belong to the end of it. Supposing I read the sentence thus, leaving out all the intermediate words:—I devise and bequeath all the freehold, copyhold and leasehold property in the counties of Lincoln and Cambridge, and all the leaseholds in the county of Dorset and elsewhere which I can dispose of by this [645] my will, with the appurtenances, to A. B." I think "elsewhere" must, in that case, extend to the whole sentence. I think it a just observation to make, that there is nothing specified about its being his own property until he comes to the end of the sentence, where he says, "which I can dispose of." It is all the freeholds in Lincolnshire and Cambridgeshire, and all the leaseholds in Dorsetshire and elsewhere "which I can dispose of by this my will." I think the word "elsewhere" must apply to the whole. If I read it in this way, it would be impossible, I think, to say that the word "elsewhere" must necessarily be confined to the county of Dorset. It would run thus:—all the freeholds in the counties of Lincoln and Cambridge and elsewhere, and all the leaseholds in the county of Dorset and elsewhere which I can dispose of by my will. I think the additional words can make no difference, though a good many observations may certainly arise upon the intermediate words, where he says, "except such as I have hereinbefore disposed of." And there is, in fact, a previous disposition of property in the county of Lincoln, but none in the county of Cambridge, and none in the county of Dorset. It is also to be observed that he repeats over again the word "leasehold," and he introduces the word "tithes." Though he does that, it appears to me that the more natural and grammatical construction of it is, to read the word "elsewhere" as belonging to the property he has power to dispose of, the tenure of which he has enumerated in the whole preceding sentence. On looking at the whole scope of the will, I think it is apparent that there is an intention to dispose of the whole of his property, and considering the grammatical construction of this sentence, I am of opinion that it carries the whole of his property wherever it was situate, and I will make a declaration to that effect.

[646] BIBBY v. THOMPSON (No. 1). June 33, 29, 1863.

[See *Newill v. Newill*, 1871, L. R. 12 Eq. 436.]

Bequest to a widow "to be applied by her for the payment of my lawful debts, and the residue for her own use and benefit and that of our infant daughter." Held, that this was not a discretionary trust, but that they were equally entitled.

The testator died in 1848, and his will was as follows:—

"I appoint my wife Margaret Bibby the sole executrix of my said will.

"I give and bequeath to my said wife the whole of my real and personal estate, to be applied by her for the payment of my lawful debts, funeral and testamentary expenses, and the residue for her own use and benefit and that of our infant daughter Mary Bibby."

Mary Bibby was still an infant, and the question was, what interest she took in the residue, which consisted wholly of personal estate.

Mr. Baggallay and Mr. Humphrey, for the Plaintiff Mary Bibby.

Mr. Selwyn and Mr. Cracknall, for the executrix and her second husband, argued that there was a discretionary trust as in *Crockett v. Crockett* (2 Phill. 553), and that the income at least was "to be applied" as the widow thought fit, for the benefit of herself and her daughter, and that therefore the widow was entitled to receive the whole income.

The cases of *De Witte v. De Witte* (11 Sim. 41); *Bustard v. Saunders* (7 Beav. 92); *Mason v. Clarke* (17 Beav. 126), were cited.

[647] THE MASTER OF THE ROLLS, at first, thought that the case came within the principle of *Crockett v. Crockett*, but he reserved judgment.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think my first view of this case was incorrect, and that the residue is divisible between the mother and her child. In *Crockett v. Crockett* the words "be at the disposal" of my wife were used. Here the residue is given to the executrix for "her own use and benefit and that of our infant daughter." That is like a gift to a trustee for the use and benefit of the mother and child.

I think that the mother and the child are equally interested in the residue.

[647] BIBBY v. THOMPSON (No. 2). June 23, 1863.

A large balance was found due from the legal personal representatives, but it appeared that the amount had been received, under orders, in another suit, by their solicitor, who retained it to satisfy large claims he had against his clients. The cause coming on for further consideration, and on a petition of the Plaintiff, the solicitor was ordered to pay the amount into Court.

The testator died in 1848. Under his will his residue was held to belong to his widow and the Plaintiff, his infant child. His widow, who was sole executrix, married Mr. Thompson in 1850.

In 1862 the usual order was made for the administration of the personal estate of the testator, and a balance of £1517, 7s. 2d. was found due from Mr. and Mrs. Thompson.

It appeared, however, that in another suit of *Eccles v. Cheyne* orders had been made, in 1856 and 1859, for payment to Thompson and wife, as the personal re-[648]-presentatives of the testator, of sums amounting to £1832, 5s. 1d. The whole of these sums had been received and retained by Mr. S. B. their solicitor, who claimed a lien on that sum for a large amount for costs and moneys expended for the maintenance of the Plaintiff and her mother. These had been disallowed by the Chief Clerk in the Defendant's discharge, as not coming within the decree.

The cause came on upon the Chief Clerk's certificate and on a petition of the Plaintiff, which prayed that Mr. S. B. might pay the £1832 into Court.

Mr. Baggallay and Mr. Humphrey, for the Plaintiff.

Mr. Selwyn and Mr. Cracknall, for the Defendants.

Mr. Cole, for the solicitor. Unless there be some fraud, a solicitor cannot be brought before the Court by petition; any claim against him, in respect of his receipt of trust money, must be made by bill and not by petition. He has made advances to and incurred expenses for his client, and he has a lien on her interest in the fund. Besides, he is accountable to the client only and not to the Plaintiff for his receipts. There is no jurisdiction upon petition to order him to make any payment, but it is premature to do so until the balance (if any) due from him has been ascertained.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this is a clear case. Here is an administration suit, instituted on behalf of an infant who is interested in the trust fund, against the trustee of the fund, to have it secured in Court and administered for her benefit. It appears that the solicitor of the Defendants has re-[649]-ceived the trust fund, under a power of attorney given by the Defendants, and that it has remained in his hands from that time to the present. This is clear, that the trust fund must be ordered to be paid into Court, in order that the persons' rights to it may be ascertained. It may be that the solicitor is entitled to a lien on it, in respect of everything to which the trustee is entitled, and I am prepared to say that the fund shall not be paid out without notice to him.

Here is a gentleman who knew perfectly well that this was a trust fund which partly belonged to the Plaintiff, and that a suit had been instituted respecting it. It appears that £1517 is due from the Defendants, which ought to be paid into Court, and if it was in their hands the Court would direct it to be paid in. But the solicitor in this cause has this fund in his hands; I think that he cannot retain it against the persons entitled, and that this Court has full jurisdiction, in matters relating to officers of the Court, to direct that to be done which is asked by the petition.

NOTE.—See *Mawhood v. Milbanke*, 15 Beav. 36.

[650] WILLIAMS v. ALLEN (No. 2). June 27, 1863.

[See *Dowdeswell v. Dowdeswell*, 1878, 9 Ch. D. 297.]

A trustee has a primary charge (in priority of the general creditors) to be recouped, out of the life-estate of a deceased tenant for life, the amount of trust moneys wrongfully received by him and for the costs of suit. Moneys are never paid out of Court to an administrator *ad litem*.

Subject to their life-estates and to trusts for their children, which failed, the ultimate limitation of the funds in the marriage settlement of Mr. and Mrs. Norman, dated in 1831, was to her next of kin. She died in 1858, and her husband died in 1860, and thereupon this limitation took effect.

The suit was instituted in April 1860 by the next of kin of Mrs. Norman, seeking to make Mr. Allen, the trustee of her settlement, liable for £1368 New £3 per cents. and other trust funds which were not forthcoming. The trustee said that the produce of the £3 per cents. had been received by Mr. and Mrs. Norman, the tenants for life, and they being dead, he required their legal personal representatives to be made parties. The Master of the Rolls, at the hearing, held (29 Beav. 292) that they were necessary parties, and thereupon the Plaintiff procured administration *ad litem* only to be granted, and made such administrators Defendants to the bill. The Master of the Rolls, on the 10th of February 1862, held this to be insufficient; but the Lords Justices, on the 30th of April 1862, were of a different opinion.

By the decree, made on the 6th of June 1862, it was declared that Mr. Allen was liable to make good the £1368 £3 per cents. and the dividends since the death of Mr. Norman in 1860, and he was ordered to pay so much of the costs as had been rendered necessary in [651] recovering this sum. An inquiry was, however, at his instance, directed, as to whom and in what manner he had disposed of the moneys arising from that fund.

The Chief Clerk found that the fund had been sold out in 1833 and 1834, and that the produce had been paid to Mrs. Norman, under the circumstances stated in the answer of Mr. Allen. In taking the accounts, it appeared that the arrears of the income of the trust funds which had arisen in the lifetime of Mr. and Mrs. Norman was far more than sufficient to replace the amount for which Mr. Allen was liable, for the income had not, for a long period, been received.

The question now discussed was, whether the arrears of income was to be applied in replacing the trust fund, in priority of the general creditors of the tenants for life, it being suggested that all the debts and claims ought to be paid *pari passu*.

Mr. Baggallay and Mr. Whitehorn, for the Plaintiffs.

Mr. Martindale, for the administrator *ad litem*.

Mr. Selwyn and Mr. Steere, for the trustee.

Mr. Burdon, for Wood.

THE MASTER OF THE ROLLS [Sir John Romilly]. It appears to me that the trustee has a primary charge upon this fund, which represents the interest of the tenant for life, and that he ought to be recouped, out of it, the amount of the trust moneys received by the tenant for life.

[652] There may be a surplus, and if so, I am of opinion that the trustee is entitled to his costs out of it. If anything should remain, it must be ascertained how much of it belongs to Mrs. Norman, and it must be carried to the account of her legal personal representative; the same must be done as to so much as belongs to Mr. Norman. There must be a full representation before the shares can be paid out of Court.

NOTE.—Reg. Lib. 1863, B. fol. 1441.

[652] BROOKE v. MORISON. June 22, 1863.

On an application to serve a bill out of the jurisdiction, the Court does not require the allegations of the bill to be stated, the Plaintiff must take the order at his own risk.

Mr. Graham Hastings moved to serve the bill on a Defendant resident in Jersey, out of the jurisdiction. He asked the Court whether it was necessary to state the facts, so as to shew that the case came within the Acts and orders (2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82; 15 & 16 Vict. c. 86, s. 4, and 10th Consolidated Order, rule 7).

THE MASTER OF THE ROLLS. You must take the order at your own risk. I could not usefully go into the facts and circumstances of the case, for the bill always makes out a *prima facie* case for service abroad.

NOTE.—See *Cookney v. Anderson*, 32 L. J. (Chanc.) 427; *Steele v. Stuart*, 10 Jur. (N. S.) 15; *Foley v. Maillardet*, 9 L. T. 643.

[653] BARNES v. BOND. June 29, 1863.

[See *Marshall v. Crowther*, 1874, 2 Ch. D. 200.]

As between tenant for life and remainder-man, the interest on the testator's debts must be borne by the income, as from the day of his death.

The testator directed his debts to be paid, and he devised and bequeathed his real and personal estate to Elizabeth Bond for her life, with remainders over. He provided that, in case his personal estate should be insufficient to pay his debts, his real estate should be sold for that purpose.

The testator died in May 1859, and in July 1860 this suit was instituted for the administration of his estate, and the real estate had been sold.

Some of the testator's debts, which carried interest, had fallen into arrear since the testator's death, and the question now arose, how the arrears of interest subsequent to the testator's death ought to be borne.

Mr. Martindale, for the tenant for life, argued that the debts and interests ought to be paid out of the *corpus* of the estate, or at all events that the interest should not begin to be paid out of the income until one year after the testator's death. He cited *Greisley v. The Earl of Chesterfield* (13 Beav. 288); *Shore v. Shore* (4 Drew. 219, 501); *Coote v. Lord Milltown* (1 Jones & Lat. 501); and see *Yates v. Yates* (28 Beav. 637).

Mr. Appach and Mr. Haynes, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. The interest of every debt which carries interest must be kept down out of income, and the tenant for life must [654] be put in the same situation as if the debts had been paid the day after the testator's death. If the tenant for life receives the whole income while the interest on the debts is running into arrear, he is liable to make good such arrears, and I cannot make any distinction between one year and another. The estate ought to be ascertained at the end of one year and the *corpus* and income duly applied; but if the testator's debts amounted to one-half his estate and the winding up has been delayed for four years, the tenant for life cannot be allowed to take the income of the whole estate during that period and throw the arrears on the *corpus*.

[654] *In re PARKER'S CHARITY.* July 4, 1863.

[S. C. 9 L. T. 72; 11 W. R. 937.]

A testatrix, in 1763, bequeathed her residue in trust for the vicar of N. for the time being, for ever, he annually preaching a sermon, the same to be paid "in augmentation" of the vicarage. The income had not been paid from 1841 to 1863, and in 1847 a sequestration had issued against the vicar, and he had become insolvent in 1852, but no sequestration had issued upon it. The Court assumed the assent of the Ordinary: and Held, that the gift constituted an augmentation to the living, and not a mere legacy to the vicar for the time being, and that the arrears down to 1847 belonged to the vicar, and the subsequent income to the sequestrator.

Mrs. Parker, by her will dated in 1763, bequeathed her residue to trustees, on trust to invest it in the public funds, "for the sole use and benefit of the vicar for the time being of the vicarage of Newton, near Swaffham in Norfolk (which is a very small and poor vicarage, whereof my late deceased husband was vicar) for ever, such vicar for the time being, in the forenoon of every 21st day of June, for ever, preaching, in the parish church of Newton aforesaid, immediately after divine service, an anniversary sermon, in commemoration of me and this my bequest. And I do hereby will, order and direct, that the yearly or other dividends and proceeds of the whole of my said *residuum* shall, from time to time for ever, be received and paid to the vicar of the said vicarage of [655] Newton for the time being *in augmentation* thereof, which is agreeable to the intent and desire of my said late dear husband deceased, who had but very small preferment himself in the church."

The Rev. John Hague Bloom, the present vicar of Newton, was instituted in 1841, but he was ignorant of this bequest until September 1858, and he failed to preach the sermon until 1859. The consequence of which was, that the income of the residue (£827 stock) accumulated and now amounted to £447.

In the meanwhile, Mr. Seppings had, in 1847, obtained a sequestration, on a judgment against the vicar, "of all the rents and rent charges in lieu of tithes, oblations, obventions, fruits, issues and profits, and other ecclesiastical goods whatsoever, of or belonging to the vicarage," for levying £2003.

After this, Mr. Bloom had, in 1852, taken the benefit of the Insolvent Act, but no sequestration had issued under the insolvency.

This was a case submitted for the opinion of the Court, with the sanction of the Charity Commissioners, as to the proper application of the accumulated fund.

Mr. Speed, for the bishop.

Mr. Erskine, for the vicar, claimed the arrears between 1841 and 1847, which, he argued, were never reached by the sequestration, nor touched by the insolvency.

Mr. Jessel, for the assignee in insolvency. The arrears, down to the insolvency in 1852, passed to the [656] vicar's assignee. It is quite true that the assignee could not touch the income of the benefice, except through a sequestration, under the 1 & 2 Vict. c. 110, s. 55. But this income formed no part of the ecclesiastical benefice; it was a mere charitable gift, by will, to the person for the time being filling the character of vicar. This did not make it part of the benefice, nor did it give the bishop any jurisdiction in the matter. The condition attached to the bequest shews

it; for if the vicar had refused to preach the sermon, the bishop could not have appointed a curate to perform that duty or have allotted to him any portion of the income. The sequestrator is the mere bailiff of the bishop, and is accountable only in the Bishop's Court (3 Burn's Ecc. Law, 590); and he can only seize those things over which the bishop has jurisdiction.

The testatrix herself had no power to make her residue part of, or, strictly speaking, an augmentation to the benefice, though it may be done under the Acts relating to Queen Anne's bounty, and the Church Building Acts. This bequest constituted a mere trust in favour of the incumbent for the time being, which was alienable by him, and the arrears, therefore, passed to his assignee under his insolvency.

Mr. Dickinson and Mr. Phear, for the sequestrator, were stopped by the Court.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the sequestrator is entitled and on this ground:—I adopt a portion of Mr. Jessel's argument, and I admit that if a fund is provided for the purchase [657] of the performance of church services by the incumbent of a living, that does not create an augmentation of the ecclesiastical benefice. But I think it quite open to any person to augment any benefice in this country, and that it does not require any statute to enable him to do so. He can leave money or give land if he comply with the formalities required by the Statute of Mortmain, and may annex to the gift any condition which is not illegal, provided the Ordinary consents. Here, the trust having been acted on for 100 years, I must assume such consent to have been properly given.

Next, as to the construction of the will, whether this bequest is an augmentation of the benefice assented to by the Ordinary or a mere charitable gift for preaching a sermon. I find it is given for the sole use and benefit of the vicar for ever. If it stopped there, I should have held it to have been given by way of augmentation of the vicarage. Then he is annually to preach a sermon, but that is not the object of the charity, but is a condition annexed to the gift, which makes it necessary for the vicar to perform that duty to enable them to obtain the particular dividends in that year. If he should wilfully break the condition (see *In re Connington's Will*, 2 L. T. (N. S.) 535) he would not be entitled to the dividends for that year, and they might possibly be applied *cy pres*, and if he refused to perform the condition for fifty years, there might be a large sum accumulated, which would make it necessary to apply to the Court, and the Court might possibly apply it in augmentation of the vicarage; but that is not the case here. The further words of the bequest make the meaning clear beyond all question, for the testatrix orders and directs the dividends to be paid to the vicar of the vicarage "in augmentation thereof." Being so, the sole [658] question is, whether the bequest is illegal or requires any particular form to give it sanction. I am of opinion that it only requires the assent of the patron and Ordinary, and that, at this moment, the arrears form part of the endowment of the benefice, and are applicable in the same way as the small tithes.

I am of opinion that the sequestrator is entitled to the income from the year 1847, and that he will be entitled to the accruing income until the sequestration is discharged; but that the vicar is entitled to the arrears prior to that time.

[658] MADDISON v. PYE. July 6, 7, 1863.

[Questioned, *Scott v. Cumberland*, 1874, L. R. 18 Eq. 578.]

An estate was devised for sale and a portion undisposed of descended on the heir. Held, that the costs of a suit to administer the real estate fell on the devisees and heir *pari passu*.

The testator died in 1835, having devised his estate on trust for sale at a future period, and having given the produce as therein mentioned.

His personal estate was duly administered, but questions having arisen as to the rights of the heir at law in the real estate, a suit was instituted in 1846, praying that the rights to the testator's freehold and copyhold estates might be ascertained and

declared. After the suit had proceeded for some time, the parties, in 1851, compromised the suit, and "it was agreed that the general costs of the cause (not thereinbefore provided for) should be taxed and should stand a charge on the *corpus* of the estate as the Court might decree." By an order of the Court, all proceedings were stayed until the death of the testator's widow, and the costs not provided for by the agreement were reserved.

The widow died in 1861, and the real estate then became saleable.

[659] It turned out that part of the produce of the devised estates had lapsed to the heir at law, it not having been disposed of by the will, and the question was, whether it was primarily liable to the costs of the administration suit or only *pari passu*.

July 7. THE MASTER OF THE ROLLS [Sir John Romilly]. *Eyre v. Marsden* (4 Myl. & Craig, 231) settles this: where a real estate is disposed of in favour of several persons, and the suit is solely for the administration of the real estate and some of the shares lapse, these shares are not to be made to bear the costs of the suit, but the costs are to be borne by the real estate generally, and the heir at law's estate is not to bear all the costs.

I think the terms of this agreement for compromise mean that the costs shall be borne by the whole of the estate; the words are that the costs "shall stand a charge on the *corpus* of the estate," which means on the whole estate; and then are added these words, "as the Court may decree," the meaning of which is not, that everybody is to have his costs, but that the Court may, if it think fit, say, one party is to have his costs and several others are to have but one set of costs between them.

I think the agreement and practice of the Court settles this question. I have always understood the rule to be this:—in suits for the administration of the personal estate, the part of it undisposed of is first applicable to the payment of the costs. But the rule is different as to real estate, there the heir at law is only charged with his proportion of the costs of suit.

[660] CASTLE v. WARLAND. July 1, 2, 1863.

A testator died in August 1861, and his executors remitted to their solicitor £80 to obtain probate and £25 to pay legacy duty. The solicitor became bankrupt in November 1861, and the money was lost. The Court allowed the executors the £80, but not the £25, the latter advance being premature, the legacies not having yet (1863) been paid.

The testator died in August 1861, and in September 1861 the executors remitted £80 to their solicitor, Edward Charles Peagam, to enable him to procure probate of the will of the testator. He also obtained £25 from the executors to pay legacy duty. Edward Charles Peagam became bankrupt in November 1861, whereby the £105 was wholly lost to the estate of the testator, and the question was, whether it ought to be allowed to the executors. At the request of the executors, the Chief Clerk reserved the question for the consideration of the Court.

The legacies still remained unpaid.

Mr. Osborne and Mr. Sandys, for the Plaintiffs.

Mr. Baggallay and Mr. E. K. Karlake, for the executors, cited *Bacon v. Bacon* (5 Ves. 331); *Williams on Executors* (p. 1648 (4th edit.)); and see *Swinfen v. Swinfen* (No. 5) (29 Beav. 211).

THE MASTER OF THE ROLLS [Sir John Romilly] thought he was warranted in allowing the £80 which had been retained by the solicitor for two months before bankruptcy, but that he could not allow the legacy duty, which only became payable on payment of the legacies.

[661] INGLE v. PARTRIDGE. July 3, 1863.

[For subsequent proceedings, see 34 Beav. 411.]

Trustees authorized a firm of solicitors (one of whom, W., was a trustee) to draw the trust funds out of a bank. W. drew it out and misapplied it. The trustees were, on interlocutory application, ordered to pay the amount into Court. Three trustees sold out trust funds and the produce was paid to one alone. The other two were, on motion, ordered to pay the amount into Court.

In February 1859 the Defendants Partridge, Fry and Williams were appointed new trustees of a marriage settlement. In March 1859 they opened a trust account with London bankers, and gave them written instructions to "honor the drafts of any two of us, or of Messrs. Goodwin & Co., No. 3 Lancaster Place, Strand, our solicitors on our behalf." Williams was a member of the firm of Goodwin & Co.

Part of the trust funds (consisting of ready money and the produce of some mortgages called in) was paid into the bank to the trust account, to the extent of £3020, 6s. 7d. It was drawn out by Williams, in the name of the firm of Goodwin & Co., and was applied by him to his own use. Another sum of £236 £3 per cents, which was standing in the names of the three trustees, was sold out by them, and the produce, £299, was paid over to Williams alone.

Upon the admission of these facts by Partridge and Fry, a motion was made that they should pay the amount into Court.

Mr. Hobhouse and Mr. Beavan, in support of the motion.

Mr. Baggallay and Mr. Cracknall, for the Defendants, argued that the Court only ordered trust moneys into Court when they were in the hands of the trustees or under their controul, and that here it was in the hands of the trustee, Williams, alone.

[662] THE MASTER OF THE ROLLS [Sir John Romilly] ordered the two Defendants Partridge and Fry to pay the amount into Court, but gave them until Hilary term, 1864, to comply with the order.

NOTE.—See *Beaumont v. Meredith*, 3 Ves. & B. 180; *Vigrass v. Binfield*, 3 Mad. 62; *Johnson v. Aston*, 1 Sim. & St. 73; *Collis v. Collis*, 2 Sim. 365; *Rothwell v. Rothwell*, 2 Sim. & St. 217; *Wyatt v. Sharratt*, 3 Beav. 498; *Hinde v. Blake*, 4 Beav. 597; *Whitmore v. Turquand*, 1 Johnson & H. 296; *Score v. Ford*, 7 Beav. 333.

[662] DIXIE v. WRIGHT. July 3, 1863.

Freeholds in which a lunatic was interested were taken compulsorily by a company, and the purchase-moneys which, under the Act of Parliament, were liable to be invested in land, was paid into Court and laid out in the Government funds. The existence of the fund was overlooked, and it went on accumulating. A. B., who became tenant in tail in possession, with immediate remainder to her in fee, by her will, devised her real estate and bequeathed "all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public, Government or Parliamentary funds," but she expressed no further intention as to conversion. Held, that the principal fund passed as real estate and the accumulations as personal estate.

By this Act (34 Geo. 3) the Ashby-de-la-Zouch Canal Company had compulsory powers of taking lands, but the purchase-moneys payable to tenants in tail, lunatics, &c., &c., were to be laid out in lands and conveyed to the same uses as the lands taken; and, in the meanwhile, the purchase-money was to be invested in the public funds or Government or real securities.

In 1794 the company took twenty-three acres of land which belonged to Sir Wolstan Dixie (a lunatic) in tail, with remainder to Eleanor Frances Pochin in tail.

The purchase-money, £1150, was paid into Court and invested in £1681 £3 per cents. It had accumulated and now amounted to £2680 stock and £4408 cash.

Sir Wolstan Dixie died in 1806, having done no act to affect the fund.

[663] Eleanor Frances Pochin died in 1823, having done no act affecting the fund, and being apparently ignorant of its existence. By her will, she devised all her real estate on certain trusts, and after making a variety of specific and pecuniary bequests, the testatrix thereby gave and bequeathed *all such capital stock and moneys as she should be possessed of or interested in, at her death, in the public, Government, or Parliamentary funds, or on any other securities, arrears of rent, and all other moneys whatsoever, which should be or become due or owing or payable to her, or should accrue from any unadministered effects of her late father and brother, or any of them, or which she should be possessed of or any ways entitled to at the time of her decease, or which should, at any time, become payable to her or her representatives, after the payment of her debts, &c., to three trustees on trusts which differed from those of her real estate.*

Upon her death, the estates tail determined, but she was also entitled to the reversion in fee of the lands.

The question was, whether this fund was real or personal estate.

Mr. Selwyn and Mr. W. Pearson, for the Plaintiff.

Mr. Mander, Mr. Eddis, Mr. Baggallay, and Mr. Whitehead, for the Defendants.

On the one hand, it was argued that this fund was impressed with a positive statutory obligation to be laid out in land, and that no act having been done to convert it into personal estate, it passed under the will as realty.

On the other side, it was contended that the fund [664] passed under the bequest contained in the will of the absolute owner, of all her capital stock in the Government funds in which she was interested at her death. But that, at all events, the accumulations of dividends formed personal estate.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the capital fund passed as real estate. Here twenty-five acres were taken by a canal company, under the authority of the Act of Parliament, compulsorily and against the will of the owner. It produced £1150; that sum was paid into Court, and represents exactly the land as it was before it was so taken. The tenant in tail was entitled to it in exactly the same way as he was to the land, and until he took some step to convert it into money, it must, in this Court, be treated as money to be invested in land to the like uses. On his death Mrs. Pochin became entitled in fee, and she might have taken it as money, but for that purpose it was necessary that she should express some intention, for unless she did so, it still retained its character of real estate.

It is admitted that she expressed no intention whatever, because she was ignorant of the existence of the fund. If she had expressed the slightest intention to convert it, it would have acquired the character of money, and have passed as such by her will. But she has expressed no intention, and, therefore, the £1150 must go as real estate, but all the accumulations pass as personal estate, and are subject to the trusts of the personal estate.

[665] ROBINSON v. SHEPHERD. July 8, 1863.

[Reversed, 4 De G. J. & S. 129; 46 E. R. 865; 10 Jur. (N. S.) 53. See *Gibson v. Fisher*, 1867, L. R. 5 Eq. 51; *In re Wilson*, 1883, 24 Ch. D. 665.]

Bequest to the descendants of the brothers and sisters of the testator's grandfather, in equal shares *per stirpes* and not *per capita*. There were two sisters. Held, that the fund was divisible, in the first instance, into moieties, and that one belonged to the descendants of one sister *per capita*, and that the other moiety similarly to the descendants of the other.

The testator devised an estate to trustees, upon trust to sell, and to divide and pay the sale moneys "to the persons, being such descendants as next hereinafter

mentioned, *in equal shares*, among and to the lawful descendants living at the time of his (the testator's) death, of such of the brothers and sisters of his late grandfather, Henry Pearson, deceased, as had died leaving lawful descendants, such descendants, respectively, to be entitled to share the same moneys in a course of distribution *per stirpes and not per capita*."

There were two such sisters who had died leaving lawful descendants, but no such brothers.

THE MASTER OF THE ROLLS [Sir John Romilly] (after referring to *Pearson v. Stephen* (5 Bli. 203), and *Dick v. Lacy* (8 Beav. 214), but which he thought did not govern the present case) said—

How can I give the fund "*per stirpes and not per capita*," and at the same time give it "*in equal shares*." I am of opinion that the correct construction is, that there are two roots, that the fund must be divided into two parts, and then that one of them must be divided equally amongst the descendants of one daughter, and the other moiety amongst those of the other daughter, living at the death of the testator. If one left eleven and the other five descendants, it would have to be [666] divided into two equal shares, and one such share would then be divided in elevenths and the other in fifths.

This is my opinion, and I will make a declaration to that effect.

[666] PONSARDIN v. STEAR. July 9, 1863.

A notice of motion to dismiss for want of prosecution is irregular, if served prior to the Plaintiff's being in default, although, at the time when the motion is heard, the Plaintiff is in default.

Before the Plaintiff was in default, according to the General Orders (33 Consol. Ord. III.), the Defendant gave notice of motion to dismiss for want of prosecution; but it was admitted that the Plaintiff was in default at the time the motion was made.

Mr. De Gex, in support of the motion. The General Order states under what circumstances a motion to dismiss may be made; but says nothing as to the time when the notice may be given. It would be a great hardship on a Defendant, where the Plaintiff is in default on the day before the last seal day, to hold that he cannot give notice to the Plaintiff, by anticipation, that unless he takes the proper steps to proceed in his cause application will be made at the last seal day to dismiss the bill. If it were so held, the result would be that the suit would be tied up during the whole of the Long Vacation. There is no case in which it has been held that it is irregular to give a notice of motion in anticipation of a default.

Mr. Selwyn and Mr. Gardener. This proceeding is totally irregular, and, if it were allowed, every Defendant might give notice of motion to dismiss for want of pro-[667]secution the day after he had filed his answer. They were stopped by—

THE MASTER OF THE ROLLS [Sir John Romilly], who said—This motion is clearly irregular, and I must refuse it with costs.

[667] EDWARDS v. BROUGHTON. July 10, 1863.

[S. C. 11 W. R. 1038; 2 N. R. 476.]

The five children of a testator were absolutely entitled to his residue. One of them, on her marriage, settled her fifth of such residue, and all other her share by survivorship or otherwise, and all her right, contingent, reversionary or otherwise, possibility, &c., therein. She afterwards became entitled to a further share, by the death of a brother intestate. Held, that it was not included in the settlement.

The testator, who died in 1826, bequeathed his residue to Eleanor Cormack, his widow, during her life or widowhood, with remainder equally between his five

children, Rebecca, Edward and three others. And he gave his widow the power of settling the daughters' share on the daughters for life, with remainder to their children. And he also directed that if either of his five children should die under the age of twenty-three years without leaving issue, the surviving children should have and take the portion of such dead child.

After all the children had attained twenty-three, Rebecca married, and by the settlement, made on her marriage, dated the 5th of February 1845, after reciting the will and the funds composing the residue, and that Eleanor (the widow) was desirous, in pursuance of the power, to settle the share of Rebecca Cormack of and in the said Bank annuities and personal estate in the manner thereafter expressed, it was witnessed that, in exercise of the power, Eleanor Cormack assigned and Rebecca Cormack assigned unto trustees "all that one-fifth part, share or proportion of and in the said sums of [stating the trust funds], and all and every other the parts, shares and proportions of her Rebecca Cormack, [668] *by survivorship or otherwise*, of and in the same, and of and in the securities for the same for the time being, and of and in the dividends, interest and annual proceeds of the same respectively, and all the estate, right, title, contingent, reversionary or other interest, possibility, claim and demand whatsoever of them Eleanor Cormack and Rebecca Cormack, and each of them, of, in, to or concerning the same or any part thereof," to hold upon the usual trusts of a marriage settlement.

Edward Cormack "died in or after the year 1835(1) intestate," and his sister Rebecca became entitled to one-fifth of his share of the trust funds.

The widow died in 1860, and the question raised by this special case was, whether Rebecca's interest in Edward's share was subject to the trusts of her settlement.

Mr. Graham Hastings, for Rebecca, argued that it was not within the settlement. That if Edward had given it to his sister by his will, the case of *Parkinson v. Dashwood* (30 Beav. 49) would strictly have applied, and that the taking it as his next of kin could make no difference.

Mr. Daune, *contra*. As, at the date of the settlement, all the children had attained twenty-three, there could be no survivorship under the settlement, and, therefore, something beyond that must have been intended. Some operation must also be given to the words "or otherwise." The case cited is distinguishable, and here the word "possibility" is used, which is sufficient to include this interest.

[669] THE MASTER OF THE ROLLS [Sir John Romilly]. I think this case is governed by my decision in *Parkinson v. Dashwood*, and I cannot distinguish it. I consider that this share was vested in the brother, and it came from him exactly as the property did from the father in *Parkinson v. Dashwood*. I must, therefore, hold that it was not included in the settlement.

[669] RAVENSCROFT v. JONES. July 13, 1863.

[Affirmed, 4 De G. J. & S. 224; 46 E. R. 904; 33 L. J. Ch. 482; 9 L. T. 818; 12 W. R. 362. See *Dawson v. Dawson*, 1867, L. R. 4 Eq. 516.]

A bequest of £700 to a daughter before her marriage, Held, not adeemed by a simple gift of £400 by the latter to the husband after the marriage, nor by an advance of £100 to the daughter on her marriage for her outfit.

The testator, Mr. Jones, by his will dated in 1849, bequeathed a legacy of £700 to his daughter Martha Jones.

In June 1855 Martha Jones married the Plaintiff Alfred Ravenscroft, and about three months previously to the marriage, and about three weeks after she had told her father of her intended marriage, her mother gave her £100 in country bank notes, and said it was from her father.

(1) There was a difficulty in fixing this date, but the judgment proceeded on the fact that Edward's death was subsequent to the settlement.

As to this sum Martha Ravenscroft said :—

"I had nothing else given to me to provide for my wedding and marriage. Out of that sum I bought my own wedding dress, and paid for other articles of dress and linen and other necessities which I required on my marriage, and I also paid the expenses of a journey to London."

Alfred Ravenscroft, in his affidavit, stated as follows :—

"About three weeks after our marriage, I was at the [670] house of my wife's father, in a room adjoining to that in which he was, and his wife placed in my hand country bank notes to the amount of £400, and said, 'Mr. Jones told me to give you this.' I went into the other room and thanked my father-in-law, who said 'he hoped it would do me good.' He said nothing then or at any other time of his will or his intentions as to his property, nor did I know anything about them."

The testator made a codicil in 1856, and died in 1859, leaving ten children. The question was, whether the legacy to his daughter Martha was adeemed to the extent of the £100 and £400.

The widow of the testator, in her affidavit, said she had no doubt whatever, from conversations she had had with the testator, that he intended these sums as part of the legacy of £700.

Mr. Southgate and Mr. J. H. Taylor, for Ravenscroft and wife.

Mr. Woodhouse, Mr. Hobhouse, Mr. Bristowe and Mr. Swanston, for the Defendants. *Powys v. Mansfield* (3 Myl. & Craig, 359); *McClure v. Evans* (29 Beav. 422); *Kirk v. Eddowes* (3 Hare, 509); *Montefiore v. Guedella* (1 De G. F. & J. 93), were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not know any case in which it has yet been determined that the gift of a sum of money to the husband of a daughter, by her father, *simpliciter*, after the marriage, and not in consequence of any promise previous to the [671] marriage taking place (which might have a very different effect), has been held to be an ademption of a legacy given to the daughter. It is quite clear that it was not given to the daughter, even nominally, though it may possibly have been afterwards employed for the benefit of herself and children. The rule is, that a legacy given to a person is adeemed by a subsequent gift to that person. But here is a case in which a testator sends £400 by the hands of his wife to the husband of his daughter, and when thanked the testator says "that he hoped it would do him good." I cannot hold that to be a gift or an advance to the wife.

I admit that if the money had been given to the daughter, either directly or indirectly, or settled partly for her benefit, I might then infer that it was intended as an advance to her. But there is nothing of the sort here. It was given apparently to the husband himself to do him good in his business. That is not an advance to her, and I think it is not an ademption. I am not aware of any case which goes to that extent, and I do not think it advisable to extend the doctrine of ademption further. Generally speaking, a testator best knows what he wants, position and condition of all his children are, and he may think that justice requires that they should have different shares in the division of his property. But equity, with a view to carrying out that equality, which is very proper, if no regard be paid to the position in life of the children *aliunde*, insists on making their shares equal, as far as is possible, although it may not appear that the testator intended it, and although there is no evidence on the subject. This Court admits parol evidence to affirm or rebut presumptions; but all evidence tending to vary a will is of a most dangerous character, and accordingly, in all questions of construction, it is very carefully excluded [672] by the Court. Nothing can be more dangerous than to revoke a testator's will, because someone partially or imperfectly recollects a conversation which may have occurred, in which the testator may have made use of certain observations as to his intentions.

I am of opinion that this gift of £400 is not an ademption of the legacy given by the will of this testator, and if he had so intended he might have stated so subsequently, in the codicil to his will.

With respect to the £100 given to the daughter at a time when she was engaged to be married, it appears that as soon as she told her father of her engagement, he gave her £100, out of which she provided her wedding clothes and for her wedding

trip. It does not appear how or by whom the wedding clothes of the other daughters were provided; I presume that they were provided by the father, because they had nothing but what was given by him. Usually a wedding outfit is not treated as an ademption of a legacy previously given; it is only providing that which is absolutely necessary, and is nothing more than an advance of money to pay for clothes necessary for a child's use, and resembles money given for a child's maintenance.

I am therefore of opinion that Mrs. Ravenscroft is entitled to the whole legacy given her by the will, and that these sums constitute no ademption.

NOTE.—Appeal dismissed by the Lords Justices, 30th January 1864.

**The Authorized Reports of CASES in CHANCERY
ARGUED and DETERMINED in the ROLLS
COURT during the time of the Right Honorable
Sir JOHN ROMILLY, Knight, Master of the Rolls.
1863, 1864. By CHARLES BEAVAN, Esqr., M.A.,
Barrister-at-Law. Vol. XXXIII. 1865.**

[1] COVENTRY *v.* BARCLAY. June 2, 3, 19, 1863.

[S. C. varied on appeal, 3 De G. J. & S. 320; 46 E. R. 659; 9 L. T. (N. S.) 496;
9 Jur. (N. S.) 1331; 12 W. R. 500. See *Ex parte Barber*, 1870, L. R. 5 Ch. 693;
Vyse v. Foster, 1874, L. R. 7 H. L. 345.]

When articles of partnership are clear and distinct, then partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which this Court must deal with them, and in some cases the Court has allowed the constant usage of partners to supersede the articles.

By a partnership deed, annual rests were to be made, and entered in a book and signed, and which were to be binding and conclusive on the partners, and in case of the death of a partner, the survivors had a right to take his share at the valuation appearing by the last annual rest. The rest was made in July 1860, in the absence of H. B. (one of the partners), in which, according to the usual custom, the plant, &c., was taken at an arbitrary sum, without any distinct valuation. A copy was furnished to H. B., who expressed no disapprobation. The book was signed by all the partners except H. B., and he died two months afterwards. Held, that the rest was binding on him and his executors, and that the latter could not require an actual valuation to be made of the partnership property.

The testator, Henry Bevan, was a partner in the brewery of Messrs. Barclay, Perkins & Co. from 1809 until his death, which happened on the 11th of September 1860.

The partnership was regulated by a deed dated the 31st of December 1831, made between the testator, Henry Bevan, and his then six co-partners, some of [2] whom had since died and had been replaced by persons representing them.

By the 3d clause, it was agreed that the dwelling-house, buildings, plant, effect and property then used or belonging to the trade, or thereafter to belong thereto, should be the joint property of the partners, and in the proportions following:—one-eighth to the testator and the remainder in shares to the other partners.

The other material clauses of the deed of co-partnership were as follows:—

4. That the gains or profits which should be made in or by the said joint trade, and all losses attending the same, should be divided between and borne by the said several persons parties thereto in the shares and proportions aforesaid.

10. That once *in every year* during the said co-partnership (that is to say), on or about the 5th day of July, or as soon after as conveniently might be, the said several persons, parties thereto, should make, cast up and fully finish between them a true,

perfect and particular *rest or reckoning* in writing of all their joint stock then in co-partnership, and of the value thereof, and of all the gains and produce thereof, and all losses, receipts, payments, dealings and transactions relating to the said co-partnership, for the year last past before the taking of such accounts, and of all debts owing to and from the said joint trade, and of all matters and things belonging thereto.

11. That every such rest or account should be entered into one book, which book *should be signed* by all the said several persons parties thereto; and each party who should require should have a copy of the said book, which said account or rest, *when finished and signed*, in [3] the manner aforesaid, should be binding and conclusive upon all the said several persons parties thereto, their heirs, executors and administrators, and should not be opened, unravelled or altered, unless manifest errors, by omissions, wrong charges or miscastings up should be made appear therein to the amount of £1000, within six calendar months next after finishing such rest or account as aforesaid. And in case any such error should be discovered and made known within that time, the same should be rectified, nevertheless the said account should be binding and conclusive as to all other the particulars therein contained.

And after various provisions enabling the partners to introduce certain persons as partners in respect of their shares, and to nominate successors to their shares in the business, the deed provided:—

38. That if, upon the death of a partner, there should be no person who should be entitled and willing to succeed as a partner to his share in the business, “then the surviving or continuing partners should become the purchaser of such share or shares, and should pay for the same, unto the executors or administrators of the party or parties so dying, so much money as the value of the share or shares, according to the last annual account or rest next preceding the death of such party or parties, together with £5 per cent. per annum upon the capital, in lieu of the share or shares of the profits of the party or parties so dying, from the time of that account or rest to the time of the decease of such party or parties, should amount unto, with interest upon such amount at the rate of £5 per cent. per annum, to be computed from such the time of the decease of the said party or parties, in four equal payments,” payable at intervals of six months. And they were to give bonds to secure [4] the amount and to indemnify against the debts. The clause then proceeded:—“And the heirs, executors or administrators of the said party or parties so dying should thereupon, at the expense of the said joint estate, convey, assign and make over the share or shares and interest of the said deceased party or parties in the said brewhouse, brewhouse plant, dwelling-house, messuage and hereditaments, stock, debts and said estate, effects and things, for the time being in or belonging to the said co-partnership, unto the said surviving or continuing co-partners, their heirs, executors, administrators and assigns.”

The partnership accounts were made up annually from 1831, and were entered in “the rest-book,” which was duly signed by all the members, including Mr. Henry Bevan, down to the 5th of July 1859.

On the 5th of July 1860 the accounts of the firm were made up in the usual and accustomed manner; but Mr. Henry Bevan, who from age and infirmity had ceased to be an active partner, was absent. A balance-sheet shewing the result of such accounts was made out, and was, in the same month of July, taken and shewn, by the Defendant Charles Bevan, one of the partners in the concern, to his uncle Mr. Henry Bevan at his residence at Twickenham, who, when he had examined it, expressed his dissatisfaction at the amount coming to him being considerably less than in the preceding year; he, however, made no objection to the mode in which the account was made out or to the manner in which the valuations were made, and he retained the balance-sheet. He never signed the rest-book, although it was signed by all of the other partners. Shortly afterwards he was taken ill, and he died at the age of eighty-three on the 11th of September 1860.

[5] By his will, dated in December 1859, Mr. Henry Bevan appointed the Plaintiffs his executors, and he directed them to get in his share of the brewery; but he appointed no successor to his share in the business, so that the 38th clause of the articles became operative.

After the death of Mr. Henry Bevan, his executors made application to Messrs. Barclay, Perkins & Co. for an account, shewing the amount which was payable to them. They also asked for an inspection of the partnership books, and required a valuation of the whole of the partnership property.

Messrs. Barclay, Perkins & Co. furnished a short account, consisting of six items, founded on the last annual rest, and shewing a balance of £152,302 due to the estate of Mr. Henry Bevan. They declined to produce the partnership accounts, with the exception only of the rest-book, which shewed the annual rest or balance for the year 1860 (July), and they insisted on retaining the share of their deceased partner in the property and plant, upon the terms of the 38th clause of the articles, namely, at the value appearing upon the last annual account or rest preceding his death.

It appeared, however, that the value of the property, plant and assets, as entered in the rest-book for the year ending in July 1860, was founded on no actual valuation of it, but, in accordance with the custom which had prevailed continuously from the year 1831, an arbitrary and nominal value was attached to them by the acting partners.

Under these circumstances, the executors insisted that the annual rest was not binding on them or their testator.

[6] Another point in the case arose under the following circumstances:—In the balance of July 1860 was a large item of £51,133, 6s. 1d., called "*the sinking fund*," which was neither entered in the account as capital or profits. This was set apart and retained to meet contingent losses, arising from bad debts not already ascertained, or on contracts, the result of which was unknown, and similar matters. The Plaintiffs insisted that they were entitled to a share of so much of this fund as might not ultimately be required to cover contingent liabilities.

The executors of Mr. Henry Bevan filed their bill against his surviving partners, alleging a number of facts tending to shew that the value of partnership property, plant and assets was greatly undervalued in the last balance of July 1860. It prayed a declaration that Mr. Henry Bevan and his executors were not bound by the rest of the 5th of July 1860, and asked that the partnership accounts might be taken from the foot of the last settled account, and that the share of Mr. Henry Bevan might be ascertained and paid.

THE SOLICITOR-GENERAL (Sir R. Palmer), Mr. Selwyn and Mr. Speed, for the Plaintiffs, argued that the last rest, not having been "*signed*" by Mr. Henry Bevan, was not, upon the terms of the articles, conclusively binding on him, and that his share must be ascertained by taking an actual valuation of all the assets of the partnership, consisting of freehold and leasehold property, plant and stock-in-trade, debts, &c., and that one-eighth part of this must be paid to the executors.

Sir Hugh Cairns, Mr. Amphlett and Mr. Hoare, for the Defendants, contended that the Plaintiffs, as executors of Mr. Henry Bevan, were only entitled to one-eighth part of the assets of the partnership as they [7] were estimated in the book of the partnership at the last annual taking of the accounts, as appearing in the book called "*the rest-book*," and that this was determined both by the true construction of the partnership articles themselves, and also by the acquiescence of the deceased partner.

Smith v. Everett (27 Beav. 446); *Lees v. Laforest* (14 Beav. 250); *Pettyt v. Janeson* (6 Madd. 146); *Simmons v. Leonard* (3 Hare, 581); *Blisset v. Daniel* (10 Hare, 493), were cited.

June 19. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this cause is, in what manner the value of the share of a deceased partner, in the great firm of brewers commonly known by the name of "Barclay, Perkins & Co.," is to be ascertained. This question partly depends on the proper construction to be placed on the articles of partnership, and partly on the acts of the partners amongst each other. The real question is this:—Is the estate of Mr. Henry Bevan bound by the valuation made in the rest-book, on which the balance-sheet shewn to him was founded? and I think that it is. It is argued that it appears by the accounts that no real valuation was made of the property, that it was estimated on an arbitrary principle, without taking any steps for the purpose of ascertaining its real market value, which, for instance, if it were sold, it would realize. But I find, upon the evidence, that the same principle of valuation had been adopted [8] since the

year 1831, when the articles were executed, down to and including the year 1860. I find that Mr. Bevan had signed the rest-book for every year during the twenty-nine years which elapsed from the date of the articles, down to and including July 1858; that he was perfectly cognizant of the mode in which this valuation was made, and that he never made any objection to it, or any remonstrance on the subject. It is obvious that if he had died at any time after he had signed the rest-book in July 1859, and prior to the 5th of July 1860, his estate would have been bound by the accounts and valuation so signed by him. I doubt whether, on any known principle by which Courts of Equity deal with such cases, he could, after so long an acquiescence in this mode of estimating the value of the concern, have been permitted to introduce a new mode and system of valuation in his lifetime without the assent of his co-partners. But that is not the question before me; the question is whether, what he did not do himself, his executors can be permitted to do in his place.

I assume, for the purpose of testing the argument, that the valuation made in the rest-book was far below the real value of the partnership assets. It is plain that if one of the other partners had died before Mr. Bevan without appointing a successor, Mr. Bevan would have had the benefit of the reduced amount of valuation in the increased share he would, in that event, have taken. Was it open to him to contend this:—If one of my partners should die I insist on the valuation so made in the rest-book; but if I should be the first to die, then I insist that my executors should have the opportunity of obtaining a new valuation, which would greatly increase my estate. I apprehend that such a course would be impossible.

[9] It is true that he was much advanced in years, but one of his co-partners was still older than himself, and reckoning merely on the circumstance of age, might reasonably have been expected to predecease him. It is impossible that Mr. Bevan could have been permitted to say in his lifetime, "I decline to sign the rest-book; if one of my co-partners predecease me, I shall insist on the valuation therein appearing, but if I die first, I shall require my executors to contest it."

The case of *Blisset v. Daniel* (10 Hare, 493), which has been much relied on in argument for the Plaintiff, appears to me, when properly considered, not to be favourable to the Plaintiff, but rather to support the view I am now stating. In that partnership there was a clause for taking the accounts similar to that which appears in the case before me, and a similar custom; but the Court there held that such a clause and custom could not be taken advantage of, for the purpose of expelling a partner, and thereby benefiting those who expelled him; that is, that it is not competent for any one or more of the partners to make use of such a clause for his or their exclusive benefit. But that would be the case here if it was open to Mr. Bevan to adopt it if he survived one of his partners, and yet that his executors could reject it if he predeceased them. Here the clause and custom would be adopted by the partner if beneficial to him, but repudiated if otherwise, and this not depending on the act of the others.

Suppose that, in the case of *Blisset v. Daniel*, instead of a power enabling some partners to expel another partner, the clause had been that they were to draw lots for one partner to retire: could the retiring partner who had drawn the unlucky lot have afterwards insisted that [10] the mode of taking the valuation ought to have been altered, and that having taken the risk of the chance which, if it turned out in his favour and had removed another partner, would have increased his share, he could repudiate the arrangement, because the chance had gone against him? I apprehend clearly not, and yet, practically, that is what is sought to be done in the present case. In truth, in *Blisset v. Daniel* the decision of the Court rests upon fraud, the Court held that, as soon as the remaining partners determined to expel Mr. Blisset, they were bound to inform him of that fact, in order that he might take such steps as he was lawfully entitled to take in the existing circumstances. In the case of *Blisset v. Daniel*, the excluded partner had actually signed the accounts and the valuation; and if that case were, in fact, applicable in the present instance, and governed this case in all respects, it would then follow that, if Mr. Bevan had died before the 5th July 1860, he would not have been bound by the valuation in the rest-books which he had signed in July 1859, a point which, on the construction of the articles, was not, and could not reasonably have been, argued before me.

If, in *Blisset v. Daniel*, the partner had died, instead of being expelled by his co-partners, then, I apprehend, the Court would have held that the valuation made was a good and binding valuation, and that his executors could not have set it aside. In truth the very point is stated by the Vice-Chancellor in p. 517 of that report, and is distinguished by him as being distinct from the case where the chances are equal, as in the case of death or voluntary retirement, but in no respect applicable to the case of expulsion.

In truth, the mode of valuing the property adopted [11] by the partners, and the manner in which they have been in the habit of taking the accounts, are circumstances applicable to the case of the continuance of this partnership, under the clause which provides for its duration as long as the nature of things would permit, and is meant for the equal benefit of all, and all the partners having an equal chance of deriving a benefit from them; they are not applicable to the case where some one partner seeks thereby to obtain an advantage over another by means of his own acts.

Unquestionably, fraud introduces a new element in all cases of this description, and no decision founded on that principle, when that is a main ingredient, can properly be held to govern cases where, as in the present, all the parties act *bonâ fide*, and where the notion of obtaining any undue advantage is as foreign to the continuing as it is to the retiring partner. If, in September 1860, Mr. Bevan, instead of dying, had voluntarily chosen to retire, I should have held him equally bound by the rest-book, though not signed by him; his death does not give his executors any higher right than he himself possessed. I am of opinion that if, in September 1860, he had first contested the propriety of the valuation, he could not have succeeded in so doing, and this appears to me to rest on a principle of great importance, and constantly acted upon in Courts of Equity. It is that the course of dealing adopted by the partners themselves binds them.

When the articles of partnership are clear and distinct, the partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which this Court must deal with them. In some cases, indeed, this Court has gone so far as to allow the constant usage of [12] partners to supersede the articles; but that case does not arise here. Here, so far as the articles say anything on the subject, they make the *last* valuation binding. When Mr. Bevan made his will he was unquestionably bound by the valuation signed by him in July 1859, according to the strict words of the articles; if he died after July 1860, and no valuation had been made since July 1859, he would have been bound by that valuation. I assent to the case of *Pettyt v. Janeson* (6 Madd. 146), which shews that if the remaining partners had endeavoured to bind his estate by that valuation, they would not have been entitled to do so; but I am at a loss to understand how that case shews that the valuation to be made in July 1860 was to be made on a principle to be introduced into the partnership for the first time, against the will of all the other partners, and materially altering their rights and interests as between themselves.

If I adopt the argument that if any one of the partners thought proper, a new system of valuation might have been introduced, still I am of opinion that it would not be competent for him to do so as to past accounts, even though they had not been signed by him, but that it would have been necessary for him to have given notice of his intention of introducing such new alteration for the future. But I do not mean to express any opinion as to whether he would, in that respect, have been entitled to controul the wishes of the other partners.

I have hitherto considered this case as if Mr. Bevan had resisted the valuation made in 1860. But it is important to see what the facts, shewn in the evidence, are, as to the conduct of Mr. Bevan; and I think that he never did contest or intend to contest the accuracy [13] of the balance-sheet submitted to him, or the principle on which it was made out. I am of opinion that the utmost extent to which the evidence can be viewed in favour of the Plaintiffs is this:—that Mr. Bevan did not expressly state his acquiescence in the balance-sheet sent to him, and which, it is admitted, accurately represents what appears in the rest-book; but I am clear that, upon the evidence, he nowhere expressed any dissent. He continues then for two months neither expressing assent nor dissent, and without making any remonstrance; and, upon the evidence of Braby and of Charles Bevan, I am disposed to think that he

had no intention to act differently, on this occasion, from what he had done on former occasions.

Then what does the case of the Plaintiffs amount to? this and this only:—that whereas an uniform course of dealing has taken place for thirty years under these articles, to all of which Mr. Bevan assented up to July 1859, and to which he expressed no dissent after that period up to September 1860, still that his executors, who stand precisely in his shoes, can come to this Court and say, “We are entitled to have the whole system altered from the date of the last account in July 1859.” If it could be shewn that the valuation was on a fraudulent principle, of which he was not cognizant, the case, as I have already said, would be varied. But nothing of the sort exists; so far from it, on the best judgment I can form, on examination of the valuations, they are made on a fair and equitable principle, assuming even that if a professional valuer were called in he would place a much higher value upon them. But in truth nothing can be less satisfactory than the valuation of professional valuers of property of this description; and this is constant experience of the Court. One set of valuers proceeds on the principle [14] that no person or set of persons could be found to buy so very large a concern, and that it must be valued as if discontinued and the business broken up, and thereupon the land and materials sold. On the other hand, another set of valuers proceeds on the principle of putting the highest rate of profit on the concern, and that the public is teeming with persons ready to compete for the purchase, and if not to buy for themselves exclusively, at least to form a joint stock company to buy and conduct so profitable a business, with expectations of indefinite success. And when the Court, in despair at reconciling such conflicting valuations, appoints a valuer, to arbitrate as it were between those two classes, it is obliged to proceed much on guesswork, without any certain data on which to found a satisfactory conclusion.

I am of opinion, on the whole of this case, that Mr. Bevan was bound by the valuation taken in the rest-book for July 1860, and that his executors cannot now disturb it.

There is still, however, another question behind, assuming that valuation to be correct, and that the purchase of Mr. Bevan's share is to be made on that principle, which is this:—It remains to be determined whether his estate is entitled to any portion of a sum of £51,133, 5s. 11d., called in the account “the sinking fund.” Upon the evidence as to the character of this fund and on the general scope of the articles, I am of opinion that the executors are bound by this item in the *last* account, and that they are not entitled to any part of this fund. As I understand the case, it is this:—the profits are ascertained over and above the sums drawn out by the partners during the year at £40,000. On the 5th of July 1860 £51,133, 5s. 11d. is set apart as a “*sinking fund*” (an expression which does [15] not accurately convey the scope and object of the function it has to perform); a sinking fund, in the ordinary acceptance of the term, is a fund set apart to make good some existing debt or deficiency, but this seems to have been a fund set apart, on an estimate, in order to meet contingent losses, whether arising from bad debts not already ascertained or on contracts already entered into, the results of which were not yet ascertained. For instance, it appears that a large portion of the trade of the concern consists in consignments made to foreign countries, which is termed “the export trade,” the final result of these transactions may not be capable of being ascertained for a considerable time. This sum is calculated, though upon what principle I have not been able accurately to ascertain, with a view of meeting the losses which may arise in transactions not concluded, and the result of which are not ascertained at the time of the annual rest, and not, as I understand it, to guard against the losses which may be sustained in contracts not then entered into. Whether this distinction is clearly defined I have not been able to satisfy myself, but still I observe that by the 37th clause of the articles it is provided, “that any executor or administrator who shall be in any way interested as aforesaid shall not have power or authority to attend at the brewhouse where such joint trade or business shall be carried on, except once in the year, at the general rest, to inspect the books of account, whereby the balance shall be made out and appear to be due to the respective parties.”

It is therefore obvious that the arrangements between the partners was, that the

executors of the deceased partner should not have the means of judging as to the profits made, except as they appear by the books on the day when the annual rest is made, and I think it must be taken, on the evidence, that this sum is, by [16] agreement, set apart as constituting no portion of the profits. If so, then, if Mr. Bevan had died before July 1860, his executors could not have required any portion of the sinking fund of July 1859, which amounted to £52,855, 5s. 9d., to be applied as belonging to his estate; and if so, and I am right in the rest of the view I have taken of this case, viz., that Mr. Bevan is bound by the rest-book of July 1860, then, in like manner, his executors cannot require any portion of this £51,133, 5s. 11d., the sinking fund of 1860, to be applied as part of his estate.

In truth, were it otherwise, the result would be, that many years might elapse before the final result of the transactions prior to that month could be completely ascertained, and, by this means, the accounts between the firm and the deceased partner might be prolonged for an indefinite period. It would also necessarily follow that if the sum so set apart had been under-estimated, the surviving partners would have a claim against the estate of the deceased partner for such deficiency, and this would necessarily entail the right of the executor to ascertain, from the accounts and inspection of vouchers and the like, whether the amount of the over-estimate or under-estimate alleged were correct; yet this appears to me to be precluded by the 37th clause, which I have read. It is, in my opinion, the object of the articles to obviate all these inconveniences.

It is my opinion, therefore, that this sum, so set apart as the nominal sinking fund, was intended to bind, and that it does bind both sides, so that neither the retiring partner nor the executor of a deceased partner, on one side, nor the surviving partner, on the other side, could contest the accuracy of the estimate so made. It follows, therefore, in my opinion, that the executor cannot claim any portion of this fund.

[17] If, indeed it could be shewn that this sum, or indeed any other part of the accounts appearing in the rest-book, was erroneous, independently of the ingredient of fraud, which does not exist here, then the articles themselves provide for the redress of such errors. But none of these are alleged to exist in the present case, with the exception of what I cannot but consider to be an irregularity, but one which does not affect the Plaintiffs or the late Mr. Henry Bevan, I mean that process by which the £1000 per quarter, drawn out by each partner in respect of the anticipated profits on his one-eighth, is omitted from both sides of the account. This would have made the profits for the year ending July 5th, 1860, £72,000 instead of £40,000, but it would not have augmented the sum to be paid to Mr. Henry Bevan. This practice, however, seems to have obtained from a very early period, and certainly it in no respect affects the interests of any of the partners *inter se*, nor does it make these accounts inaccurate, in the sense in which they could alone be opened by virtue of the 11th clause of the articles, or so as to shew that Mr. Henry Bevan or his executors were not bound by them.

In my opinion, therefore, the Plaintiffs fail wholly in their contention, and, as I understand that the sums appearing by the rest-book of July 1860 have been duly discharged or secured, according to the provision of the 38th clause of the articles, there is nothing, if I am right, to be done further between the Plaintiffs and the Defendants, and the bill must be dismissed with costs.

NOTE.—This case was affirmed by Lord Westbury, L.C., on the 10th of December 1863, as to the first point, but reversed as to the second, his Lordship considering that “the sinking fund” was a “suspense account,” the surplus of which was divisible between the Plaintiffs and the surviving partners, according to their shares in the partnership. [3 De G. J. & S. 320.]

[18] COWEN v. PHILLIPS. May 7, 1863.

[S. C. 9 Jur. (N. S.) 657; 8 L. T. 622; 11 W. R. 706. Followed, *Fillingham v. Wood* [1891], 1 Ch. 51.]

A tenant in possession, having an equitable interest only under an agreement for a

lease for a term, is, in equity, an "adjoining owner" under the Metropolitan Building Act (18 & 19 Vict. c. 122), and three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbour, under the powers of that Act.

The question in this case arose on the construction of the Metropolitan Building Act (18 & 19 Vict. c. 122), which enables (s. 83) "*the building owner*" to pull down and rebuild party-walls, and do other works, upon giving his neighbour, who is in the Act called "the adjoining owner," "at least three months previous notice," s. 85 (1). The word "owner" is defined in s. 3 as follows;—"owner shall apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as tenant from year to year, or for any less term, or as a tenant at will."

The question arose under the following circumstances:—By a memorandum of agreement, signed but not under seal, Mr. Baker agreed to let to the Plaintiffs, Cowen and Davis, a shop and parlour on the ground floor and two kitchens on the basement, being part of No. 3 Bruton Street, Bond Street.

Messrs. Phillips (the Defendants), who were the occupiers of the adjoining house, being desirous of rebuilding the party-wall between their premises and No. 3 Bruton Street, gave due notice to Mr. Baker only on the 18th of July 1862. Mr. Baker not having appointed a surveyor to act for him, one was appointed for him by Mr. Phillips under the Act. The surveyors made an award on the 2d of August 1862, settling how the works were to be done, and awarding that the works [19] should "be commenced at once." No notice whatever was given by Messrs. Phillips to the Plaintiffs. On the 21st of August 1862 the Defendants' workmen commenced operations and knocked holes through the party-wall, thus exposing the shop. The Plaintiffs thereupon filed this bill praying an injunction.

The Plaintiffs submitted that the Defendants had no right to pull down the wall, during the Plaintiffs' tenancy, without the Plaintiffs' consent, or without having served them with the notice required by the statute. They did not object to the wall being pulled down and rebuilt, provided some good and effectual fence or screen was erected to protect the said premises and all the articles therein from exposure and depredation, and provided that all damage done to their premises and articles was made good to them by the Defendants.

An interlocutory injunction had been granted, and the cause now came on for hearing.

Mr. C. Swanston, for the Plaintiffs, argued that the agreement was valid as a contract, and that, in equity, the Plaintiffs were tenants for three years certain; *Parker v. Taswell* (2 De G. & J. 559). He asked that the injunction might be made perpetual, and that the Defendants might be ordered to pay the costs. He also asked for an inquiry as to damages; *Burgess v. Hills* (26 Beav. 244).

Mr. Selwyn and Mr. Renshaw, for the Defendants. The agreement not being under seal is void as a legal demise; 7 & 8 Vict. c. 76, s. 4; 8 & 9 Vict. c. 106, s. 3. The Plaintiffs are therefore tenants from year to year or at will, and therefore not within the definition of [20] "owners," so as to entitle them to notice. The Act only contemplates a legal ownership and does not affect equitable interests, and a notice to a trustee would be sufficient without giving notice to every *cestui que trust* who might be interested. Such a notice has been given in the present instance.

This is not a case for damages, none having been sustained. They cited *Stratton v. Petit* (16 C. B. Rep. 420); *Tress v. Savage* (4 Ell. & B. 36).

Mr. Hobhouse and Mr. Freeling, for Baker, merely asked for his costs.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiffs have a right to a decree. The real question is, whether the Plaintiffs, as the adjoining owners, were entitled to receive any notice from the Defendants. The Plaintiffs have been in occupation under the agreement set forth in the bill, by which Mr. Baker, who had power to grant an under-lease, says, in consideration of £50, I hereby let you the shop, parlour and kitchen for three years, at the yearly rent of £105. It is not under seal, and therefore, under the Act, it is not a lease; but, although it is void as a lease, the question is, whether it is not valid as an agreement. I have no doubt

that it is a valid contract, and that this Court would specifically enforce it. Whether a Court of law would refuse to give damages is another question, with which I have nothing to do.

The only question is, whether the Plaintiffs were the adjoining owners within the Metropolitan Building Act, [21] which excepts tenants from year to year. If I am right as to validity of this agreement here, then in equity the Plaintiffs had an interest greater than from year to year, for it was an interest for three years, and unless this clause of the Act be confined to bare legal interests, the Plaintiffs were clearly entitled to notice, and I have been referred to no case which says they are not. If this Act were confined to bare legal interests, then in the case of a marriage settlement, where the legal estate is vested in trustees, although the husband and wife, the tenants for life, are in possession of their property, and the trustees abroad, the husband and wife are to have no notice of pulling down their house. I am satisfied that this is not the proper construction of the Act, nor could it be carried into effect.

According to Mr. Baker's evidence the house was divided in two with two doors; the Defendants were told that he had no power to deal with the part occupied by the Plaintiffs, and that they must be dealt with separately. But the Defendants chose to assume that they are only to deal with Mr. Baker, they treat the premises as his, and, under the 5th section, they appointed a surveyor on his behalf upon his neglecting to appoint one, but they give no notice to the Plaintiffs. The arbitrators make an award respecting the works to be done on the premises of which the Plaintiffs are the adjoining owners, and the Defendants break into the premises, notwithstanding the Act of Parliament says that they shall not proceed unless they comply with certain forms, which they have not complied with.

I am of opinion that the Defendants are in the wrong, that the Plaintiffs were justified in bringing this suit to a hearing, and that Mr. Baker was properly made a party. There must therefore be a decree for [22] the Plaintiffs with costs up to hearing, including those of Mr. Baker, and there must be an inquiry if any and what damage has been sustained by Plaintiffs.

[22] FECHTER v. MONTGOMERY. June 19, 1863.

[See *Montague v. Flockton*, 1873, L. R. 16 Eq. 199. Distinguished, *Grimston v. Cunningham* [1894], 1 Q. B. 125.]

The Plaintiff, the manager of a London theatre, engaged the Defendant, a provincial actor desirous of appearing on the London stage, for two years. Though there was nothing expressed on the subject, the Court inferred an engagement on the part of the Plaintiff to employ the Defendant for a reasonable time, and on the part of the Defendant not to perform elsewhere. The Plaintiff having (under these circumstances) delayed the Defendant's appearance for five months, the Defendant broke his engagement and went to another theatre. Held, that he had a right so to do, and that the Plaintiff was not entitled to an interlocutory injunction to prevent his performing there.

In 1862 the Plaintiff Mr. Fechter, the lessee of the Lyceum Theatre, entered into negotiations with the Defendant, a leading actor of considerable distinction in the provincial theatres, with a view to engage his services. Interviews took place between them, at which the Plaintiff expressed his earnest desire of acting in London in Shakespeare's plays, and said he was willing to make a pecuniary sacrifice for the attainment of that object. He said, Mr. Fechter, "Remember that I come to you not to be idle, but to act:" to which he replied, "Certainly, that is so." The Plaintiff promised the Defendant an immediate appearance, and stated the parts to be given to the Defendant, and he proposed to open with one of such plays.

The parties shook hands on the bargain, which did not, however, appear to be very definite; but a day or two afterwards the Defendant, having expressed a wish that his engagement should be in writing, Mr. Barnett, the Plaintiff's stage manager, wrote to the Defendant as follows:—

"July 28th, 1862.—Dear Montgomery,—I am directed by Mr. Fechter [23] to offer you an engagement at the Lyceum Theatre for two years, commencing January 1st, 1863, at a salary of £7 per week for the first and £10 per week for the second year; it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter.—Yours truly,

H. BARNETT,
"Pro C. FECHTER."

The Defendant replied by simply accepting the offer, "on the terms and conditions named in the letter of the 28th of July 1862." There was no other written agreement. The salary was considerably less than that which the Defendant was earning by his country engagements, which was £30 per week.

The Plaintiff opened the Lyceum Theatre, on the 7th of January 1863, with a dramatic piece called "The Duke's Motto," in which Mr. Montgomery was not engaged. This piece proved eminently satisfactory to the public, and lucrative to the Plaintiff, and he had continued the performance of it from day to day down to the present time. Mr. Montgomery had not, as yet, made his appearance, though he had been willing and anxious so to do, but he had regularly received his salary. He was, from the commencement, advertised in the play bills as about shortly to appear.

The Defendant, being greatly dissatisfied, had an interview with the Plaintiff on the 13th of June 1863, when he complained and stated that he should go, and "that if the Plaintiff would not break his engagement in a friendly way, he would break it from the present moment."

The Defendant, thereupon, entered into an engage-[24]-ment with Mr. Vining to perform at the Princess's Theatre, commencing on the 20th of June.

The Plaintiff immediately filed this bill to restrain him, and the case now came on upon a motion for an injunction.

In support of the motion, the Plaintiff's stage manager made an affidavit, stating as follows:—

"It is the custom of actors, and well understood by them in their profession, that when an actor is engaged at a theatre, although the agreement may be silent on the subject of his performing elsewhere, he is bound, by the person engaging him, to perform only at the theatre at which he is engaged; the object of an engagement by the manager of the theatre being, not merely that it should be at his discretion to avail himself of the present engagement, but should, at the same time, exclude the person engaged from offering his services to any other theatre."

To this the Defendant in his affidavit stated, "It was certainly not my intention not to perform at any other theatre, without the consent of the Plaintiff, during the aforesaid period of two years, if the Plaintiff did not keep the promise that he had made to me, and on the faith of which I had entered into my agreement, nor was there any understanding of the kind. The alleged custom referred to in the 4th paragraph of the said bill (if any such custom exists) only holds good so long as the agreement between the manager and actor is unbroken by the manager."

Mr. Selwyn, and Mr. T. H. Terrell, for the Plaintiff, argued that there was an implied engagement, on the part of the Defendant, not to act elsewhere than at the [25] Lyceum. That so long as the salary stipulated for was regularly paid, the agreement remained in force, and that there was no obligation, on the part of the Plaintiff, as to the extent to which he would avail himself of the Defendant's services. That the Plaintiff had every wish actively to employ the Defendant, but that the interests of the theatre at present prevented it. They cited *Lumley v. Wagner* (5 De G. & Sm. 485).

THE MASTER OF THE ROLLS referred to *Clarke v. Price* (2 Wilson, C. C. 157).

Mr. Baggallay and Mr. Graham Hastings, for Mr. Montgomery, argued that the whole object of the Defendant, and for which he had made such great sacrifices, had been defeated by the Plaintiff's not allowing him to appear before a London audience, and that the Plaintiff, who was the party in default, was not entitled to an injunction.

Mr. Brooksbank, for Mr. Vining, the lessee of the Princess's Theatre.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this is not a case in which the Court ought to interfere by way of interlocutory injunction to restrain the Defendant from acting.

The first question to be considered is, what is the [26] meaning of the agreement which has been entered into between the parties, and its meaning must be construed not merely by the terms of it, but also by the position and situation of the parties who have entered into the contract. The contract consists of a simple consent to a proposal, which is in these words:—"I am directed by Mr. Fechter to offer you an engagement at the Lyceum Theatre for two years, commencing January 1st, 1863, at a salary of £7 per week for the first, £10 per week for the second year; it being thoroughly understood that no advantage will be taken of the confidence you have reposed in Mr. Fechter."

If this be construed strictly, it of course does not give Mr. Montgomery any right to require Mr. Fechter to employ his services at the theatre, so long as his salary is paid, and on the other hand it does not give Mr. Fechter any right to prevent Mr. Montgomery from acting in any other place than the Lyceum. But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of the 21st of June 1862, written to Mr. Barnett, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theatre, and that it was an agreement on the other side that he (Mr. Montgomery) should not perform elsewhere without the consent of Mr. Fechter; that there was a mutuality in the agreement entered into on both sides, on the one side that he should have an opportunity of displaying what his abilities and talents were before a London audience, and [27] on the other side, that he should not act elsewhere, unless with the permission of the Plaintiff.

That being the state of the case, the only questions are, whether that contract has been really broken between the parties, and who was the person that first broke it, so as to entitle the other to say it is no longer binding upon him. Upon that question, it is material to regard the facts that occurred; but before I advert to them, I may notice an observation that fell from Mr. Terrell that the contract is like an agreement for engaging a clerk, or any other person whose service you require and wish to secure. I do not assent to that view of the case; you must regard the position and situation in which the person is placed who enters into the contract. Here the Defendant carries on the profession of an actor, a profession peculiar in its character and results, for it is to be observed that his success entirely depends on pleasing the public, and upon being constantly before the public. It is scarcely possible to say that he could acquire such a reputation, by being associated with Mr. Fechter, as would supply the place, which I assume, for the purpose of the argument, he might have gained by delighting a large portion of a London audience with the ability with which he acted. It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person. It is clear that the great object of any gentleman wishing to become a distinguished actor, when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description, and it would be defeated if the effect of the contract is this:—That if the gentleman who engaged him is not bound to employ him, and does not in fact do so, so as to [28] give him an opportunity to display his talent and abilities, yet he is not to be at liberty to act elsewhere, unless by the permission of the gentleman who engaged him. I entertain no doubt that it was a mutual contract between the parties, and also that Mr. Fechter so understood it. It is shewn by Mr. Barnett's letter, and by the conversation itself, that this was part of the contract entered into between them.

I now come to the question, whether it can be said that Mr. Montgomery is to blame for saying, on the 13th of June, that he would then put an end to the contract. That there was a binding contract up to the 13th of June cannot be disputed. Mr. Montgomery then says to Mr. Fechter, you must employ me to perform on the London stage. How long was he to go on waiting for the performance of that part of the contract? He had waited five months before he took any step, during that time he admits he was bound only to perform in London at the Plaintiff's theatre,

and that no engagement could be made except by the permission of Mr. Fechter; but finding the "Duke's Motto" running on, he says "This may go on as long as it has already done, I do not agree to that; you have kept me five months without giving me the opportunity of shewing what my powers of acting are, you tell me this is to go on much longer: I object to it, I will put an end to my contract." Was that a reasonable time? He had been waiting five months, during which time he had no opportunity of performing before a London audience, and then, when he finds he is to have no more chance of doing so for the next five months, or possibly, as was stated, the next fifteen months, he says, "I will put an end to the contract."

Does not that come exactly within the case which [29] the Vice-Chancellor Parker put when he said (5 De G. & Sm. 506), "If there had been a want of ability, or a want of willingness, or a want of good faith, on the part of Mr. Lumley, with respect to this, or if there had been non-performance of it, I think he would have come in vain to a Court of Equity to ask it to put in force the very stringent remedies which are given by the injunction.

I leave out all consideration of "want of ability," and I agree with Mr. Baggallay that there is no "want of good faith" on the part of Mr. Fechter, for my belief is, that he intended to avail himself of the services of Mr. Montgomery, and that he intended to give him ample opportunity of shewing what his abilities were before a London audience, but that circumstances turned out, which, though they did not make it impossible to perform the contract, at least made it extremely profitable not to perform it. But there is certainly a "non-performance." Then the Plaintiff is not at liberty to say although this is a part of the mutual contract between us and I cannot perform it, still I will bind you not to play at any other theatre. The consideration which was promised to Mr. Montgomery, and which is binding upon the Plaintiff, is twofold, he was to receive seven guineas a week, and was to have an opportunity of shewing what his abilities were before a London audience. He is justified in saying, "I cannot take one part of the consideration without the other; you have deprived me of part of the consideration for five months, I do not complain of your non-performance of that part for that period, but allow me now to shew the public what I can do." Mr. Fechter in reply says that the success of the piece which he is at present playing is such, that he cannot do it, and he declines to act upon the contract. I am of [30] opinion that the Defendant Mr. Montgomery waited a reasonable time, and that it was not necessary to give any further notice than to say, "If you do not comply with the contract and permit me to appear within a month I will abandon the contract." Nay, more, that no such specified time was necessary when Mr. Fechter informed him that the piece then running would continue to be played and would render it impossible for the Defendant to appear at the Lyceum. The Defendant then enters into a contract to appear elsewhere, and I am of opinion he was justified in so doing. The letter which has been produced, and which is admitted to be Mr. Montgomery's handwriting, does not vary the case in any way. That was written at a time when he considered the contract to be binding, but finding that state of things was to go on for a longer period, in fact for an indefinite period, he says, "I will put an end to the contract; I decline to be longer bound by it." I am of opinion that he had a right to do so, and that, under these circumstances, this is not a case in which this Court can interfere by interlocutory injunction to prevent him from performing at a different theatre.

I shall make no order upon this motion, and I shall make the costs costs in the cause. If the Plaintiff can make a better case at the hearing he may do so.

[31] INGILBY v. SHAFTO. June 22, 23, 1863.

[S. C. 32 L. J. Ch. 807; 8 L. T. 785; 9 Jur. (N. S.) 1141.

See *Bidder v. Bridges*, 1885, 29 Ch. D. 38.]

Upon a bill of discovery in aid of an action at law the Plaintiff is only entitled to a discovery of such matters as make out his own title, and cannot compel a discovery of the particulars of his adversary's title and how he makes it out.

A. brought an ejectment against B., whereupon B. filed a bill of discovery against A. seeking to discover under what title he claimed at law and how he made it out. Held, that the Defendant was not bound to give this discovery.

This case came before the Court upon exceptions for insufficiency to the answer of the Defendant to a bill of discovery.

The bill was for discovery merely, in aid of a defence of actions of ejectment brought by the Defendant Shafto against the Plaintiff Ingilby.

The bill stated that the Plaintiff was tenant for life in possession of copyhold lands in Yorkshire. It then proceeded to state how his title was derived, which was shortly as follows :—

Sir John Ingilby the testator, who died in 1772, devised them to Sir John Ingilby for life, with remainder to his son Sir William in tail, with remainders over. Sir John Ingilby was admitted, and he and his son, in 1804, surrendered them to the use of Sir John for life, with remainder to such uses as Sir William should appoint, &c., and they were admitted.

Sir John Ingilby died in 1815, and thereupon Sir William entered; he died in 1854, having devised them to the Plaintiff for life. The Plaintiff was thereupon admitted and was in undisturbed possession.

The bill stated that the Defendant, in February 1863, issued ten writs of ejectment in respect of portions of the copyhold, and it set out the vague particulars of the lands comprised therein.

[32] The bill proceeded as follows :—

11. The said writs of ejectment comprise, in the whole, 847 acres only, but the claim which the Defendant sets up extends to property of much greater extent and value.

12. The Defendant has refused to disclose to the Plaintiff the character in which he sues, or to furnish to the Plaintiff the grounds or particulars of his said claim, or the facts, circumstances or grounds, on or by reason of which, he pretends that the Plaintiff is not such tenant for life in possession as aforesaid, and the proceedings in ejectment do not in any way disclose the character in which the Defendant sues, or the nature of the case which is intended to be set up, or on what facts, circumstances or grounds the Plaintiff's title is disputed. But the Defendant some time since applied to the steward of the manor to admit him as tenant to the copyhold lands, which the steward has refused to do, and, on the occasion of the application, the Defendant produced to the steward a pretended pedigree, and also a draft of a proposed admittance, from which it appears that the Defendant then claimed, in some way which is not clearly disclosed and which the Plaintiff cannot understand, to be entitled to admittance as the customary heir at law of Sir John Ingilby the testator, who died in the year 1772.

13. The said pretended pedigree was as follows :—[setting it out].

14. The said pedigree is incorrect in many particulars, both by reason of incorrect statements of date and other incorrect statements contained therein, and by reason of the omission of many members of the family whose names ought to have been comprised therein; [33] and, among other errors, by the omission of the names of Charles Ingilby and Columbus Ingilby named in the will of Sir John Ingilby the testator, who died in the year 1772, and by the omission of the issue of Charles Ingilby and Columbus Ingilby, all of whom were prior to the Defendant and the persons through whom he claims, in the line of descent from Sir John Ingilby the testator, and by reason of other omissions and errors which the Defendant has the means of supplying and correcting respectively.

15. Several of the persons through whom the Defendant purports to trace his descent made dispositions by surrender, will, or otherwise, of their copyhold estates, and dispositions of all their real estate sufficient to pass copyholds, or some other dispositions which would have passed any interest in the said copyhold estates which might have been vested in such persons respectively.

16. The Defendant has in his possession or power, and within his knowledge, respectively, a large quantity of documentary and other particulars and materials, which, if produced, would shew that the said copyhold estates have not descended on

the Defendant or on any other person being the customary heir of Sir John Ingilby the testator, who died in 1772, and would also supply the means of correcting the pretended pedigree, and shew that the Defendant is not such customary heir, and would otherwise establish the Plaintiff's title; and if the Defendant would make discovery of the matters within his knowledge, as aforesaid, and of the documentary materials and particulars in his possession or power, as aforesaid, the same would furnish a complete defence to the several actions of ejectment, by esta-[34]-blishing the Plaintiff's title to the said lands and negating that of the Defendant.

17. The Plaintiff cannot safely proceed in his defence to the actions of ejectment, respectively, without obtaining a discovery from the Defendant of the character in which he sues, and of the nature of the claim which he sets up, and of the several particulars aforesaid, and of all other particulars relating to the title or alleged title to the lands.

Upon these statements, the Plaintiff strictly interrogated the Defendant, but as to their form, it will be sufficient to refer to the exceptions, which will be stated presently.

The Defendant put in a short answer, which commenced thus:—"I am advised that the Plaintiff is not entitled to the greater part of the discovery sought by his bill in this cause, and I have therefore omitted and decline to answer several of the interrogatories and parts of interrogatories to the bill. I claim and allege to be myself entitled to the lands comprised in the writs of ejectment in the bill mentioned, and I allege that the Plaintiff has no title thereto, and I deny his title thereto."

The answer then proceeded to this effect:—"He did not know whether the Plaintiff was tenant for life; he admitted the seisin of Sir John Ingilby, and believed he made the will stated in the bill, but could not say whether he had surrendered the copyholds to the use of the will. He believed that he died in 1772 or 1773, but that the first devisee was illegitimate. He submitted whether the surrender and admittance of 1804 barred the entail. He believed that Sir John and Sir William [35] died at the times stated, but did not know whether he made the will stated. He admitted the actions of ejectment brought by him.

As to documents, he said as follows:—

I have, in the schedule hereto, "set forth a list of certain documents in my possession or power relating to the matters in the said bill mentioned. I do not admit that all such particulars establish or tend to establish the Plaintiff's title affirmatively, but in order to avoid any question on that ground, I am willing to produce all the documents specified in the first part of the said schedule."

He then claimed privilege for the documents in the second part of the schedule, as professional communications, and proceeded thus:—

"And save as in the said schedule appears, I deny that I have or ever had in my possession or power," any documents, &c., "which, if produced, would establish the Plaintiff's title, or tend to establish the Plaintiff's title, affirmatively to any of the copyhold lands," &c., "or which would, by establishing or tending to establish the Plaintiff's title affirmatively to any of such lands or hereditaments, furnish a complete or any defence to the said actions of ejectment respectively."

The Plaintiff took twenty-four exceptions to this answer, on the ground that the Defendant had not answered the following interrogations, viz.:—

The 6th, which asked whether the surrender of 1804 had not been made, "and whether Defendant impeached the same, and if so, in what respects and on what grounds."

[36] The 7th, which was as follows:—

"Does the Defendant claim the said lands under any and what limitations of the will of the said Sir John Ingilby the testator, or as customary heir of the said testator, or in what character does the Defendant claim the same? Does the Defendant claim the said lands under the said John Wright, afterwards Sir John Ingilby," &c., and other persons specified?

The 8th, which was, "Does the Defendant deny that the surrender of the 12th of September 1804 effectually barred the estate tail of the said Sir John Ingilby?" &c.

Part of the 16th was as follows:—

"Does not the Defendant pretend or allege that the Plaintiff is not such tenant

for life in possession, as aforesaid, or in what respects, and on what grounds, and by reason of what facts and circumstances, does the Defendant impeach the Plaintiff's title, and what is the character in which the Defendant claims the said lands and in which he sues, and what are the particulars, facts, circumstances and grounds on which he pretends that the Plaintiff is not such tenant for life, as in the bill stated, or on which he the Defendant pretends that he is entitled to the said lands?"

The 21st asked whether the pretended pedigree was not incorrect and contained omissions, and it went into particulars and details respecting it, and concluded thus:—

"Set forth all the materials and particulars, in the knowledge, possession or power of the Defendant, relating to the pedigree of the said family, and, in particular, by what links the Defendant traces his descent, and the particulars of the births, deaths and marriages on which the said alleged descent and heirship depend, [37] and the parishes and places where the same occurred, and whether or not the several persons through whom the Defendant traces his descent died intestate, and if not, what wills they respectively made."

The 23d was to this effect:—

"Has not the Defendant or had he not once within his knowledge, and whether not in his possession or power," &c., documents "*relating to the matters in the said bill mentioned*, and whether or not particulars, by which, if produced, it would appear that the said copyhold estates have not descended on the Defendant," or on any person through whom he claims, or on the customary heir of Sir John Ingilby, who died in 1772, "and whether or not particulars which would supply the means of correcting the said pretended pedigree, and whether or not particulars which would shew or lead to shew that the Defendant is not such customary heir as alleged, and whether or not particulars which would establish or tend to establish the Plaintiff's title, and whether or not particulars relating to the pedigree of the said family, and to the dispositions of copyhold, and whether or not of real estate, by the members thereof, or some and which of them, and whether or not particulars which would furnish a complete or some and what defence to the said actions of ejectment respectively, and whether or not particulars relating to the title to the said lands comprised in the said actions, and whether or not particulars relating, in some way, to the matters *in the bill mentioned*, or some one of such particulars as before mentioned."

The exceptions now came on for argument.

Mr. G. W. Hemming (in the absence of Mr. Selwyn), in support of the exceptions. He cited Mitford on [38] Pleading (p. 9 (4th edit.)); *The Attorney-General v. The Corporation of London* (2 Mac. & G. 247, and 2 Hall & Twells, 1); *Flitcroft v. Fletcher* (11 Exch. Rep. 543); *Lowndes v. Davies* (6 Sim. 468); *Bellwood v. Wetherell* (1 You. & C. (Exch.) 211); *Metcalf v. Hervey* (1 Ves. sen. 248); *Clegg v. Edmonson* (22 Beav. 125); *Smith v. The Duke of Beaufort* (1 Hare, 507, and 1 Phil. 209); 17 & 18 Vict. c. 126, s. 51; and see Wigram on Discovery (pp. 285, 286 (2d edit.)).

Mr. Jessel, for the Defendant, was stopped by the Court.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will look into this case, but my present impression is, on the whole, unfavourable to you.

In the first place, I apprehend the case is wholly independent of the Common Law Procedure Act. If you were entitled to this discovery before that Act, you are undoubtedly entitled to it now. I apprehend that if a Plaintiff in equity filed a simple bill of discovery in aid of or as a defence to an action at law, he is not justified in coming here for the purpose merely of getting the Defendant to admit documents, to save himself the trouble of proving them. That is to be done simply by calling upon his opponent to admit them at common law, and if he do not, he has to pay the costs of proving them, whatever those costs may be. But all that a party to an action at law is entitled to come for here is discovery of any matters which will aid him in his action at law. In that respect undoubtedly the Plaintiff at law is entitled to call upon the Defendant in equity to say whether he has not in his possession certain documents, or the knowledge of certain facts, which would enable him to establish his case at law. So a Defendant at law is entitled to come into equity in the same manner, to establish his defence at law. But I apprehend that no party to an action at law is entitled to call upon his opponent to say how he intends to frame his case, or how he intends to argue it, upon the facts which are known to all. I do not find, in this bill, a statement that the Defendant is in posses-

sion of any documents, or has a knowledge of any facts which would establish the Plaintiff's defence to the actions of ejectment. [Mr. Hemming. I called your Honor's attention to the general allegation on that point contained in the bill.] If there be such, the Plaintiff is entitled to have a discovery of them, provided they do not amount to this, which the Plaintiff is not entitled to ask, viz., to require the Defendant to state how he puts his case.

I suggested, during the argument, the case of an overdue bill of exchange, where all the equitable defences are open to the Defendant at law. I apprehend that the Plaintiff at law is not entitled to come into this Court upon a bill of discovery, and say, "You have pleaded that there was a want of consideration, that the consideration was a bad one, that the bill was obtained by fraud, and various other things of that sort: which of those do you intend to rely upon? By whom and in what way was it obtained by fraud? Was it obtained by John Smith in such a place or in such a manner? And in what way do you intend to make out your case?" No person is entitled to come in that way, nor is there to be found in the reported decisions any practice or procedure of this Court of that description.

Here is a gentleman who has been in possession of [40] land for some years, and ejectments are brought against him, whereupon he files a bill of discovery, stating a number of documents which tend to establish his title, and asks the Defendant, "Do you intend to contest them, and if you do, in what form? You formerly alleged that you claimed this property under a particular pedigree, do you intend to claim under it now, and are not some of the allegations you make false?" How that assists the Plaintiff or comes within the rule, that this Court gives discovery in aid of a defence to an action at law, I am at a loss to see.

There is a distinction between a bill of discovery merely and a bill seeking relief. Discovery is sought in both cases; in the latter case it seeks discovery with reference to the case stated and the relief prayed by the bill, and then the Plaintiff may, within certain limits, call upon the Defendant to state how and on what ground he can oppose the relief asked, because in such a suit the Plaintiff may disprove the whole of it. But where the discovery is asked in aid of an action at law, then all that you can ask is for the discovery of facts and documents in the Defendant's possession, the knowledge of which will assist you in proving your own title in the action.

It is here proper to make an observation with respect to the general statement as to documents. A bill praying relief only states the matters relating to that relief, and asks the Defendant whether he has not documents in his possession relating to such matters, and he is bound to answer that. Where you file a bill of discovery in aid of an action at law, all that you can ask the Defendant is, whether he has any document in his possession which relates to the action, or any fact within his knowledge which establishes the case of the [41] Plaintiff in equity. You may also require him to answer as to any specified fact which is alleged in the bill and which relates to the action, but you cannot require him to give a discovery as to all the matters you may think proper to state in the bill, which do not relate to the action. I do not remember to have seen any such bill, but if admissible, it might be filed by the Plaintiff as well as by the Defendant in ejectment. I think the *dicta* cited have reference to another subject-matter, and not to a bill of discovery in aid of a defence to an action at law. I think that the object of the insertion of the passages cited from the Common Law Procedure Act was because no proceeding of this sort could before that Act be sustained either at law or in equity. But if the case of *Flitcroft v. Fletcher* (11 Exch. Rep. 543) be law, it seems to establish that you are entitled at law to call upon a Plaintiff to set forth in what manner and on what ground he intends to support his claim. If so, your remedy is at law, and it would be undesirable that this Court should give relief in the way now asked. I will carefully look into the authorities and will mention the case to-morrow. Let it be in the paper to-morrow morning as part heard.

June 23. THE MASTER OF THE ROLLS [Sir John Romilly]. The consideration I have given to this case since yesterday has confirmed me in the view I then expressed. I am satisfied that the province of discovery in equity is not to compel a Defendant to set out in what manner he means to make out his case, or to deal with a certain set of materials, or whether he intends to dispute one proposition or another.

What the Plaintiff is entitled to, as I expressed yester-[42]-day at the end of the Plaintiff's argument, is this :—he is entitled to the discovery of everything in the possession of the other party, either of facts, deeds, papers or documents, which will help him in making out his case at law ; it is confined to that and he cannot go beyond that. No doubt in cases praying relief you may do this :—you may ask what defence do you make to my case, and on what ground. But that is because the Court requires the case of each party to the suit to be pleaded, in order that neither may be taken by surprise. The result is, that having gone through the interrogatories and the exceptions fully, and the passages which were referred to, I think that the Defendant has given the Plaintiff all the discovery which he is entitled to.

It was said that the Defendant had not answered whether he had any documents in his possession relating to the matters in the bill mentioned ; but he has stated that he has no papers at all, other than those he has set forth, which assist the Plaintiff's case. I think that this is sufficient, and that with respect to the rest that he is not entitled to any further or other discovery.

I may add that I have looked very carefully into Sir James Wigram's book, and I concur in the observations that he has made upon the subject, which are to be found at page 286 and the following pages. I think that what he there says is not over-ruled or contested by Lord Cottenham in the case of *The Attorney-General v. The Corporation of London* (2 Mac. & G. 247). He has laid down the principle there with great ability and acuteness, and I think that that principle governs this case.

[43] DRAKEFORD v. DRAKEFORD. June 23, 26, 1863.

[S. C. 9 L. T. 10 ; 11 W. R. 977. Distinguished, *Howard v. Collins*, 1868, L. R. 5 Eq. 351. See *In re Featherstone's Trusts*, 1882, 22 Ch. D. 119 ; *Kingsbury v. Waller* [1901], A. C. 194.]

Construction of a bequest to the survivors of a class after the death of two successive tenants for life.

A testator bequeathed his funded property to his widow for life, and afterwards to his brother for life, and then to be equally divided amongst his brother's "surviving legitimate children and my niece R. W.:" Held, that the survivorship had reference to the death of the brother only.

Bequest to a brother for life, and at his death "to be equally divided amongst his surviving children and my niece R. W.:" Held, that this was not a gift to a class ; and, R. W. having died in the life of the testator, that R. W.'s share lapsed.

Lieutenant Colonel William Lewis, by his will, dated the 4th September 1816, gave and bequeathed as follows :—

"In case my dearest wife, Rosamond Lewis, should survive me, I give, with the following deduction, to her sole use and disposal, during her natural life, the half-yearly interest arising on my property funded in the Bengal six per cent. loans, the principal of which amounts to sicca rupees 202,500 (two hundred and two thousand five hundred) : I also leave absolutely to my wife all my unfunded property, in cash, bills, jewels, plate, furniture, &c., &c., &c. The deduction above alluded to is, of £300 (three hundred pounds) sterling a year, to be paid, by half-yearly instalments, to my brother Henry Lewis, or in case of his decease to my nephew Henry Lewis, the son of the former. At the death of my wife Rosamond, I direct that annuities of £100 (one hundred pounds) sterling a year each shall be purchased (should they be surviving) out of the principal of my property, for the separate lives of my sisters-in-law Barbara Willows and Jane Willows, and for that of my niece and goddaughter Rosamond Willows. After the above shall have been effected, I bequeath the half-yearly interest arising on my funded property to my brother Henry Lewis for his natural life, at whose death the principal is to be equally divided amongst his surviving legitimate children and my niece and goddaughter Rosamond Willows."

The widow, who was the administratrix, having duly [44] administered the other assets, converted the sicca rupees into £27,732 consols.

The testator died in 1817. His niece Rosamond Willows died in his lifetime.

Henry Lewis, the testator's brother, died in 1828, and the testator's widow died in 1861.

The testator's brother, Henry Lewis, had five children, one of whom died in his lifetime (1819), two afterwards died in the life of the widow, and two were still living.

The first question was, which of the brother's children took vested interests under the bequest of the funded property "amongst his surviving legitimate children?"

Mr. Selwyn and Mr. Hetherington, for the trustees of the settlement and for one of the surviving children of Henry Lewis. "Surviving children" must mean those who were living at the period of distribution, which was at the death of the survivor of the widow and brother. The testator perhaps contemplated that the brother would survive his widow; but the class must be ascertained at the period of "division," which must await the death of the widow; for otherwise, if she survived the brother, her interest would cease for the purpose of division. Again, the "principal" is to be divided, but that could not be ascertained until after the death of the widow, at which time the three annuities had to be provided for. They cited *Daniell v. Daniell* (6 Ves. 296); *Stevenson v. Gullan* (18 Beav. 590).

Mr. Chitty, for a surviving child and her husband [45] and children, relied on the direction to "divide," and cited *Cripps v. Wolcott* (4 Madd. 11); *Taylor v. Beverley* (1 Coll. 108).

Mr. Langley, in the same interest.

Mr. Baggallay and Mr. Lake, for the other surviving child and family, cited *Spurrell v. Spurrell* (11 Hare, 54).

Mr. Cole, Mr. Morris, Mr. Busk, Mr. Hobhouse, Mr. Whitehead and Mr. Osborne, *contra*, were not called on upon this point.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the words are plainly expressed. The general rule certainly is that the class of legatees is to be settled at the time when the fund is to be divided; but this is clear, that a testator may require the class to be ascertained, not at the period of distribution but at an earlier period. I find no means of adopting the argument I have heard, except by altering the words of the will. The interest of the funded property is bequeathed to his widow for her life, then to his brother for life, "at whose death the principal is to be equally divided amongst his surviving legitimate children and my niece." It is perfectly plain that at his brother's death the fund was to be divided amongst his surviving children. That does not revoke or interfere with the gift to the widow for life, but it means that the shares shall be ascertained at that period. What is the meaning of "his surviving children?" Plainly the children who survive him. This is the only gift to them, and it means that the funded property is to be divided and become vested interests at that period, though if any were infants, their shares could [46] not be paid to them. It means that the interests were to be vested at the death of the father, but to be paid at the proper time, viz., on the death of the widow.

I strongly approve of the principle of the case of *Cripps v. Wolcott*, it is now settled law and has never been overruled. It is this: that, in cases of survivorship, the class is to be ascertained at the period of distribution, if no other time is expressed by the testator; but here I am of opinion that the testator has expressed another period.

The next question related to the share intended for the testator's niece Rosamond Willows, who died in the testator's lifetime. It was insisted, on the one hand, that under the words "to be equally divided amongst his [the brother's] surviving legitimate children and my niece and goddaughter Rosamond Willows," her share had lapsed by her death in the testator's lifetime. But it was contended, on the other hand, that the gift was to a class, and that the whole vested in those members of the class who were ultimately found to be objects of the gift, viz., the children of the brother who survived him.

Mr. Selwyn and Mr. Hetherington, for the Plaintiffs, argued that the gift was to a class composed of the surviving children and the niece; that the whole survived, and that there was no lapse; *Re Stanhope's Trusts* (27 Beav. 201).

Mr. Chitty, on this point, cited *Porter v. Fox* (6 Sim. 485); *Clark v. Phillips* (17 Jur. 886), to shew that they all formed one class.

[47] Mr. Busk, for Jane Willows, now Mrs. Gent, an annuitant, asked for the money requisite to purchase her annuity, instead of the annuity; *Bayley v. Bishop* (9 Ves. 11); *Palmer v. Craufurd* (3 Swans. 482); *Dawson v. Hearn* (1 Russ. & My. 606); *Ford v. Batley* (17 Beav. 303); *Re Browne's Will* (27 Beav. 324); *Stokes v. Cheek* (28 Beav. 620).

Mr. Cole and Mr. Morris, for the next of kin, also argued that there was a lapse, and that there was an intestacy as to the lapsed share.

Mr. Hobhouse and Mr. Whitehead, for the executors of the widow, also argued that there was a lapse, that Rosamond did not take as one of a class, but as a named person, and that her share lapsed and passed to the widow under the general bequest of "all my unfunded property in cash," &c., &c.; *Webster v. Boddington* (26 Beav. 128); *James v. Lord Wynford* (1 Sm. & Giff. 40); *Cambridge v. Rous* (8 Ves. 12).

[THE MASTER OF THE ROLLS. I am clear that the widow is not entitled.]

Mr. Osborne and Mr. Turner, for other parties.

Mr. Selwyn, in reply. It is not essential that the class should be ascertained at the same time. Thus where there is a gift at a future period to the children of A., who is dead, and to the children of B., who is living, the children of A. are ascertained and take vested interests, but the shares of the children of B. vest as they are born.

[48] June 26. THE MASTER OF THE ROLLS [Sir John Romilly]. On the question whether the share of Rosamond Willows lapsed to the next of kin, I am of opinion that it has. This is clearly established by the cases:—that a class must be ascertained at one and the same time. I do not mean the number of persons constituting the class, for though vested it may be liable to be increased before the time of payment at some future period. As, for instance, if a testator give property to A. for life, with remainder to the children of B. and the children of C., and C. should be dead at the testator's death, the number of C.'s children is ascertained at that time, but the number of the children of B. cannot be ascertained until his death or the death of the tenant for life, but the whole of the property vests in them all on the death of the testator, liable to be divested *pro tanto* on other children of B. coming into *esse*. I have no doubt that if there be a gift to the children of A., and to my niece Rosamond, and to my niece Mary, and so on, that may be a class. But to make this one class it must be to this effect:—"I leave the whole of my funded property to my brother for his life, and at his death the property to be equally divided amongst his children and my niece Rosamond Willows, or such of them as shall survive the tenant for life." In all these cases the class would be ascertained at a particular period, and if one died there would be no lapse. But here Rosamond Willows is to take her share at all events; it is given absolutely to her, and the only persons to be ascertained are the children of the brother, and they are to be ascertained at his death; for I have decided that those only take who survived him. There is, in this sense, a class, viz., certain surviving children, but they do not form the whole of the class. If Rosamond had survived the testator she [49] would, on his death, have taken a vested interest in a share liable to be increased or diminished by the deaths or births of the children of the brother.

I am of opinion that the share to which she would have been entitled, if she had survived the testator, lapsed, and must go to the next of kin of the testator.

[49] INGRAM v. MORECRAFT. July 7, 8, 1863.

A. B. sold a piece of land to C. D. and covenanted for quiet enjoyment. Afterwards A. B. raised the level, by three inches, of a brook running past C. D.'s grounds through his, A. B.'s, property. Held, that this was not a proper subject of complaint for the interference of this Court.

Where one grants to another a right-of-way, the latter must bear the expense of making it available, by forming the road, keeping it in repair and erecting the necessary fences: *Semble*.

In 1861 the Plaintiff Mr. Ingram purchased of the Defendant a portion of a field called Titsworth Close, together with a new right-of-way. This way was to pass

along the north and eastern sides for twelve feet to the high road, upon lands of the Defendant. The property was conveyed, and the Defendant covenanted for quiet enjoyment of the land purchased with the appurtenances (in the usual terms) without any interruption of the Defendant. The Plaintiff erected a house and premises on the land so purchased.

With regard to the right-of-way, it was not said by whom and at whose expense it was to be formed, and in order to make it available, it was necessary to break down a fence which divided two of the Defendant's fields. The Plaintiff, in using the road, from time to time broke down the fence, which the Defendant reinstated, thus causing an obstruction to the way. This was one subject of complaint in this suit, the Plaintiff requiring the Defendant to keep a way, of twelve feet wide, open and accessible for his use.

Another subject of complaint was this :—There ran [50] along the southern part of the land purchased an ancient watercourse, which flowed towards and along the Defendant's property. The Defendant had, on several occasions, dammed the water up on his premises, but this obstruction had been removed. He had also placed a quantity of stone, &c., in the watercourse, which raised the level of the water, as the Court held, to the extent of three inches. The Plaintiff complained that the Defendant had thus obstructed the free flowing of the water.

The bill prayed an injunction to restrain the Defendant from continuing the obstruction to the watercourse and the right of road, and for damages.

The cause now came on for hearing.

Mr. Selwyn and Mr. Nalder, for the Plaintiff.

Mr. Baggallay and Mr. Kay, for the Defendant.

July 7. THE MASTER OF THE ROLLS [Sir John Romilly]. I have had an opportunity of reading the evidence, and I think that the Plaintiff has not made out a case for the interference of this Court. I cannot find that he has sustained any damage at all. The utmost that anyone says is, that the water is dammed up and rises some three inches up the wall of the ditch to the damage of the said wall, but without saying that any damage has been sustained; I do not find that it has made it either moist or damp.

Mr. Nalder pressed on me that it did not matter whether damage was done or not, for that if a person [51] covenant to do an act he must be compelled to do it, whether the consequence of the act is wholly immaterial; for this he cited *Dickenson v. The Grand Junction Canal Company* (15 Beav. 260). It is no doubt true, that if a man enter into a covenant to do a particular thing, however absurd, the covenantee is entitled to have the covenant performed; but here there is no covenant not to put stones in the brook. The argument is founded solely on the covenant for quiet enjoyment, and it is said, that the words are express, that he shall have the enjoyment of the premises. But he has the full enjoyment of the premises: if neither they nor he sustain any injury, and if you do not shew any damage, you have no right to the interposition of this Court. Here, therefore, there is no covenant not to do this act, and the damage complained of is of a description which is not susceptible of appreciation.

The other question is of some nicety. A man grants to another a right-of-way from a path to the public road; but, at an intermediate place there was a fence, and in order that the carts may pass, it is necessary to knock down the fence. This the Plaintiff does, and then the Defendant puts it up again. I am not clear that the Defendant is not entitled to do so, provided he does not so do it as to prevent the Plaintiff from using the right-of-way. The question however really is, who shall be at the expense of £1 for a gate, and this I do not think a fit subject for a Chancery suit.

My impression is, that where a right-of-way is granted, it is for the dominant tenant to do all that is necessary for making the right-of-way available. If I grant a man a right to lay pipes over my land, it follows that [52] he must keep them water-tight, for otherwise the escape of water is a trespass. The same rule applies to a road, as the grantee cannot go to the side beyond the limits of the road when it is out of repair, he must make it good. What is the difference when the question relates to a gate which is necessary?

My opinion is given with diffidence, because the question was not fully argued, but I think that it is the duty of the dominant tenant to do all that is necessary to make the road available for himself, and to protect the servient tenement from unnecessary injury.

I intend to dismiss the bill, with liberty to the Plaintiff to bring any action he may be advised in respect of the subject comprised within the bill. The costs follow the event, and the bill must be dismissed with costs.

[52] ADSETTS v. HIVES. *July 8, 1863.*

[S. C. 9 L. T. 110; 2 N. R. 474; 9 Jur. (N. S.) 1063; 11 W. R. 1092.]

A mortgagor executed a mortgage deed to A. B., the solicitor who prepared it. On the following morning, A. B. filled in the date, the names of the tenants and the date of the proviso for redemption. Held, that this alteration did not render the deed void.

A. B., through a solicitor, borrowed money from C. D. upon a deposit of title-deeds. The solicitor obtained the deeds back for the purpose, as he stated, of preparing a legal mortgage. Instead of this, he got A. B. to execute a legal mortgage to himself, instead of to C. D., and he afterwards raised money, on a transfer of this mortgage and on the delivery of the title-deeds, from a creditor without notice. Held, that the loss must fall on A. B., and that he was liable to pay both mortgages.

In 1858 the Defendant Mr. Hives, who was building a house on a piece of his freehold land, instructed Shaw, an attorney, to procure him a loan by means of a mortgage of the property, and he handed over to him his title-deeds for that purpose. The Plaintiff Adsetts agreed to advance £650 by instalments, and having, on the 29th of September 1858, paid the first instalment of £150, Shaw handed over to him the title-deeds of the [53] property, as a security for that sum and further advances. The last instalment was paid in February 1859, and all the moneys passed through the hands of Shaw.

On the 1st of April 1859 the Plaintiff received from Shaw the following letter :—

“April 1st, 1859.—Dear Sir,—Will you be good enough to send me, by bearer, Mr. Hives’s deeds, so that I may at once prepare the proper mortgage deeds to you.
“JOS. SHAW.”

Upon receiving this letter, the Plaintiff took the deeds, so deposited with him on behalf of Hives as a security for the sums advanced to him by the Plaintiff, to Shaw at his office, and handed them over to him, and Shaw thereupon gave the Plaintiff the following memorandum :—

“Memorandum.—I have received from Mr. Adsetts a bundle of deeds belonging to Mr. Hives’s property at Ilkeston, to enable me to prepare mortgage deeds, and I undertake to return same safe to Mr. Adsetts.
“JOS. SHAW.”

“April 1st, 1859.”

Having obtained the title-deeds, Shaw prepared a mortgage of the property for £850 from Hives to himself, instead of to the Plaintiff, and he sent the engrossment over by his clerk to Hives for execution, with the following letter :—

“April 7th, 1859.—Dear Sir,—My clerk will hand you cheque for £235, the balance of the £850. Please sign the mortgage, and when I come over again I will give up to you the promissory notes and memorandums you have signed for the various advances. I have prepared the mortgage [54] in my own name, because Mr. Adsetts will not advance more than £650, and I shall, if possible, pay him off.
“JOS. SHAW.”

This mortgage was dated the 7th of April 1859, and was executed by Mr. Hives in the presence of Mr. Shaw’s clerk, who in his cross-examination stated as follows :—

“He (Mr. Hives) signed the deed, but he looked through the deed before signing it, and I read it over to him. The date was not filled in when he signed it, but it

was filled in by Mr. Shaw on the following morning in my presence. The names of the tenants were not filled in when it was signed, because Mr. Shaw had not then got them. I got their names, and they were inserted by Mr. Shaw, in my presence, on the following morning; Mr. Hives gave me the names of the tenants. The date in the proviso for redemption was also inserted on the following morning by Mr. Shaw." In the above transactions Shaw was the only solicitor employed.

Shaw afterwards, in 1860, borrowed £750 from the British Equitable Investment Society upon a conveyance of the property and a transfer of the mortgage, and he, at the same time, delivered over to the company the title-deeds of the property. The money so raised he applied to his own use.

Shaw concealed these matters from the Plaintiff, and to quiet him delivered over a forged mortgage and some forged title-deeds; but the fraud being discovered Shaw was prosecuted and sentenced to penal servitude.

This was a foreclosure suit instituted by Adsetts against Hives and the Investment Company and their trustees. The company claimed as purchasers for valuable consideration without notice.

Mr. Southgate and Mr. Jessel, for the Plaintiff, claimed priority over the British Equitable Investment Company, on the ground that the mortgage deed of the 7th of April 1859 was void, it having been materially altered by the grantee subsequently to its execution.

They cited *Pigot's case* (11 Coke's Rep. 26 b.); *Davidson v. Cooper* (13 Mees. & W. 343); *Hudson v. Revett* (5 Bing. 368); *Mackintosh v. Haydon* (Ryan & M. 362); *Hebblewhite v. M'Morine* (6 Mees. & W. 200).

Mr. Selwyn and Mr. Shebbeare, for the company, were stopped by the Court.

THE MASTER OF THE ROLLS [Sir John Romilly]. I have no doubt that this is a perfectly valid deed. I do not go into the niceties and refinements respecting the effect of altering deeds, but I will not be the first person to hold, that where a mortgagor and mortgagee execute a deed and leave blanks in it, to be filled up with the names of persons not parties to the deed, and with the date in the proviso for redemption previously agreed upon, all which are merely formal, and this only for the purpose of completing the expression of the intention of the parties to the deed already apparent on the face of it, and where, in order to effect this purpose, the date in the proviso for redemption, which is six months, the usual time, is simply filled in, and the names of the tenants in whose occupation the parcel mentioned in the deed are specified, I repeat that I will [56] not be the first Judge to hold that this is such an alteration in the deed as to come within *Piggott's case*, and to avoid the deed.

In the case of *Doe on the demise of Lewis v. Bingham* (4 Barn. & Ald. 672), a very material alteration was made after various persons had executed the deed. The persons who had executed the deed in the first instance were mortgagees who were paid off, and all the blanks which affected them were properly filled up in the deed before they executed the deed, and after that a great many blanks were filled up and interlineations made before it was finally executed by the last party to it. The four distinguished Judges of that Court held, that the deed was perfectly valid to convey the property. Mr. Justice Bayley says, "It seems to me that this deed, notwithstanding the interlineations and the filling up of the blanks subsequently to its execution by Lassam, was still valid, so far as to convey the property from the Defendant to the lessors of the Plaintiff; the whole deed may be considered as one entire transaction, operating as to the different parties to it from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of the opinion, that any alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood.

Here the alteration of the deed is, in the proper sense of the word, only completing the deed, it fills up the date of the deed, which is frequently done immediately after the execution of it, and what is necessarily consequent upon the date of the deed, the day fixed for redemption, which is six months later. In fact, until [57] the deed is executed, these dates cannot be properly filled up.

I have no doubt the company are purchasers for value without notice.

Mr. Baggallay and Mr. Karlake, for Hives and his assignees, then argued that, as between two innocent parties, the estate ought not to be charged with the two mortgages and that the Plaintiff ought to bear the loss, for in the transaction Shaw had acted at his attorney and agent, and that the Plaintiff, by parting with the deeds, had enabled Shaw to commit the fraud. That the Plaintiff, who no longer possessed the title-deeds, had ceased to have any equitable mortgage, and that the transfer of the legal mortgage, of which Shaw was a trustee for the Plaintiff, to the company, was a mere breach of trust, giving a personal remedy only as against Shaw, and none as against the estate.

THE MASTER OF THE ROLLS [Sir John Romilly]. This a very painful case, as all cases of this sort are, where the question is, which of two innocent persons is to bear the loss occasioned by the fraud of a third.

Upon the facts of this case, I am of opinion that the Plaintiff is entitled to a decree. The law of the case is very clear; but it is very important in this case to keep distinct the circumstances relating to the equitable mortgage to the Plaintiff and the execution of the legal mortgage by Mr. Hives to Shaw. I consider it to be proved that Hives knew that money was to be raised [58] upon a deposit of these deeds and that he transmitted the deeds to Shaw for that purpose. He knew, also, that Shaw was borrowing money for him upon the authority of the deeds, and he knew, also, in the month of September 1858, that the Plaintiff was the person who advanced the money and that the amount was £650. Knowing all this, Hives required Shaw to procure for him a further advance of £200. Throughout Shaw was the agent of Hives, and I consider that when Shaw deposited the title-deeds with the Plaintiff, a complete equitable mortgage was constituted thereby, with an undertaking to execute a valid mortgage when the last instalment had been advanced. That being so, the question is, how has he lost it? I am of opinion that when he returned the deeds to Shaw, he returned them to him as his own solicitor, and not as the solicitor of Hives, and, consequently, if Shaw committed a fraud with those deeds, the result must be, that the loss must fall upon the Plaintiff and not upon Hives. I consider that if the solicitor of the equitable mortgagee pledge the deeds, the equitable mortgagee must get the deeds back from the pledgee and pay him what may be necessary for that purpose; but as soon as he gets them back his rights, as equitable mortgagee against the mortgagor, remain unaltered. In my opinion, the relation of mortgagor and equitable mortgagee between Hives and the Plaintiff was fully constituted, and the Plaintiff is now entitled to enforce that equitable security against Hives, coupled always with this condition, that when Hives redeems him, he must deliver up the title-deeds which were deposited with him, and this he will be able to do by redeeming the British Equitable Investment Company. What has taken place in this case to interfere with that right? Suppose that, after the equitable mortgage had been constituted, the mortgagor executed a legal mortgage of the property to [59] another person. If that legal mortgagee had notice of the prior equitable mortgage, he is bound by it; but if he has no notice of it, then the legal mortgage has priority, and the equitable mortgagee can only enforce his equitable rights against the legal mortgagee by redeeming him. If the mortgagor think fit to make a voluntary legal mortgage, without receiving an advance of money at all for it, if such mortgagee conceals that fact, and obtains an advance of money upon the security of that mortgage from other persons who have no notice of the prior equitable security, such a charge upon the property becomes good as against the equitable mortgagee, who can only enforce his security by paying to the prior mortgagees who have got the legal estate the amount due to them, subject always to this—that if the equitable mortgagee has retained the deeds, they cannot be got from him without payment of the amount due to him.

How does this case differ from that which I have suggested? Here is a good equitable mortgage constituted between Hives and the Plaintiff, and thereupon Mr. Shaw, who is the agent of both, writes a letter to Mr. Hives, and says, "I am going to pay off Mr. Adsetts, and therefore I have made out the mortgage in my name." How will that discharge the equitable mortgage? Supposing that to be done, what was there to prevent Mr. Adsetts from filing a bill the next day to enforce his equitable mortgage? If Mr. Adsetts' assent had been obtained, and he

had said, "You may make out the mortgage to Mr. Shaw," then he could not complain. But Shaw himself says nothing of the sort in his letter; he says, I have prepared the mortgage in my own name, not because Mr. Adsetts assents to it, but because Mr. Adsetts "will not advance more than [60] £650, and I shall, if possible, pay him off." What was there to justify Mr. Hives in assenting to that? No doubt he trusted Mr. Shaw in the matter.

I must notice what appears to me to be a mistake in the argument. It was said that this was a case of trustee and *cestui que trust*, and thereupon an argument was founded upon it. But, assuming that Shaw was trustee of the deeds for the Plaintiff, this does not alter the case. Hives executed this mortgage deed to Shaw without any authority whatever from Mr. Adsetts, and thereupon Mr. Shaw raised money upon it from the British Equitable Investment Company. He obtained the title-deeds from the Plaintiff by fraud; but I do not think that this affects the equities as between the parties to this suit.

Mr. Hives has, by giving Mr. Shaw a legal mortgage, given him the opportunity of raising money upon it, and he cannot prevent this being a first charge upon the property, but this does not discharge the prior equitable mortgage, though it be the fact that Shaw has also committed a fraud upon the Plaintiff. Mr. Hives has given the Plaintiff an equitable mortgage upon the property, and has contracted to give him a legal mortgage. He has, by another transaction, given Mr. Shaw a legal mortgage upon the property, upon which he has raised money, and for which Mr. Hives has received nothing, but he is not the person to complain that Shaw has thereby deprived the Plaintiff of the equitable mortgage which had been previously given to him. The consequence is, that when the Plaintiff gets back the deeds from the persons to whom they were pledged, by paying them off, he is entitled to have his equitable mortgage enforced against the property, and also the prior charge which has been created by the act of the [61] mortgagor, and without the payment of which he could not get back the title-deeds.

I am of opinion, therefore (although undoubtedly it is very hard that Mr. Hives should have to pay for the fraud committed by Shaw), that the case is shortly this:— In addition to the equitable mortgage, Mr. Hives has improperly, through the deceit of Shaw, given him a legal mortgage for £850, upon which he has raised money, and which Mr. Hives must pay. The Plaintiff, therefore, is entitled to the usual decree in such a case.

[61] CHAPMAN v. BRADLEY. July 8, 13, 1863.

[S. C. affirmed on appeal, 4 De G. J. & S. 71; 46 E. R. 842; 33 L. J. Ch. 139; 9 L. T. 495; 3 N. R. 182; 10 Jur. (N. S.) 5; 12 W. R. 140. Followed, *A., otherwise M. v. M.* 1884, 10 P. D. 179.]

A man went through the ceremony of marriage abroad with his deceased wife's niece. The marriage was void according to the English law, but valid according to the foreign law. He, on that occasion, executed a marriage settlement in favour of his intended wife, and also of the children of his former and of his intended marriage, as a class. Held, that the whole was void.

In 1843 William Orton Bradley married Susannah Guthrie. She died in 1856, leaving six children of the marriage.

In September 1857 the ceremony of marriage was performed at Neufchatel, in Switzerland, between William Orton Bradley and Elizabeth Dorothy Jones. Elizabeth Dorothy Jones was a child of his first wife's sister. He was absent about a fortnight from England, and did not change his domicile.

Upon the occasion of his second marriage, and in contemplation thereof, he executed a settlement, dated the 30th of September 1857. The deed recited the former marriage, and that "William Orton Bradley had six children by his late wife," and that, on the treaty for the then presently intended marriage, it was agreed that William Orton Bradley should assign the one-seventh [62] share to which he was entitled in certain funds, property and effects, to trustees, to be held by them upon

the trusts thereafter declared concerning the same, for the benefit of Elizabeth Dorothy Jones and William Orton Bradley and his children, as well by his said former marriage as of the said then intended marriage. *It then witnessed* that, in pursuance of the said agreement in that behalf, and in consideration of the said then intended marriage, and in consideration of the natural love and affection which he, William Orton Bradley, bore for his children by his then late wife, and for divers other good causes and considerations him moving, he, William Orton Bradley, with the privity of Elizabeth Dorothy Jones, did thereby assign unto two trustees all that his one-seventh share of the funds, property and effects, in trust for William Orton Bradley until the said intended marriage should be solemnized, and after the solemnization thereof, upon trust to pay the annual income, during the joint lives of William Orton Bradley and Elizabeth Dorothy Jones, to her for her separate use without power of anticipation; and, after the death of either of them, to pay the annual income to the survivor of them during his or her life, but as to Elizabeth Dorothy Jones, so long only as she should be the widow of William Orton Bradley. And subject thereto, the trustees were to hold the trust funds "in trust for such of the children of William Orton Bradley, whether by his said former marriage or by the said then intended marriage, as being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under it, and, if more than one, in equal shares as tenants in common."

The marriage was valid according to the law of Switzerland, but invalid by the law of England (5 & 6 Will. 4, c. 54).

[63] William Orton Bradley died in 1860, leaving Elizabeth Dorothy Jones surviving, and two children by the alleged second marriage. This suit was instituted on behalf of his creditors, insisting that the settlement was voluntary and void against creditors under the 13 Eliz. c. 5. It alleged that he was insolvent at the date of the settlement.

Mr. Hobhouse and Mr. Haddan, for the Plaintiff. First, the settlement is altogether void; it was founded on a mistake as to the law, and on a subsequent valid marriage, which never took effect. Secondly, it was merely voluntary and void as against creditors. They cited *Brook v. Brook* (3 Sm. & Gif. 280, 481; S. C. 9 H. L. Cas. 193); *Robinson v. Dickenson* (3 Russ. 399); *Coulson v. Allison* (2 Giff. 279; S. C. 2 De G. F. & J. 521); *Clayton v. Earl Winton* (3 Madd. 302, n.); *Newstead v. Seales* (1 Atk. 265); *Ellerton v. Gastrell* (1 Comyn, 381); *The Queen v. The Inhabitants of Brighton* (1 Best & Smith, 447); *Jones v. Southall* (20 Beav. 187); *French v. French* (6 De G. M. & G. 95; S. C. 3 Drew. 716); *Johnson v. Legard* (6 M. & Sel. 60, and Turner & R. 281); *Davenport v. Bishopp* (2 Younge & C. C. C. 451, and 1 Phil. 698).

Mr. Selwyn and Mr. Bromhead, for different Defendants. A marriage legally valid in Switzerland was undoubtedly solemnized at Neufchatel; a consideration thereupon immediately arose, sufficient, if not to support the settlement in favour of the then intended wife and her children, at least to support it in favour of the children of the first marriage. An actual marriage, according to the law of a foreign State, was sufficient to support a settlement. This Court will not deprive third parties of [64] the benefit contracted for by a deed, because it does not recognize, as valid here, an act which in other countries is held legal. But if such a marriage abroad was not sufficient to support the deed in favour of the then intended wife, the consideration of natural love and affection was sufficient to support it in favour of the children of the first marriage.

Mr. Hobhouse, in reply, referred to *Webster v. Boddington* (26 Beav. 128), to shew that where there is a gift to a class, it is void altogether if void as to any.

THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether the settlement made on the 30th of September 1857, on the marriage of Mr. Bradley with the niece of his deceased wife, is not absolutely void. It was made under these circumstances:—After the decease of his first wife, an attachment sprung up between Mr. Bradley and her niece; they agreed to be married, and, supposing that by going abroad, where the law of England did not prevail, a valid marriage might be contracted between them, they went to Switzerland in September 1857, where the ceremony of marriage was solemnized between them, and this settlement was executed upon that occasion.

The first thing to consider is, the effect of the settlement, and whether the consideration does not wholly fail. It was in consideration of the marriage; and if the only valuable consideration of the deed had been confined to that, the cases of *Robinson v. Dickenson* (3 Russ. 399); *Coulson v. Allison* (2 Giff. 279); and *Brook v. Brook* (3 Smale & Giff. 481), [65] all seem to establish that this deed was invalid. It is an attempt to make a good marriage settlement upon a consideration which, in effect, is a mere agreement for a cohabitation, and all the Courts have held this to be absolutely void. Lord Campbell states it very clearly in the case of *Brook v. Brook*. Either it is a settlement in consideration of a marriage which fails altogether, or if any consideration remains, it is an illegal consideration to enter into contract for mere cohabitation.

The next question is, whether the words, "in consideration of the natural love and affection which William Morton Bradley bore for his children by his late wife," make it good as a voluntary settlement, but I think it does not. If, on attempting to marry this lady, or after going through the marriage ceremony, Mr. Bradley had made a voluntary deed in favour of the children of his first marriage, I should have been of opinion that it was good, but here it is mixed up with the other invalid considerations. Some cases draw distinctions, as to what relations are and are not within the consideration of marriage, but I think it clear that the children of the first marriage would be within the consideration of a settlement made on a second marriage.

This sometimes happens:—A man agrees to sell a piece of land for a sum of money, and the purchase-money is not paid; the contract is not necessarily at an end, but the unpaid purchase-money remains a charge on the land; but if, for any reason, the contract fails, then the purchase-money ceases to be a charge on the land. Here the only consideration is a future marriage, which never can be performed; and I am of opinion, therefore, that the whole contract fails to take effect.

In addition to this, there is this further objection to [66] the deed:—the objects to take are a class composed of the children by the former marriage and those by the intended marriage. This obviously introduces an element of uncertainty, for it includes after-born illegitimate children. Who can say what part they are to take? And where that is so, as in the cases of limitations void for perpetuity as to some of a class, the Court says it fails altogether, because you cannot distinguish who are to take.

I have not read the evidence as to the insolvency carefully, being of opinion that there was no such insolvency as to invalidate the deed on that ground. This also is clear, that the deed was perfectly *bona fide*, and was not executed with the object of defeating his creditors. I therefore stopped the Defendant's counsel on that point.

I am of opinion that the deed altogether fails.

NOTE.—Affirmed by the Lords Justices, 5th December 1863, on the ground that the settlement was only to take effect after a marriage had been validly and effectually "solemnized." [4 De G. J. & S. 71.]

[67] THE ATTORNEY-GENERAL v. THE CORPORATION OF AVON OTHERWISE
ABERAVON. May 5, 1863.

[S. C. varied on appeal, 3 De G. J. & S. 637; 46 E. R. 783; 33 L. J. Ch. 172;
2 N. R. 564; 11 W. R. 1050.]

The Court of Chancery will not, in a suit relating to the property of a corporation, determine on the validity of a Royal Charter of Incorporation.

The Municipal Corporation Act (5 & 6 Will. 4, c. 76) enables the town council of boroughs mentioned in the schedule to call in question any collusive alienation of the corporate property prior to the 5th of June 1835. The subsequent Act (1 Vict. c. 78, s. 49) enables the Crown to grant charters to other towns, extending to them "all the powers and provisions" of the Municipal Corporation Act. The Crown having granted such a charter in 1861: Held, that all the clauses of the first Act

were applicable, and that the right of questioning collusive alienation could be carried back to the date of the charter, but not further.

The town of Avon otherwise Aberavon in Glamorganshire was an ancient borough, having a corporation called "The Portreeve, Aldermen and Burgesses of Avon otherwise Aberavon."

It possessed certain property under charters or deeds set out in this information, dated in the reign of King Edward the 3d. (See *Evan v. The Corporation of Avon*, 29 Beav. 144.)

The Aberavon Market Act, 1848 (11 & 12 Vict. c. cxxxviii.), authorized the corporation to construct a market in the town, with conveniences; it obliged all persons to sell live stock in the market alone, and gave power to levy tolls. The moneys were to be applied in payment of the sums borrowed; secondly, in maintaining the market, and the residue as the corporation might think fit. The Act authorized the corporation to borrow £3000 on the security of the tolls and property, but it gave no powers to sell or demise them.

The corporation was not included in the Municipal Corporation Act (5 & 6 Will. 4, c. 76), but in 1853 some of the inhabitants petitioned Her Majesty for a grant of a charter of incorporation under the Municipal [68] Corporation Amendment Act (7 Will. 4, and 1 Vict. c. 78), the 49th section of which is as follows:—

"49. And be it enacted, that if the inhabitant householders of any town or borough in England or Wales shall petition His Majesty to grant to them a charter of incorporation, it shall be lawful for His Majesty, by any such charter, if he shall think fit, by the advice of his Privy Council, to grant the same, *to extend to the inhabitants of any such town or borough, within the district to be set forth in such charter, all the powers and provisions of the said Act* (meaning the 5 & 6 Will. 4, c. 76) *for regulating corporations*, whether such town or borough be or be not a corporate town or borough, or be or be not named in either of the schedules to the said Act."

The first application for a charter was opposed by the corporation and was unsuccessful. A second similar petition was however presented in 1859, which was also opposed; but, on the 16th of January 1861, the Lord President of the Council intimated to the parties that their Lordships had decided upon recommending Her Majesty to grant a charter of incorporation to the borough.

On the 11th of February 1861 the corporation, in anticipation of the charter, sold the Town Hall and entered into an agreement with John Jones to demise to him, in consideration of £600, the market, &c., and tolls, for fifty years, at a rent of £5.

This information was filed by the Attorney-General on the 15th of March 1861 (before the grant of the charter), against the corporation, stating that they were about to grant a lease of the market and tolls to John [69] Jones, and praying an injunction to restrain the granting the lease. The injunction was granted on the following day, and, on an application to dissolve it, made on the 16th of April 1861, the motion was ordered to stand over to the hearing.

Afterwards, on the 2d of July 1861, a Royal charter, under the Great Seal was granted. It recited the 7 Will. 4, and 1 Vict. c. 78, and then "Her Majesty, as well by virtue of the powers and authorities vested in her by virtue of her royal prerogative, as by virtue of the powers and authorities given to her by the said recited Act of the first year of her reign, and all other powers and authorities enabling her in that behalf, did grant and declare, that the inhabitants of the said borough of Aberavon, comprised within the aforesaid boundaries, and their successors, should be, for ever thereafter, one body politic and corporate, in deed, fact and name, and that the said body corporate should be called *the mayor, aldermen and burgesses of the borough of Aberavon*, and them, by the name of '*The Mayor, Aldermen and Burgesses of the Borough of Aberavon*,' into one body corporate and politic, in deed, fact and name, did, for her, her heirs and successors erect and constitute by these presents, *and granted* to the said body corporate and politic, that, by the same name, they should have perpetual succession, and be for ever thereafter persons able and capable in law to have and exercise, and do and suffer, and that they should have and exercise, and do and suffer, *all acts, powers, authorities, immunities and privileges, which were then held and enjoyed, done and suffered by the several boroughs named in the schedules*

to the said Act for regulating municipal corporations in England and Wales, in the like manner and subject to the same provisions, as fully and as amply, to all intents and purposes whatsoever, as if the [70] said borough of Aberavon had been one of the boroughs named and included in the 2d section of Schedule (B) to that Act annexed, *and thereby extended* to the said inhabitants of the said borough, comprised within the aforesaid boundaries, *all the powers and provisions of the said Act* passed in the session of Parliament holden in the fifth and sixth years of King William the IVth for regulating municipal corporations in England and Wales, and of all and every other Acts or Act of Parliament made and passed for altering, amending or enlarging the same Act and the powers and provisions thereof, or in anywise relating thereto.

On the 6th of February 1862, after the grant of the charter, the information was amended. The Defendants were then the old corporation, their officer, the new corporation, and John Jones. It prayed a declaration that, under the Municipal Corporation Acts and the charter, the market, tolls, &c., and all and singular other the estates, moneys, property and effects of the old corporation had become vested in the new corporation, and it asked that they might be ascertained, and for a declaration that the corporation was not authorized to lease the market and tolls, and for an injunction.

The *portreeve, aldermen and burgesses*, and their officer Mr. Griffith Williams, by their answer to the amended information, stated that they had very large debts and liabilities, and they insisted that the charter of the 2d July 1861 was invalid and void, and there never was any such corporation as "*The Mayor, Aldermen and Burgesses of the Borough of Aberavon*, and that, if any such corporation did exist, they had no estate, right, title or interest whatsoever in the estates and hereditaments of the old corporation, and that if they had, they ought to have been Co-plaintiffs instead of being De-[71]-fendants thereto; and they insisted that this suit was not properly constituted as to parties and otherwise, and that it ought to be dismissed.

The cause now came on for hearing.

Mr. Baggallay, Mr. Welsby and Mr. W. Pearson, in support of the information.

The charter granted by the Queen is perfectly valid, and is authorized by the Acts 5 & 6 Will. 4, c. 76, s. 141, and 1 Vict. c. 78, s. 49, which enable Her Majesty to grant charters to towns and boroughs, extending to them all the powers and provisions of the Municipal Corporation Act. The effect of the charter therefore is, to place this borough in the same position as if it had been included in Schedule (B) of the first Act, and the charter so states. The consequence is, that all the property of the corporation has become vested in it, by its present name, but clothed with a public trust under the 92d section. It is a mistake to suppose there are two corporations, the old and the new; they are identical, though the name, the members, the mode of electing them, and other internal arrangements, have been changed; *Attorney-General v. Kerr* (2 Beav. 420); *Attorney-General v. The Corporation of Leicester* (9 Beav. 546); *Attorney-General v. Wilson* (9 Sim. 48, and Craig & Phil. 1); *Doe d. Bristol Hospital v. Norton* (11 Mees. & W. 913); 5 & 6 Will. 4, c. 76, s. 6.

Taking the 1st and 141st sections of the first Act, and the 49th of the second, in connexion with each other, the effect is, that all the laws, usages, &c., of these boroughs to which charters may be thereafter granted are become nullified.

[72] There is nothing improper in the frame of the information, for the special remedies afforded by the Act (s. 97) do not exclude the right of the Attorney-General to sue for the purpose of setting aside collusive alienations of corporate property and breaches of trust; *Attorney-General v. Aspinall* (1 Keen, 513, and 2 Myl. & Cr. 613); *Attorney-General v. Wilson* (1 Cr. & Phil. 23). They also referred to the 13 & 14 Vict. c. 42.

Mr. Selwyn, Mr. Speed and Mr. Everitt, for the Defendants. The *onus* of proving that the property granted by the ancient charters to the old corporation is taken away by statute lies on the Attorney-General. Such Acts must be construed strictly; *Fludier v. Lambe* (Ca. tem. Hardwicke, 307). The Crown had neither the power to grant, nor has it granted a charter confiscating the property of this corporation. "Some things are clear," says Lord Kenyon, "when a corporation exists capable of discharging its functions, the Crown cannot obtrude another charter upon them; they may either accept or reject it." Here, this corporation has been held to have the same power of dealing with its property as a private individual; *Evan v. The*

Corporation of Avon (29 Beav. 144), any attempt to take it away is simply void. The power of the Crown is creative but not destructive; it may grant a charter, but it cannot alter the rights derived under it.

The object of the 49th section of the Act was to extend to boroughs "all the powers and provisions of the said Act for regulating corporations," and not for their de-[73]-struction, or to take away from them, adversely, their property. Again, the 1st section of the 5 & 6 Will. 4, c. 76, repeals and annuls the grants of those boroughs only which are named in the schedule, and not of those to which charters might afterwards be granted. But this alleged charter is void and has no legal existence, for the majority of the inhabitants voted against it, and it could not be forced on them by a minority; *Rutter v. Chapman* (8 Mee. & Wels. 1), and see *Rawlinson's Municipal Corporation Acts* (pp. 244, 460 (3d edit.)). The 97th section of the 5 & 6 Will. 4, c. 76, shews that it is inapplicable, for it would be retrospective, and enable the council to call in question transactions which took place so far back as the 5th of June 1835.

Lastly, in point of pleading the present information is irregular. When the information was filed (15th March 1861) the Attorney-General had no right to interfere with the private property of the corporation, and he cannot, by amendment, avail himself of a right since acquired by the charter (2d July 1861); *Pilkington v. Wignall* (2 Madd. 240). Besides, the Attorney-General has no right, under the statute, to interfere at all.

THE MASTER OF THE ROLLS [Sir John Romilly]. Upon various points in this case it will not be necessary for me to hear a reply. The first thing to be considered is, whether this is a charter granted by the Crown by virtue of its prerogative or under the power of the Parliamentary enactments. Charters granted under the former are either new charters to a body not before incorporated, or to restore an old corporation [74] which has, from various causes, become incapable of performing its own functions and duties. But in neither of these cases does the charter at all affect the property belonging to any corporation. It is also certain, that before the passing of the Municipal Corporation Act, property not expressly given to corporations in trust belonged to them absolutely, and that they took and held it without any qualification or limitation, and in the same way and with the same powers over it as an individual proprietor. But where property is given to a corporation subject to a trust, they take it subject to the performance of that trust.

I am of opinion that this is not a charter under the power vested in the Queen by virtue of her Royal prerogative, but that it is a charter under the powers of the Act of the 7 Will. 4, and 1 Vict. c. 78, which it recites.

The first question I have to consider, and which has been raised very pointedly by the counsel for the Defendants, is, whether the corporation has any validity at all. I am of opinion that this is not a question for me to try. It is suggested that this corporation is invalid by reason of its not having been made upon the petition of a majority of the inhabitants. The Queen having thought fit to grant a charter under this Act of Parliament, the Court of Chancery is not the proper tribunal to try the validity of the charter; the ordinary and proper mode of trying that is by a *quo warranto*, and it is admitted by Mr. Speed that the Court of Queen's Bench will not grant a *quo warranto*, where the object clearly is to call in question the validity of a charter granted under the 49th section of this Act. This was decided in *The Queen v. Taylor* (11 Ad. & Ell. 949), and it is [75] quite clear that this Court cannot do it. Even in the case of a deed which is impeached, this Court will act upon it until it has been set aside by some proper proceedings. That rule applies much more strongly to the case of a Royal charter, granted under the Great Seal and under the authority of an Act of Parliament, and this Court will assume a Royal charter to be valid and subsisting, unless some proceedings are taken to set it aside, but which proceedings are not to be taken in this Court. I am of opinion, therefore, that I have no option, but that I must treat this as a valid and subsisting charter under the 49th section of the 1 & 2 Vict.

That being so, the next question I have to consider is, what is the effect of the charter. This is expressed in the 49th clause of the 1 Vict. c. 78. There is power given, by this Act of Parliament, enabling Her Majesty to grant a charter to a borough,

whether a corporate borough or not, to extend to the inhabitants "all powers and provisions of the Municipal Corporation Act, in the same manner as if it had been included in the schedule to that Act." Accordingly, Her Majesty, under the advice of her Privy Council, has thought fit to grant such a charter, and has given this corporation the same powers and privileges "as fully and as amply, to all intents and purposes whatsoever, as if the borough of Aberavon had been one of the boroughs named and included in the 2d section of Schedule (A) to that Act annexed;" and thereby extending to the inhabitants the powers and provisions of the 5 & 6 Will. 4, c. 76.

These being the words of the charter, the next thing to consider is, what is the operation and effect of it? I dissent from the argument that has been pressed upon me, that this is taking away property from one body [76] and giving it to another. I fully assent to the proposition, as to the identity between, what is commonly called, "the old corporation" and "the new corporation." It is one and the same corporation, it is regulated undoubtedly in a very different manner, it is subject to a number of different rules, it is altered by various provisions of the Act of Parliament, but it is as much the same corporation as the City of London or the City of Westminster would remain the same city, although different Acts of Parliament might pass for the purpose of regulating the police or any other matter connected with those cities. It is precisely the same, and it would remain the same even if it were called by another name.

This Corporation was originally the Corporation of Aberavon, and it is still the Corporation of Aberavon. The governing body was formerly called "*The Portreeve, Aldermen and Burgesses of Aberavon*," it is now called "*The Mayor, Aldermen and Burgesses of the Borough of Aberavon*." It is true that the burgesses are a different body, it is true that the aldermen are elected in a different manner, but, nevertheless, the corporation is identical, and no species of property is transferred from one body to another, but the property belonging to the corporation, at all events the property at the time of the grant of the new charter to this corporation, is merely affected by different rules, provisions and obligations from those which existed before. Upon that I entertain no doubt.

The question then is, what are the alterations which have been imposed upon this corporation, and how is this Corporation of Aberavon affected by this charter, under the 49th section of this Act. The statute says that all the powers and provisions of the Municipal [77] Corporation Act are to be extended to such town or borough. I am told that this section does not apply, and that I must put some limitation upon the effect of these words in the Act of Parliament. It says "all the powers and provisions" are to be extended to it. How can I stop short at one? I remember the case of *Ex parte The Fishmongers' Company, In the Matter of the Lords of the Treasury* (7 Sim. 154, and 1 Myl. & Cr. 676), in which the question was, whether the Lords of the Treasury were liable to pay to the Fishmongers' Company the expense of the reinvestment of the purchase-moneys for quays belonging to the company and taken by the Government. There were two Acts of Parliament, the second referring to the former, and incorporating its powers, &c. Lord Cottenham went through all the clauses of the first Act, and said they must all apply to the second, and that he could not stop short at one proviso in favour of either party. So here I am of opinion that every clause must apply.

The first argument is, that the first section of the Municipal Corporation Act cannot apply, for this reason:—it enacts, "that so much of all laws, statutes and usages, and so much of all Royal and other charters, grants and letters patent now in force relating to the several boroughs named in Schedules (A) and (B) to this Act annexed, or to the inhabitants thereof, or to the several bodies or reputed bodies corporate named in the said schedule, or any of them, as are inconsistent with or contrary to the provisions of this Act, shall be and the same are hereby repealed and annulled." It does two things; in the first place it repeals all laws, statutes and usages which are inconsistent with the Act; and, in the next place, it repeals so much of the Royal [78] and other charters, grants and letters patent in force relating to the boroughs as are inconsistent with this Act. It is said that the borough of Abercorn is not mentioned in Schedule (A) or Schedule (B). But the words in the

49th section are, that the charter is to extend to the inhabitants of any borough "all the powers and provisions of the said Act for regulating corporations, whether such town or borough be or be not a corporate town or borough, or be or be not named in either of the schedules to the said Act." Therefore the powers and provisions can be extended to a town which is not named in the schedule to the Municipal Corporation Act by the way in which it was thought proper to do it, by granting a charter declaring that they shall all apply "in the like manner, and subject to the same provisions, as fully and as amply, to all intents and purposes whatsoever, as if the borough of Aberavon had been one of the boroughs named and included in the 2d section of Schedule (B) to that Act annexed."

I am of opinion that the Crown had authority to do that, and also, that, until this charter is set aside, I am bound by the terms of it, and that, consequently, I must read this Act of Parliament in the same manner as if the borough of Aberavon had been mentioned in the 2d Section of Schedule (B) to the Act. I am not sure, however, that I understand the materiality of this part of the argument; because I do not find any Royal or other charters, grants or letters patent which are now in force in the borough of Aberavon which are inconsistent with the Act. There is property given by the three charters of Edw. III., and that is the property which is dealt with by the new charter and the provisions of the statute, but I see no clause in them which [79] contravenes the powers of this Act or which requires to be repealed.

I come to the 97th section of the Act, which is very important. It says, "That it shall be lawful for the council first to be elected in any borough under the provisions of this Act to call in question all purchases, sales, leases and demises not made in pursuance of some *bond fide* covenant, contract, agreement or resolution, made or entered into, as aforesaid, before the 5th day of June, and all contracts for the purchases, sale, lease and demise of any lands, tenements and hereditaments, and all divisions and appropriations of money," &c., before that time. Now that raises, I think, some difficulty, on which I should be glad to hear some observations from Mr. Baggallay in reply. As it stands, that undoubtedly specifies the 5th of June 1835, and it may be a question whether the Act of Parliament intended to enable this corporation to impeach any sales made so long ago as the six concluding months of 1835, which, nevertheless, might have been made without any suspicion of being impeached, or expectation of a charter being granted twenty-six years afterwards.

With respect to this, another question, which has been pressed upon me very strongly, with respect to the frame of the record, also arises. By the information the Attorney-General complains of certain sales and purchases, made or intended to be made, after the charter was known to be about to be granted, but before it was actually granted. It is said that this clause only enables the corporation or the new town council first elected to impeach them. Now, undoubtedly, this is not a bill by the corporation itself. On the other hand *The Attorney-General v. The Corporation of Liverpool* (1 Myl. & Cr. 171, 199, and 2 Myl. & Cr. 613), [80] or as it was afterwards called *The Attorney-General v. Aspinall*, lays this down distinctly:—That where a borough was about to be made one of those subject to the provisions of the Municipal Corporation Act, and was about to dispose of corporate property, the Attorney-General could properly interfere for the purpose of preventing that sale. This is an information filed, during the same period of suspense, to prevent the lease of certain property prior to the granting of the charter. I think that case is a sufficient authority to sustain this information, so far as it seeks to set aside or prevent any lease or alienation of property proposed to be made after the time when it was known that the charter was about to be granted, or in fact subsequently to the time when the petition was presented to the Privy Council for that purpose.

I wish to hear a reply as to whether I can properly interfere with the leases proposed to be granted before the charter was actually granted, and whether the 97th clause must not be read as if, instead of the words "before the said 5th day of June," the words "before the date of the charter" were inserted. Secondly, whether, if you go beyond that and seek to impeach any other transactions, it must not be at the instance of the town council itself. With respect to all the rest of the case, I relieve you from making any observations.

Mr. Baggallay, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly] declared that the property of "The Portreeve, &c., of Avon," including the market and tolls, became and were vested in the Mayor, &c., of Aberavon, for the purposes and subject to the provisions of the Municipal Corporation Acts, subject to any incumbrances affecting the same when they so [81] vested. He directed an inquiry as to what property the corporation possessed at the granting of the charter, and what charges, &c., affected the same; and also an inquiry whether any and what property belonging to the corporation had been sold, or otherwise disposed of, between the 16th of January 1861 and the date of the charter, and under what circumstances.

NOTE.—Upon appeal, the Lords Justices, on the 4th of August 1863, held that, at the filing of the information, the Attorney-General had no title to sue, except as regarded the market and tolls, and that the title subsequently acquired by the charter could not be brought forward by amendment. [3 De G. J. & S. 637.]

[81] MAY v. MAY. June 3, 4, 8, 1863.

[See *In re Blakely Ordnance Company, Limited*, 1876, 46 L. J. Ch. 371.]

Whether the practice of the Court of allowing a copy of a lost instrument to be stamped, in order that it may be given in evidence is altered since the 13 & 14 Vict. c. 97, s. 12.

A conveyance of property by a father to his son to give him a qualification to vote: Held, not invalid, but a bounty.

A father, by agreement, took all his son's property, undertaking to pay his debts. Held, that, in the absence of proof to the contrary, the son was entitled to the surplus, if any.

This was a suit instituted by a son against his father. The bill alleged that, on the 3d of January 1854, when the Plaintiff was about to be married to his second wife, then Miss Emma Cooper, the Defendant, his father, signed the following agreement:—

"I hereby agree to allow my son William May, on his marriage with Emma Cooper, the sum of £200 a year, to be paid quarterly, and in advance, on the 1st of January £50, 1st April £50, the 1st July £50, and the 1st of October £50.

"Witness, Charlotte Halcomb."

"JOSEPH MAY."

[82] The Plaintiff married in the same month, and his wife died in January 1858.

The agreement was not produced, but the Plaintiff accounted for its loss as follows:—

"The memorandum of agreement, so signed by the Defendant, was deposited by the Plaintiff in his secretaire, in his dwelling-house, at Deansfield, in Hampshire, which secretaire was afterwards, and in absence of the Plaintiff, broken open by the Defendant, and the Plaintiff has never since seen the said memorandum of agreement. While the memorandum of agreement was in the Plaintiff's possession, he made a true and exact copy thereof. The Plaintiff, for some time, carried such copy in his pocket, whereby the same became much creased and worn, but was still perfectly legible. After the secretaire had been broken open by the Defendant, the Plaintiff made a true and exact copy of the original copy so made by him of the original memorandum, and then destroyed the original copy. Such second copy was and is a true and exact copy of the original memorandum of agreement so signed by the Defendant, and such second copy is now in the Plaintiff's possession or power."

The Plaintiff sought to enforce this agreement.

Another question arose under these circumstances:—

In 1853 the Defendant voluntarily conveyed to the Plaintiff some freehold property, which the Plaintiff had, in 1855, mortgaged to Orme. By a deed dated the 12th of March 1861, this mortgage was transferred to the Defendant. The Plaintiff

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was a party to the transfer, which contained a power of redemption and a covenant, on the part of the Plaintiff, to pay the mort-[83]-gage debt. The Plaintiff claimed a right to redeem this property.

The next question arose under these circumstances :—

In 1860 the Plaintiff had incurred debts and fallen into pecuniary difficulties, and in April 1860 it was agreed, between the Plaintiff and the Defendant, that the Defendant should take all the son's property, he undertaking to pay his debts. This was accordingly done, and the question was, whether the Defendant was entitled to the surplus, if any, of the Plaintiff's property after paying his debts.

The bill prayed an account, redemption and payment of the residue, and for an account and payment of the arrears of the annuity of £200, and that the future payment might be secured.

The cause now came on for hearing.

Mr. Hobhouse and Mr. Welford, for the Plaintiff.

Mr. Selwyn and Mr. Bagshawe, for the Defendant.

The following points were argued. First, the Plaintiff asked the leave of the Court to allow him to obtain a proper stamp to be put upon the copy of the lost document of the 3d of January 1854. This was resisted on the part of the Defendant. On this point, *Bousfield v. Godfrey* (5 Bing. 418); *Smith v. Henley* (1 Phil. 391); *Blair v. Ormond* (1 De G. & Sm. 428); *Rippiner v. Wright* (2 Barn. & Ald. 478); 13 & 14 Vict. c. 97, s. 12, were cited.

[84] Secondly. The Defendant contested the Plaintiff's right of redemption of the property mortgaged to Orme, and insisted that the conveyance from the father to the son in 1853 was invalid, having been executed for the purpose of giving him a qualification to vote. As to this, the cases of *Brackenbury v. Brackenbury* (2 Jac. & W. 391); *Childers v. Childers* (3 Kay & John. 310, and 1 De G. & Jones, 482), were cited.

Thirdly. It was argued that the Defendant having undertaken to pay the Plaintiff's debts, the surplus of the property belonged to him beneficially.

June 4. THE MASTER OF THE ROLLS [Sir John Romilly]. On the principal point argued before me in this cause, my opinion is adverse to the Plaintiff. I think that he has not established the correctness of the copy he proposes to put in evidence of the agreement entered into on his second marriage, and still less has he proved that the original has been lost by any conduct of the Defendant, so as to entitle the Plaintiff to call on this Court to allow him to obtain a proper stamp to be put upon it as a copy, and thus enable it to be given in evidence in this cause.

The account the Plaintiff gives of it is extremely unsatisfactory. Up to a late period he asserted that he had the original in his possession; and he never suggested, until after he had amended his bill, that the original had been lost, and after the Defendant, in order to protect his own property, had been obliged to break open the secretaire in the house which his son had abandoned.

[85] I do not think it necessary to go into the question, whether the late statute, which enables all deeds, agreements and instruments, other than bills, notes and receipts, to be stamped on paying the proper penalty, may not have extended the view formerly taken by Courts of law and Equity, by enabling the copy of a lost document to be stamped, even where it is not proved to have been lost by the person who is sought to be charged; the more so as some of the cases seem to have put the principle, of not allowing the copy of the lost document to be stamped, on the ground that, in the absence of the original, they are unable to judge whether the document was one which could, with propriety, be allowed to be stamped on paying the penalty. I say this, because, on the evidence before me, I by no means feel convinced of the accuracy of this copy of a copy. Neither the original nor the first copy are forthcoming, and this copy of a copy seems to have been made as late as the year 1862, in which year the bill itself was filed. So far, therefore, as the bill seeks to fix the father with the payment of an annuity to his son of £200 per annum, it must be dismissed.

On the other two points, I entertain an opinion favourable to the Plaintiff. I think the transfer to the Defendant of Orme's mortgage did not convey the absolute interest in the property to the Defendant. The deed of the 12th of March 1861 expressly reserves a power of redemption, and it also contains a covenant by the

Plaintiff to pay the mortgage debt; two circumstances, wholly inconsistent with the view pressed upon me by the Defendant, that it was intended to be a sale to him. It is, in my opinion, also no just ground of defence that the property may have been originally given by the father to the son in order to give him a [86] qualification to vote. Assuming it to have been so, I am of opinion that it was bounty from the father to the son, and intended to be such, and that it became the property of the son. With respect to that, the son must be at liberty to redeem, on payment of what is due to the father for principal, interest and costs.

The remaining point arises thus :—

The Plaintiff had fallen into distressed circumstances, and in April 1860 it was agreed between the Plaintiff and Defendant that the Defendant should take all his son's property, undertaking to pay his debts, which the Defendant accordingly has done. The question is, whether the Defendant is liable to account to the son for the overplus which may remain in his hands after paying such debts. This does not rest on any written instrument, it was an agreement between them not reduced into writing, but which has been acted upon by both, down to the present time. The evidence respecting it rests on the testimony of the Plaintiff and Defendant of what their respective understandings were on the subject. On this point, I am of opinion that the burthen of proof must lie on the Defendant, to establish that he was to take the surplus for his own benefit, if there were any surplus; and I am of opinion that, in the circumstances under which this arrangement took place, the Defendant has failed, as indeed it was probable that, in the absence of writing, he should fail, in proving that he is entitled to retain the surplus.

I must, therefore, on this part of the case, direct an account to be taken, and direct the Defendant to account for the surplus, if, on taking the account, it appear that there is any; and, in taking this account, I [87] shall not allow the Defendant anything in respect of the payment of the annuity of £200 since the decease of the Plaintiff's wife, down to the month of August 1860, when the payment of it was discontinued. I do not consider that these payments establish that the Defendant considered or admitted that he was liable to pay such annuity after the death of the lady; but, on the other hand, I consider them as acts of bounty on the part of the father, and not as money lent by him to his son. The whole course of proceedings between them seems to establish this fact, and accordingly I have, for the purpose of considering these questions, not thought that the fact, which is established, that all the property in question in this suit originally flowed from the father, and was by him given to his son, of such importance as to vary the rights between them, as I have stated them.

When a father parts with property in favour of his son, it becomes, as between them, the exclusive property of the son, as much as if it had been given to him for valuable consideration, in all cases, except where it rests *in fieri*, and some act remains to be done by the father to make the gift complete, and which, as between volunteers, this Court will not interfere to compel; but, in this case, that latter question does not arise.

I shall give no costs on either side of any part of this suit.

The decree will therefore be, first, to dismiss the bill so far as it prays an account of the arrears of the annuity and for security for the future payment of it. Secondly, to direct the usual redemption decree of the mortgage transferred to the Defendant by the indenture [88] of 12th of March 1861; but, in the costs to be added to the debt, I do not include the costs of this suit. And, thirdly, the decree will direct an account of the property of the Plaintiff taken by the Defendant under the verbal agreement of April 1860, and of his application thereof in payment of his debts, making to him all just allowances in respect of his charges and expenses in so doing, and directing him to account for the surplus, if any, to the Plaintiff. I fear that, in respect of this, I must reserve further consideration.

[88] HORA v. HORA. July 7, 1863.

The testator gave his residue, on trust to apply the income for the maintenance, education and support of his children until the youngest attained twenty-one. The children having been maintained, &c., the Court declined, directing an account of the application of the income during the minority of the youngest child, without a special case being made out.

The testator gave all his real and personal estate to his wife and eldest son, upon trust "to apply the rents, profits and income of the aforesaid properties to the maintenance, education and support of all his children by his present and former wife, until his youngest child attained the age of twenty-one years." He directed an annuity to be thereupon provided for his wife, and the remaining property to be equally divided amongst his children.

The testator died in 1843, leaving eight children, the youngest of whom attained twenty-one in 1861.

This suit was instituted to carry into effect the trusts of the will. The bill stated that since the testator's death the income had been applied in the maintenance, education and support of the children.

[89] Mr. Selwyn and Mr. John Pearson, for the Plaintiff.

Mr. Schomberg, for one of the children, asked for an account of the income, and of the application thereof, from 1843 to 1861.

Mr. Baggallay and Mr. Hansom resisted this account on the part of the widow and executrix.

THE MASTER OF THE ROLLS [Sir John Romilly]. If it appears that the children have been maintained, educated and supported, I can direct no such account. Here that has been done; and if any one is dissatisfied with the application of the income until the youngest child attained twenty-one, he ought to have made out some special case. There is no suggestion that the children have not been properly maintained and supported, and I cannot direct this account. (NOTE.—See *Jodrell v. Jodrell*, 14 Beav. 397.)

[90] BOUSFIELD v. HODGES. July 9, 1863.

Suits were compromised with the sanction of the Court (infants being interested), and it was agreed that the estate should be sold by auction, for the purpose of division, and that A. B. should have the conduct of the sale. At the auction the property could not be sold, and it was afterwards sold by private contract at the reserved bidding. Held, that this was a valid sale, and the purchaser was decreed specifically to perform his contract.

Where a purchaser accepts the title, he is only bound to the extent to which he has been made cognizant of it.

Four suits had been instituted for the administration of three estates, which were divisible amongst various members of a family. These estates were closely connected together, and various intricate questions arose respecting them.

To put an end to the litigation, a compromise was effected, and infants being interested, the sanction of the Court had been obtained confirming the compromise. (See *Bousfield v. Bousfield*, 31 Beav. 59; affirmed, 1 De G. J. & Smith, 459.) By one of the terms of the compromise, it was agreed that all the estates should be sold by public auction, and that Mr. Simpson (an executor and trustee) should have the conduct of the sale, and that all parties should be at liberty to bid.

The property in question was put up for sale by auction, but was bought in. After that, Mr. Simpson (none of the adults dissenting) sold the property to the Defendant, in September 1862, by private contract, for £15,000. This was the reserved price at the sale.

The purchaser accepted the title, but having delayed in completing his contract, this suit was instituted against him by Mr. Edmund Collingwood Bousfield for specific

performance. The only objection raised by the Defendant was that, under the agreement for compromise, the sale must necessarily be by public auction, and that a sale by private contract was invalid.

[91] Mr. Selwyn and Mr. Marten, for the Plaintiff, argued that, having failed to sell by public auction, a sale by private contract at the reserved price, which the vendor was justified in fixing, *Re Peyton's Settlement* (30 Beav. 252), was authorized; *Else v. Barnard* (28 Beav. 228); *Mather v. Priestman* (9 Sim. 352), where a sale of the estate of an insolvent by private contract, after an ineffectual attempt to sell by auction, as required by the statute, was held valid.

They argued that the Defendant, having accepted the title and there being no fraud or surprise, could not now raise the objection.

Mr. Bush, for the Defendant. The contract cannot be supported. An agent or trustee authorized to sell by public auction cannot sell by private contract; *Daniel v. Adams* (1 Ambl. 495); Sugden's Vendors (pp. 61, 216 (14th edit.)). Here the 8th condition of the contract states, that "the vendor is a trustee selling under a trust for sale," and some of the parties, being infants, cannot affirm the sale. Trustees, pending a suit, are bound to obtain the authority of the Court in exercising powers of sale and leasing the trust property; *Turner v. Turner* (30 Beav. 414).

Secondly, the title was accepted under the belief that the order for compromise authorized a sale by private contract. The purchaser is not bound by an acceptance of a title made in ignorance of the facts; *Jenkins v. Hiles* (6 Ves. 655), where the principle is clearly laid down by Lord Eldon, who says, "When the vendor," &c. He also cited *Warren v. Richardson* (1 Younge, 1).

[92] THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Defendant will get a perfectly good title under this contract, and that there is a misapprehension in the foundation of his argument. This is not a sale under the authority of the Court; on that part of the case I have no doubt. I assent to the proposition that where there is a suit pending for the administration of an estate, the trustee can only sell with the authority and sanction of the Court. But this is not a sale under the Court; if it had been, it would have been so stated in the order, the purchase-money would have to be paid into Court, and the sale would have to be confirmed by an order. But a sale under the Court would have defeated the object of parties and of this order, which was, to stay all proceedings whatever in the suit. After the compromise had been sanctioned, the Court could not make any other order in the suit unless the order approving the compromise had been first set aside, except to carry the compromise into effect. This order controlled the Court; it is an order to compromise the suit on certain terms specified therein, and with which the Court had nothing to do, further than this:—to consider whether the compromise was for the benefit of the parties to it who were under disability. For that purpose a reference was made, the terms of the compromise were considered in Chambers and were approved of and confirmed, and all further proceedings in the suits were stayed. The Court was thereupon *functus officio*, and if an application had been made to confirm the sale, or to take any other steps in the suits, the Court would simply have said that it had nothing to do with the matter.

It was agreed, by the 17th clause of the compromise, that the estate should be sold by the person who [93] had authority to sell, without the interference of the Court; but it was agreed that all persons interested should have liberty to bid, and that the sale should take place by public auction, and that Mr. Simpson should have the conduct of the sale.

This being no sale under the authority of the Court, but under a compromise sanctioned by the Court, the only question is, whether this has been duly carried into effect by the persons entrusted with the controul of the sale. The Plaintiff Edmund Collingwood Bousfield is the vendor, and Mr. Simpson, who had the conduct of the sale, finding he had no bidding at the auction, and subsequently an offer having been made by the Defendant to buy the property at the amount of the reserved bidding, accepts it. I think it was not *ultra vires* to accept the price which would have been taken at the auction if it had been offered, and that it was competent for him to sell the property by private contract at the amount of the reserved bidding.

I do not dispute that where an agent or trustee is authorized to sell any property

in a particular manner, the authority is limited to that particular mode of selling, and that he cannot exceed the scope of his authority. But that is not the case here; it is an agreement by all parties that the property shall be sold, at all events, for the purposes of division, and that it shall be sold by public auction. Assume it could not be sold at all by public auction, is there to be an end of the compromise? I think not. As soon as Mr. Simpson attempted to sell by auction, he found that he could not sell it by that mode, that he then accepted an offer to purchase the property upon the conditions of sale and at the reserved price previously agreed to be accepted for it. I think that this was a perfectly good sale, and [94] that the Defendant is bound to complete. My decision will affirm his title.

As to the acceptance of the title, I assent to this proposition:—that a purchaser is only bound by his acceptance of the title, so far as he is made cognizant of it, and that if anything is kept back by the vendor he is not, as to that, bound by his acceptance. But here the Defendant was cognizant of everything except this order for a compromise.

[94] SEMPLE v. HOLLAND. *July 16, 1863.*

The Plaintiff obtained a judgment against a tenant for life in remainder, whose estate was liable to forfeiture by his non-user of the name and arms of the testator. Upon a bill to realize the charge, the Court, at the hearing, refused to grant an injunction to restrain the tenant for life from forfeiting his life-estate.

Under the will of Michael Corbett, the Defendant Corbett Holland was tenant for life in remainder, expectant on the decease of his father and of his uncle without issue, of large real estates in Gloucestershire.

The will contained a clause, enjoining every tenant for life or in tail in possession of the estate to take and use the name of Corbett as their last or principal name, and to wear the family arms. And in default of taking or in case of discontinuing to use the same, then the estate of such persons was to cease and determine, and the remainders were to be accelerated.

In 1858 the Plaintiff obtained a judgment against Corbett Holland, which he duly registered, and he thereby acquired a charge on his reversionary life-estate. This bill was filed by the Plaintiff to set aside a fraudulent conveyance of the reversion, and also for a foreclosure and redemption as against Corbett Holland and his other incumbrancers.

[95] The bill, amongst other things, prayed "that the Defendant Corbett Holland might be restrained by injunction from entering into any treaty, negotiation or arrangement with his brother, or any other person or persons, for defeating the Plaintiff's said security, by not taking or not using the surname of Corbett when he should become entitled to an estate for life in the hereditaments and premises devised to him by the will of the testator Michael Corbett."

The cause now came on to be heard.

Mr. Baggallay and Mr. T. H. Terrell, for the Plaintiff, asked, amongst other relief, to restrain the Defendant from forfeiting his life-estate by non-user of the name and arms.

Mr. Selwyn, Mr. Hobhouse, Mr. Southgate, Mr. Cole and Mr. Begg, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot compel the Defendant Corbett Holland to take the name or arms of Corbett, nor can I grant such an injunction as is asked.

[96] HENNESSEY v. BRAY. *July 16, 1863.*

[S. C. 9 Jur. (N. S.) 1065; 11 W. R. 1053.]

The word "heirs," in a devise to first and other sons, construed "heirs of the body," in order to give effect to the general intention that the sons should take successively and in priority of birth.

Devise to A. B. for life, and afterwards to his "first and other sons successively according to the priority of their respective births and their respective heirs" [omitting "of their bodies"], to the extent that the elder should be preferred to the younger, and "for default of such son or sons," to the daughters as tenants in common in fee. Held, that the sons of A. B. took successively as tenants in tail general.

Trustee *de facto*, held liable to account as a trustee *de jure*.

The estate of a tenant for life was liable to forfeiture on his mortgaging it. He mortgaged it to C. D. unknown to the parties taking under the forfeiture. Held, that C. D. was liable to account to them for the rents, at all events from the filing of the bill, and, beyond that, from the time he had notice of the trusts creating the forfeiture.

The testator, by his will dated in 1844, devised his estate, called Bray Down, to trustees in fee, upon trust as follows:—"To pay the rents to my son Reginald Bray for and during the term of his natural life, and from and immediately after the decease of my son Reginald Bray my will is, that the trustees or trustee for the time being of this my will shall stand and be possessed of my Bray Down estate, and also my mine thereon, and all other such mines as shall be thereon, and the profits, proceeds, dues and produce of such mine or mines, respectively, upon trust for the first and other sons of my son Reginald Bray, successively, according to the priority of their respective births, and their respective heirs for ever, to the intent that the elder of the said son and sons of my son Reginald Bray and his heirs shall be preferred and taken before the younger of the same sons and his heirs; and for default of such son or sons as last aforesaid, upon trust for all and every the daughter and daughters of Reginald Bray and their respective heirs and assigns for ever, equally to be divided between them, if more than one, share and share alike, as tenants in common and not as joint-tenants, and if there shall be but one such daughter [97] of Reginald Bray, then upon trust for such one daughter, her heirs and assigns for ever."

He then provided that if Reginald Bray should execute any mortgage, &c., of the rents and profits of the Bray Down estate "then and from thenceforth, and in either of such cases, the trusts hereinbefore declared for his benefit shall absolutely cease and be void, and my said trustees or trustee, for the time being of this my will shall, immediately thereupon, during the remainder of the life of my said son Reginald Bray, stand and be possessed of my said rents and profits, proceeds, dues and produce, upon trusts for such person or persons and in the same manner, in all respects, as if my said son Reginald Bray were then dead."

He gave the residue of his real and personal estate in trust to convert and divide between his other children.

The testator died in the same year (1844).

By an indenture, dated the 29th of October 1851, Reginald Bray mortgaged the estate to Kittow for £100; but this was not discovered by the Plaintiffs until 1861.

Reginald Bray had had one child only, a son, who died an infant in the year 1852.

The Defendant William Pitt Bray was the heir at law of the testator, and as such claimed to be entitled, in possession, to the Bray Down estate. The Defendants Reginald Bray, Richard Kittow and George Jennings contended that, under the trusts of the will, the son of Reginald Bray took the fee-simple of the Bray Down estate, and that, upon the death of such [98] son, the fee-simple devolved upon the Defendant Reginald Bray as the heir at law of his son.

The bill sought a declaration that the estate and interest of Reginald Bray ceased upon the 29th of October 1851, and a declaration of what persons thereupon became entitled to the rents and profits of the Bray Down estate.

It asked for an account and payment of the rents received by Kittow and Reginald Bray since that time.

Mr. Hobhouse and Mr. Kekewich, for the Plaintiffs, two of the children of the testator.

First, the general intention is that the sons should take *successively*, and this could only be attained by giving them estates tail. The life-estate of Reginald became

forfeited upon his executing the mortgage to Kittow, and the estate is now vested in the residuary devisees, subject to the rights of any son who may hereafter be born to Reginald Bray.

Secondly, as to the period from which the Defendants ought to account for the rents, they argued that Jennings and Kittow were accountable from the death of the son, when his estate ceased and the forfeiture took effect. They cited *Jarman on Wills* (p. 728 (1st edit.)); *Joel v. Mills* (3 K. & J. 458); *Lambarde v. Turton* (1 De G. F. & J. 495); *Hicks v. Sallitt* (3 De G. M. & G. 782); *Wright v. Chard* (4 Drew. 673); *Ashley v. Ashley* (6 Sim. 358); *Dormer v. Fortescue* (3 Atk. 124); *Tyrone v. The Marquis of Waterford* (1 De G. F. & J. 613).

[99] Mr. Southgate and Mr. E. Charles, for Kittow, argued that the account against him ought to be from the filing of the bill only; *Hicks v. Sallitt* (3 De G. M. & G. 782). That the mortgage deed gave him no notice of the trusts, and that he had acted merely as agent of Reginald Bray and not as trustee, and was therefore only accountable to his principal; *Maw v. Pearson* (28 Beav. 196).

Mr. Speed, for Jennings, argued that the son of Reginald Bray took a vested estate in fee-simple upon his birth, and that upon his death the estate descended in fee-simple upon his father. He insisted that Jennings, who was not a properly constituted trustee, was not liable to account; *In re Pollard's Trusts* (32 L. J. (Ch.) 657); *Foster v. Lord Romney* (11 East, 594); *The King v. The Marquis of Stafford* (7 East, 521); *Kershaw v. Kershaw* (3 El. & B. 845); *Lewis d. Ormond v. Waters* (6 East, 336).

Reginald Bray did not appear on the hearing.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this is an estate tail in the sons, and I am of opinion that it was a vested interest in them immediately upon their births.

It is clear, upon the words of gift to the first and other sons of Reginald Bray, the elder to be preferred and take before the younger, that the moment a son was born, the estate immediately vested in him for an estate of inheritance, either in fee-simple or in tail, and [100] that it did not remain contingent until the death of Reginald Bray took place. If this devise to the sons gave an estate in fee-simple, then this effect took place:—That if Reginald Bray had three or four sons, and the eldest son had died in the lifetime of his father, then the vested fee-simple would (to use an expression which shocked our ancestors very much) have descended upon his father, under the statute (3 & 4 Will. 4, c. 106, s. 6), and vested in him as heir of his son. In that state of things, the clause of forfeiture was, of course, put an end to, and Reginald Bray became the owner of the estate in fee-simple, and could deal with it as he pleased. But I think it is impossible to give that construction to this devise, because the effect of it would be, to prevent any other son of Reginald Bray taking the estate as the testator intended, although the eldest son died an infant. A second son would take nothing, whereby it is obvious that the whole object of this devise would be defeated: for it directs that the first and other sons should take “successively, according to the priority of their births, and their respective heirs for ever, to the intent that the elder of the said son or sons of my son Reginald Bray and his heirs shall be preferred and taken before the younger of the same sons and his heirs.”

I think that the intention of the testator is clear that the sons were to take, in succession, estates of inheritance, and the only way in which they could so take is, by giving them successively estates in tail general.

That being my opinion as to the expressed intention of the testator, is there any rule of law in construing wills, which forbids it? The only rule is that the word “heirs” is to be taken in the largest possible sense, and [101] then this would be an estate in fee-simple, and not an estate tail. But the Court has thought that where the meaning of the testator is plain, the limitations may be modified to carry it into effect. Nothing is more common than an estate for life to a son being enlarged to an estate tail, in order to prevent the application of the rules against perpetuity, and this is done under the doctrine termed *cy-pres*. By this, where a testator has given a series of estates in succession, which would be too remote, the Courts, in order to effect the general intention of the testator, and even against the ordinary meaning of the

particular expression of the clause, have given the first devise an estate tail, so that, as nearly as possible, all the children may take in succession.

I think it is open to this Court to say here, that the word "*heirs*" is to be read "*heirs of the body*," for the purpose of giving effect to the plainly expressed scope and intention of the will.

Then is this construction affected by the gift over? On the contrary, I think that, if anything, it is assisted by it; for the will goes on to say, "And for default of such son or sons as last aforesaid, upon trust for all and every the daughter and daughters of Reginald Bray," and so on. It is very true it does not say *issue*, if it had said "such issue," even then the cases which Mr. Speed has referred to would shew that *such issue* referred to the sons who are mentioned previously; but he expressly says, "and for default of such son or sons as last aforesaid." The meaning then is this:—a son takes an estate tail, and if that estate tail does not take effect, then it goes over to the daughters. My opinion therefore is, upon the authority of the class of cases [102] referred to (omitting *Keene v. Dickson* (1 Bos. & Pullen, 254, n.), which is an authority the other way, but which is, if not expressly overruled, expressly disregarded in all the subsequent decisions (1 Jarm. on Wills, 685, n. (2d edit.)), that upon the failure of the previous estates, the gift over in favour of the daughters takes effect, and therefore I am of opinion that Reginald Bray took an estate for life, with estates to his first and other sons successively in tail general, and that upon the failure of those estates the limitation over to the daughters as tenants in common in fee took effect.

That being so, the forfeiture clause takes effect, and it is a singular thing, in this case, that Reginald Bray, who is the person principally interested in arguing against this construction of the will, does not appear to argue the question. The Defendant Mr. Jennings has not been properly and regularly appointed a trustee, but this Court cannot regard that, because the property has been conveyed to him, and he has accepted it upon the trusts of the will, and therefore he is *de facto* a trustee. I am therefore of opinion that he must be held answerable for all the rents and profits of the estate which he has received.

The only other question is, the time from which the account is to be taken. I am disposed to think that Mr. Kittow is only liable to account for the rents of the estate (assuming him to have received any for his own benefit) from the time he had notice of the trusts, whenever that was, but he clearly had notice of the trusts when the bill was filed. Reginald Bray and G. Jennings are liable to account for the rents and profits from the death of Reginald Bray's son, when [103] the gift over and the forfeiture took effect, but Mr. Kittow is only liable since the filing of the bill, unless the Plaintiffs can shew that he had notice of the trust prior to that time; the mortgage deed clearly gave him no notice.

[103] FERGUSON v. THE LONDON AND BRIGHTON RAILWAY COMPANY.

July 16, 1863.

[S. C. affirmed on appeal, 3 De G. J. & S. 653; 46 E. R. 790; 33 L. J. Ch. 29; 9 L. T. 134; 2 N. R. 566; 11 W. R. 1088. See *Pulling v. London, Chatham and Dover Railway Company*, 1864, 3 De G. J. & S. 669; 46 E. R. 796; *Barnes v. Southsea Railway Company*, 1884, 27 Ch. D. 543; *Kerford v. Seacombe, Hoylake and Deeside Railway Company*, 1888, 57 L. J. Ch. 273.]

A person held, under the same lease, a piece of ground on the south side of a public road, on which his house and garden were situate, and a corresponding piece of ground of equal width on the north side, on which he was prohibited from building, but it was used for the purposes of recreation and pleasure. A railway company were desirous of taking the north piece only. The Court refused, on motion, to compel them to take both, as being parts of a "*house*" within the 92d section of the Lands Clauses Consolidation Act.

In 1840 the owner of Champion Park formed a private road running east and west through part of it, and he laid out the land, on both sides of it, in plots, to let

on building leases. Some of the intended lessees entered into arrangements with the owner, that houses should be erected on the south side of the road only, and that the land on the north side should be kept free from any buildings.

By an indenture of lease, dated in 1843, two pieces of this land were demised to the Plaintiff; one was on the south side of the road, and was 80 feet wide and nearly 400 feet deep; and on this the Plaintiff's house was erected, having a garden before and behind. The other corresponding piece was on the north side of the road, and was of the same width (80 feet) and 105 feet long. The Plaintiff, by his lease, covenanted not to build, on the ground on the north side of the road, any messuage or building, coach-house, stable, cow-house or other buildings whatsoever, save and except a greenhouse or hot-house, or pleasure or summer-house.

The piece of ground on the north belonging to the Plaintiff, together with several similar pieces belonging [104] to other lessees, remained free from buildings. It was covered with turf, and was used by the Plaintiffs and other lessees and their families (as the Plaintiff said) for a cricket-ground and for recreation, as part of the grounds belonging to their houses.

Both pieces of land together comprised about 1 acre 27 perches.

In 1844 the parish adopted the road as a public road.

The Defendants, the company, in December 1862, gave notice to the Plaintiff that they required the piece of land on the north of the new road only for the purpose of their undertaking. The Plaintiff insisted that they were bound to take the whole of the property, that is, the house and land at the south of the new road, as well as that on the north. The question was whether, under the 92d section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 92), the Defendants could take the property on the north without taking that on the south. That section says, "that no party shall at any time be required to sell or convey to the company *a part only of any house*, or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

The Plaintiff filed this bill in July 1863, to restrain the Defendants from taking possession of a part of his premises until they had paid compensation for the whole, and a motion was now made for an injunction.

Mr. Selwyn and Mr. A. G. Marten, for the Plaintiff, argued that both pieces of land were, in law, comprised under the word "house," and that the Defendants could [105] not resist taking the whole. They relied on the cases of *Lord Grosvenor v. Hampstead Railway Company* (1 De Gex & J. 446); *Cole v. West London Railway Company* (27 Beav. 242); *King v. Wycombe Railway Company* (28 Beav. 107); and see *Pulling v. The London, Chatham and Dover Railway Company* (M. R. 25 April 1864, and L. J. 23 June 1864).

Mr. Rolt and Mr. J. H. Taylor, for the Defendants, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I ought not to interfere by injunction in this case. If the Plaintiff establishes his right, compensation must be given to him for the whole of his house, whether the railway company are allowed to take the land now or not. But my opinion is, that the Court ought not to interfere to restrain the company from taking the land without giving compensation for the whole as part of the "house," except where it is clear, upon the construction put upon this Act of Parliament, that it forms part of the "house," properly so called. I cannot say that I have come to that conclusion in this case. It does not appear to me necessary to consider whether it was included in the same demise or not; a very large piece of land may have been included in the demise, on a portion of which the Plaintiff may have built a house and laid out pleasure-grounds, and he may have separated another portion from it for other purposes. I find here a house built upon a piece of land 80 feet from east to west, and nearly 400 feet from north to south, with a garden before and behind it, and bounded by other persons' property on both sides and [106] by a public highway on the north. My opinion is, that if any person were asked what the house consisted of, or what the house was, he would consider the house included only that portion of the garden which lies in front of and behind it, and which is bounded by the public high road on the north and by the property of another person on the south. It may be true, that if a purchaser of the house were informed that the piece of land in front beyond the road was held with

the house under one demise of the whole property, then a question might arise whether the vendor had not, when selling the house, had the intention of selling all that was included in the demise. But I do not think that any person would fairly consider that anything on the other side of a public high road was part of the house. Under the terms of the Act of Parliament, I must be satisfied that there could be no question upon that fact, before I compel the railway company to take the whole, before they enter upon the land.

I propose not to grant the injunction, but to make the costs of the motion costs in the cause. If the Plaintiff proves his case at the hearing, and is able to establish that the whole of the house ought to be taken, he will have the full benefit of it.

NOTE.—Upon appeal the Lords Justices differed, and the decision was affirmed, 4th August 1863. [3 De G. J. & S. 653.]

[107] CHURCHILL v. SHEPHERD. July 18, 1863.

By a settlement made in June 1842, property of the wife was settled, and the husband covenanted that if, during the coverture, any real or personal estate should "descend or devolve to or vest" in his wife, or in him in her right, he would settle it. In August 1842 a sum, part of the distributive share of the wife in the estate of her father, who died in 1821, and which had been overlooked, was recovered and paid to the trustees of the settlement, and the husband received the income for twelve years. Held, that it was not within the covenant to settle, and that the husband had not so acquiesced as to make it subject to the trusts of the settlement.

By the settlement made on the marriage of Smyth Churchill with Mary Shepherd, dated the 16th of June 1842, certain property of the wife and husband was assigned to trustees upon the usual trusts.

And Smyth Churchill thereby covenanted with the trustees that, "if, at any time or times during the said intended coverture, any real or personal estate should descend, or devolve to, or vest in Mary Shepherd, or to or in Smyth Churchill in her right, then and in such case, and so often as the same should happen," Smyth Churchill would execute or join with Mary Shepherd in executing all such deeds, &c., as should be necessary for conveying, &c., the said real and personal estate, in such manner, that the same should be vested in the trustees, upon such trusts as would nearest correspond with the trusts before expressed concerning the trust moneys thereby settled.

The circumstances which gave rise to the question in this special case were as follows:—The father of Mary Shepherd died intestate in the year 1821, and her mother, who was the administratrix of her father, died in 1853. After her mother's death, it was found that she was considerably indebted to the estate of her father. The amount, being ascertained, was paid to the administrator *de bonis non* of her father, who, in August 1854, transferred £1003 consols (being the distributive share of Mary Churchill) to the trustees of her marriage settlement, and they had paid the income to the tenant for [108] life, in accordance with the settlement, down to the present time.

The question was, substantially, whether this fund was included in the marriage settlement.

Mr. Selwyn and Mr. G. A. Young, for the Plaintiff, argued that this was not property which had descended, devolved to, or vested in the wife during the coverture, and that therefore it was not included within the covenant to settle.

Mr. Boyle, for the Defendant, a child of the marriage. This sum is bound by the covenant; its existence was not known at the date of the marriage, and if known, it must have been considered that the mother (the administratrix) had a life interest in it. It vested in the husband upon and during the marriage, and at the moment the coverture took place; it therefore comes within the covenant. The wife has acquiesced since 1821, and the husband since 1842, and he has received the dividends

since 1854; he has therefore devoted it to the trusts of the settlement. He cited *Blythe v. Granville* (13 Sim. 190).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this fund is not within the covenant. When the covenant speaks of real or personal estate which should descend, or devolve to, or vest in the wife during the intended coverture, it applies to something not actually descended, or devolved, or vested at that moment, and if anything which had then descended or which then belonged to the wife is not settled, it must be assumed that it was not intended to be settled.

[109] As to the alleged acquiescence, I am of opinion, assuming the husband did not request this sum to be paid to the trustees, or express a desire that it should form part of the settlement, that the fact of receiving the dividends for twelve years did not constitute such a waiver or acquiescence, on his part, as to make this fund subject to the trusts of the settlement. Mr. Churchill is therefore entitled to it, subject to his wife's consent.

[109] BASHFORD v. CANN. July 21, 1863.

[S. C. 11 W. R. 1037. See *Preston v. Neele*, 1879, 12 Ch. D. 771.]

Upon the grant of an annuity during the grantor's life, the grantee undertook that when the annuity "came to be paid off" and "as soon as the annuity was redeemed" he would assign the policy on the grantor's life to the grantee. The policy was effected by and paid for by the grantee. Held, on the death of the grantor without having redeemed the annuity, that the representative of the grantor was not entitled to the produce of the policy, or even to the surplus beyond the redemption money.

By an indenture dated the 15th of April 1829, Austin, in consideration of £1800, granted to Walker an annuity of £205, payable during the life of Austin, and secured by a demise of certain property for one hundred years, if Austin should so long live. The deed contained a power to Austin to redeem the annuity in two portions, on payment of £1800 and the arrears of the annuity. Walker agreed to accept these sums "as and for the price of repurchase, and in satisfaction and full discharge of" the annuity; and immediately after the repurchase, the annuity and term of years, "and all other securities for the same annuity, shall cease and be void."

Austin also thereby covenanted that he would personally attend at the West of England, or at any other office of insurance in London or Westminster, for the purpose and to the end that a policy of insurance might be obtained, at the expense of Walker, on the life of him, Austin, and that he would not, during the con-[110]tinuance of the annuity, go on the seas, or in parts beyond the seas, without giving Walker notice; and that, in case Walker should have previously insured any sum not exceeding £1800 on the life of Austin, and should pay any additional rate of insurance, by reason of Austin going on the seas, he, Austin, should reimburse and pay Walker such additional premiums.

On the 16th of April 1829 Walker wrote and sent the following letter to Austin:—

"London, 16th April 1829.—Sir,—In order that no misunderstanding may arise, when the annuity which you granted to me yesterday comes to be paid off, I beg to record, for your satisfaction, that the policy of insurance on your life for £1200, which I intend to effect in the West of England Office, is to be assigned to you, as soon as the annuity is redeemed and all arrears discharged, upon payment to me of the stamp duty on the policy, the proportion of the premium which shall have been paid for the current year, and all expenses attending the assignment.—I am, Sir, your obedient servant,

"J. P. Austin, Esq."

"GEORGE WALKER."

On the 6th of May 1829, Austin having attended, Walker effected a policy in the

West of England Office for £1200. He subsequently, in May 1837, effected a further policy for £600.

The policies were kept up wholly at the expense of the grantee, and Austin died in June 1862, without having redeemed the annuity.

The policy of £1200, together with the bonuses, was now claimed by the Plaintiff, the annuity and policies [111] having been conveyed to him Walker. The Defendant Norton also claimed that policy, under an assignment of it by way of mortgage made by Austin in 1858.

Mr. Selwyn and Mr. Woodroffe, for the Plaintiff. In the absence of any contract, the grantee of the annuity is entitled to the policy purchased and wholly paid for by himself. Here the original contract is that, on redemption of the annuity, the policy is to be assigned to the grantor, that is, upon repayment of the £1800. The grantor is not entitled to the policy except he thinks proper to redeem and to pay the £1800. If the Defendant's view be correct, when applied to the time when the grantor died in 1862, it would be equally so if he had died in 1829, and Walker would then have lost all his money, and Austin would have received £1200; *Gottlieb v. Cranch* (4 De G. M. & G. 440); *Drysdale v. Piggott* (22 Beav. 238; reversed, 8 De G. M. & G. 549; 2 Giff. 357). The case of *Courtenay v. Wright*, which will be cited, is inapplicable, that was a case of redemption of an annuity, where the grantee had bound himself to assign all the securities.

Mr. Baggallay and Mr. Dymond, for the insurance office, merely asked for costs.

Mr. Southgate and Mr. L. Mackeson, for Norton, argued that, by the terms of the special contract contained in the letter, the policy belonged to the grantor on the termination of the annuity. That as the policy was to be Austin's, in the event of his discharging himself from the obligations of the annuity deed in one way, that is by redeeming it, the same must have been intended, in case he discharged himself from that obligation [112] by paying the annuity in full; *Lea v. Hinton* (19 Beav. 324, and 5 De G. M. & G. 823); *Drysdale v. Piggott* (8 De G. M. & G. 546); *Courtenay v. Wright* (2 Giff. 337). The policies were effected as a security for the redemption money, and when the Plaintiff has received the £1800 or the annuity which represents it, the Defendant is, at least, entitled to the surplus.

THE MASTER OF THE ROLLS [Sir John Romilly]. It is admitted that upon the deed alone there could be no claim on behalf of Austin or of Norton, who stands in his shoes, to have the policy delivered up. But, it was observed, there may be a separate and distinct contract which entitles them to that equity, and which must controul the deed; and the letter of the 16th of April 1829, which obviously refers to the policy for £1200 effected on the 6th of May, is said to constitute such a contract, and to give the grantor a right to have the policy. It is to be observed, however, that the grantee was under no obligation to keep it up and might have abandoned it at any time.

The grantee Mr. Walker writes this letter to Mr. Austin. [His Honor read it, see p. 110.]

When the annuity "comes to be paid off" it is to be assigned to you "as soon as the annuity is redeemed." It has never been paid off and has never been redeemed. It is said that, under the deed and this letter, the grantee is entitled to the whole produce of the policy, and that this is a contract that, when the annuity ceases by the death of the grantor, the policy is to be assigned to the representatives of the grantor, although the only event on which it is agreed to be done has never occurred. [113] But this letter cannot controul the deed or extend it to something the grantor has not contracted for except in certain events which have not happened. If the grantor had come a few days before his death, he might have insisted on redeeming the annuity, and, upon payment of £1800, have required to have the policy assigned to him. But he has not done so; and his assignee waits till the event has occurred which makes the policy valuable, and then claims to be entitled to the same benefit of the policy as if he or his assignor had redeemed the annuity and paid the £1800, which he has never done. Such a proposition is not tenable in a Court of Equity.

As the annuity has not been redeemed and cannot be redeemed, the Plaintiff is entitled to the whole benefit of the policies. I cannot hold that they are a security merely for the amount of the redemption money.

The Plaintiff is entitled to a decree for the money due on the policies, including all bonuses and other moneys due thereon, together with interest at £4 per cent. from the 6th of October 1862.

The Defendant Norton must pay the costs of this suit.

[114] SYKES v. SHEARD. July 20, 23, 1863.

[S. C. affirmed on appeal, 2 De G. J. & S. 6; 46 E. R. 276; 33 L. J. Ch. 181; 9 L. T. 430; 3 N. R. 144; 9 Jur. (N. S.) 1262; 12 W. R. 117. Disapproved, *Jeffreys v. Marshall*, 1870, 23 L. T. 548; 19 W. R. 94.]

Trustees were empowered to sell real estate, but not without the consent of seven tenants for life of the produce. After the death of one of the tenants for life, the trustees entered into a contract to sell, with the consent of the surviving six and of the absolute owner of the seventh share. Held, that a sale required the assent of all the seven tenants for life, and that a good title could not be made.

The testator, Edward Sykes, by his will dated in 1857, devised his real and personal estate to his sons Edward and John, and to his son-in-law, Newlove (the Plaintiffs), their heirs, &c., upon trust to sell his real estate, together or in parcels, and to get in his residuary personal estate and invest the moneys in their names. And the testator declared that *no sale of his real or personal estate, or any part thereof, should be made, without the consent, in writing, of his sons and daughters also, whether covert or sole, and that his said trustees or trustee, with such consent as aforesaid, should have further a discretionary power to postpone, for such period as to them or him should seem expedient, the conversion or getting in of any part of his residuary personal estate.*

The trustees were to hold the produce in trust for the testator's sons and daughters, subject to the trusts thereafter contained. The testator directed the trustees to retain the shares of his sons and daughters, upon trust to pay the income to them, and after their decease on certain trusts for their children and issue, and, in default, as the sons and daughters should by will appoint.

The testator then empowered the trustees of his will, for the time being, to give receipts for all moneys, and declared that the persons taking the same should not be liable to see to the application thereof. And, notwithstanding the trust for sale, the trustees, in their discretion or at the request of the objects beneficially interested, were empowered to allot the real and personal estate, or any part thereof, to any object or objects of the trusts contained in favour of his children and issue, in full or part satisfaction of the share of such object or objects. But the estate allotted was to be held subject to trusts corresponding, as near as might be, with the trusts declared of the shares in respect of which such allotment should be made.

The testator died in 1858, leaving seven children surviving.

Elizabeth Newlove, one of such children, died in 1860, without issue. By her will, she appointed all her share in the real and personal estate of her father to the Plaintiff (her husband) Richard Newlove absolutely.

On the 31st of May 1862 the trustees, with the consent of all the children of the testator then living, and of Richard Newlove, agreed to sell the testator's real estate to the Defendant John Sheard for £5000.

They delivered an abstract of their title, to which the Defendant objected that the consent of all the children of the testator living at his decease was necessary to make a valid title, and that, owing to the death of his daughter, Elizabeth Newlove, without having given any consent to a sale, the power contained in the testator's will could not be exercised by the Plaintiffs. He therefore refused to complete the purchase.

It appeared not only that infants were interested in the produce of the estate, but that there was a possibility of others hereafter coming into existence.

[116] The Plaintiffs having filed this bill for a specific performance, the Defendant,

by his answer, said that he was ready, willing and anxious to complete his purchase, if the Plaintiffs would exercise the power of sale and make a good title.

Mr. Southgate and Mr. Dickinson, for the Plaintiffs. A good title can be made to this property, for the Plaintiffs can convey the legal estate to the Defendant, and he will also obtain the equitable estate by the surviving children and Richard Newlove, who is absolutely entitled to his wife Elizabeth's share, joining in the conveyance and assenting to the sale. The right of Richard Newlove to assent in respect of his interest has not been destroyed; *Holdsworth v. Goose* (29 Beav. 111).

Mr. Selwyn and Mr. Wright, for the Defendant. By the express terms of the power, it can only arise upon the consent of all the children; this cannot now be obtained. Nothing can be substituted for it, unless everyone, who, by possibility, can ever be interested in the produce should consent; but that cannot be given, by reason of the infancy of some of the parties and the possibility of future-born issue. If the sale be not warranted by the power, this Court cannot authorize a sale on the ground that it will be beneficial to the parties, *Johnstone v. Baber* (8 Beav. 233), for it has no jurisdiction to extend the trustees' power of sale; *Pearse v. Gardner* (10 Hare, 287).

Mr. Southgate, in reply. The object of requiring the consent of the sons and daughters was to give them the opportunity of protecting their own interests, and [117] not for the purpose of protecting the shares of the others, or of defeating the power. That protection is afforded by the consent of Mr. Newlove. If the Defendants' construction be correct, then even the personal estate cannot be sold for want of the consent of the deceased daughter.

July 23. THE MASTER OF THE ROLLS [Sir John Romilly]. I regret to say that, on considering this case with reference to the authorities, I do not think that the Plaintiffs are entitled to a decree for specific performance. I should have been glad if I could have come to the conclusion that they could make a good title.

This is a singular and unfortunate case, and the difficulty arises from the testator's will not having been so carefully drawn as it ought to have been. The question is, whether the trustees of the estate, who are the Plaintiffs, can make a good title under this trust? If the trust for sale had stood alone, no question could have been raised upon it, but unfortunately the testator goes on to declare that no sale of the real and personal estate or any part thereof should be made without the consent in writing of his sons and daughters also, whether covert or sole. Upon that, I am of opinion that this is not a trust to sell whenever they think fit, and to invest the moneys and perform the trusts, but that it is a trust only to sell with the consent in writing of his sons and daughters, that is, with the consent in writing of *all* his sons and daughters.

One of the daughters has died without having consented, and the question is, whether under these cir-[118]-cumstances a good title can be made. I am clearly of opinion that, if she were now alive and refused to consent, a good title could not be made. Suppose she had been incompetent to consent, and had died without having had the power of consenting, how could I execute the trust. The testator has declared that the trust shall not be executed without the consent in writing of all his sons and daughters; and you can get the consent only of all those who are living, but that will not make a good title to the property, for that would not be sufficient under the power. The trust is incapable of being exercised except with the consent of every one of a class of persons, one of whom does not consent, and cannot consent, and although the testator has made a very absurd disposition of his property, he had the power of doing so. He might have said that the trust shall not be executed without the consent of A. B., who was a perfect stranger to him; but if A. B. says, I shall not mix myself up in the matter, and will have nothing to do with it, the trust cannot be executed: it is a condition inseparable from the trust. I think that is the case here. No doubt if you could obtain the consent of all the persons beneficially interested in the property, then you might make a good title, because the Plaintiffs will convey the legal estate, but they cannot convey the whole of the equitable interest, because these shares are settled on unborn children, and some children interested are now infants and incapable of consenting. Therefore, as the purchaser would not get a marketable title, and could not dispose of the estate, I am of opinion

that the title cannot be forced upon him as it stands, and that the bill must be dismissed with costs.

NOTE.—Affirmed by the Lords Justices, 25 Nov. 1863. [2 De G. J. & S. 6.]

[119] *Re THE EAST WHEAL MARTHA MINING COMPANY.* July 23, 1863.

A shareholder executed a transfer of his shares, which he took, together with his certificate of shares, to the company's office for registration. He left the transfer, but refused to leave the certificate for the inspection of the directors: Held, that the Court would not, on motion under the 25 & 26 Vict. c. 89, s. 35, compel the company to register the transfer, and the Court refused a motion for that object with costs.

This was a motion, under the 25 & 26 Vict. c. 89, s. 35, for an order to rectify the register, by the insertion of the name of Mr. Newman as a shareholder for ten shares.

This company had been first registered under the 19 & 20 Vict. c. 47, and the shares had been fully paid up. On the 9th of June 1863 Mr. Snell, who was the registered proprietor of 125 shares, executed a transfer of ten of them to Mr. Newman. On the 10th of July 1863 the transfer was left at the office of the company and the registration fee was paid. At the same time, Mr. Newman's certificate of his shares was produced to the clerk, who required it to be left, but this was declined, and he thereupon handed back the certificate.

At a general meeting of the company, held on the 15th of July, a special resolution was passed for winding up the company voluntarily, under the 25 & 26 Vict. c. 89, s. 129, and which stood for confirmation on the 14th of August. (25 & 26 Vict. c. 89, s. 51.)

In the meanwhile, the board of directors declined to register the transfer of the ten shares, on the ground that the certificate ought to have been left at the office for their inspection, together with the transfer.

Mr. Roxburgh, in support of the application, argued that the board of directors had no right to require the [120] deposit of the certificate. That the 19 & 20 Vict. c. 47, table B (14) was imperative, which enacted that "the deed of transfer shall be presented to the company, accompanied with such evidence as they may require to prove the title of the transferror, and thereupon the company shall register the transferee as a shareholder." He insisted that here the requirement was unreasonable; for the production of the certificate and the fact that Mr. Snell was already on the register conclusively proved "the title of the transferror." He said that it was suggested that the object is to create votes, but that was not the fact. As between the vendor and purchaser, the purchaser had a right to compel a transfer.

Mr. Selwyn and Mr. Hemming, for the company. After the resolution to wind up, the directors and company were powerless; 25 & 26 Vict. c. 89, ss. 130, 133. It is for the company to point out what evidence they require, and the shareholders are bound to furnish it. The certificate, under the common seal of the company, is *prima facie* evidence of the title to the share therein specified; 19 & 20 Vict. c. 47, s. 21; and it ought to have been left at the office for the inspection of the directors themselves.

Mr. Roxburgh, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot make this order. I think the principle is clear, the Act of Parliament says that the directors shall register the shares, but that they shall require the deed of transfer to be produced, accompanied with such evidence as they may require to prove the title of the transferror. They are therefore made the judges of the evidence of the title which they may require. When [121] the transferror applied to have the shares transferred, he produced his certificate, and was informed that the company required the certificate to be left; he declined to leave it, and the question is, was he right in so doing? I am of opinion he was wrong. It is obvious that the directors may refuse to delegate

to a clerk the right of determining whether the certificate is genuine or not, for a spurious document might be produced and a transfer to a wrong person completed upon it. I think that there was sufficient to justify the directors in requiring the document itself to be left for their inspection, I see nothing unreasonable in this requisition, and the Act gave them authority to make it. I could not compel the directors to register the shares without a due examination of the certificate. The transferrer would be entitled to have it returned, but in all cases where production is required, it means such a production as will enable the person to act on it to satisfy himself that he may do so safely.

As to the argument with respect to specific performance, I am of opinion that, upon a sale of the shares, the transferee might call upon the transferrer to comply with the rules of the office, and that if he declined, this Court would compel him, but he has not thought fit so to do.

I cannot compel the company to register these shares, for I am of opinion that it is not enough for a shareholder to produce his certificate in the office over the counter to a clerk, who tells him it must be left; and if he refuses to do so, he cannot compel the company to register the transfer without further proof of his title.

I must refuse this motion with costs.

[122] TROUP v. RICARDO. July 23, 1863.

The Court declined to direct a writ of *audita querela* to issue upon an *ex parte* motion, saying that if it was a matter of right it would issue as of course; but that if the Court's judgment must be exercised, the other side must be present.

Mr. Phillbrick applied *ex parte* that a writ of *audita querela* might issue. He stated that the writ had been sealed in the Petty Bag Office, but that it required the authority of the Court to deliver it out. He cited Sellow's Pract. (vol. 2, p. 253); Bacon's Abridg. (tit. Audita Querela); Jacob's Law Dict. (tit. Audita Querela); Fitzherbert, Natura Brevium (p. 233; 5 Taunt. 558). He also stated, as a reason for granting the application, that a bill had been filed and a demurrer allowed, on the simple ground that there had been an insolvency and no revesting order. As to this, he cited *Turner v. Davies* (3 Wm. Saund. 147, n.); *Wearing v. Ellis* (25 L. J. (Ch.) 248, and 26 L. J. (Ch.) 15).

THE MASTER OF THE ROLLS [Sir John Romilly]. If it is a matter of right, you will take it as of course without application to me, but if my judgment is to be exercised, I must have the persons here who are to be affected by it, and you must give them notice of motion. I decline to interfere except on hearing the parties to be affected.

NOTE.—See *Nathan v. Giles*, 5 Taunt. 571, where the Court held that a writ of *audita querela* need not be moved for, but was a proceeding of common right and *ex debito justitiæ*.

[123] *In re KEYNSHAM COMPANY*. July 16, 24, 1863.

[S. C. 8 L. T. 687; 9 Jur. (N. S.) 885; 11 W. R. 926. Followed, *In re Sablonière Hotel Company*, 1866, L. R. 3 Eq. 76. Discussed, *In re Poole Firebrick and Blueclay Company*, 1873, L. R. 17 Eq. 268.]

Under a voluntary winding up, the Court has jurisdiction to stay actions by creditors against the company.

Upon granting an injunction to stay an action by a creditor against a company, during a voluntary winding up, the Court required the liquidators to give the creditor access to the proceedings, and gave to the creditor his costs down to the time he had notice of the winding up.

This company was being wound up voluntarily (25 & 26 Vict. c. 89, s. 129) under a special resolution of the 22d of June 1863. A creditor of the company was proceeding against it in an action at law.

Mr. Baggallay and Mr. Roxburgh, on behalf of the official liquidator, moved for an injunction to stay the further proceedings of the creditor in the action. They argued that the Court had jurisdiction to stay the action at law under the 138th section, which empowered it to exercise, in respect of calls or "of any other matter," the powers which the Court might exercise if the company were being wound up by the Court. [THE MASTER OF THE ROLLS. I think it gives the Court jurisdiction, but you must make out a case. This case differs from one where the winding up is in Chambers, for there I know what funds there are to pay the creditors.] The object of the Act is to prevent one creditor from sweeping away the assets, and that all the creditors may be paid *pari passu* (sect. 133, par. 1). The affidavit shews that there are sufficient assets to pay the creditors, and that in two months we shall be able to pay every debt. By the 133d section (par. 5), upon the appointment of liquidators, the powers of the directors cease, and therefore the action cannot now be properly defended.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am disposed to grant an injunction, on the terms of [124] your allowing the Plaintiff at law to have access to all the proceedings, so that he may know how the winding up is going on, and I will give him liberty to apply to the Court.

Mr. Beales afterwards appeared and resisted the injunction; but

THE MASTER OF THE ROLLS said, all he could do, if asked, would be to give the creditor leave to answer the affidavits.

The matter was not further pressed.

July 24. Mr. Beales said there was a difficulty in the registrar's office as to the costs of the creditor, and he now asked for the costs of the creditor at law and of the motion.

THE MASTER OF THE ROLLS [Sir John Romilly] thought that the practice was analogous to the staying actions by creditors after a decree for administration, and that here the creditor ought to have his costs down to the time when he had notice of the winding up, such costs to be added to his debt.

[125] PASKE *v.* HASELFOOT. July 3, 31, 1863.

[S. C. 9 L. T. 75; 2 N. R. 568; 9 Jur. (N. S.) 1047; 11 W. R. 1089.]

A power was given to A. B. to appoint a fund, by will, to his wife alone, or to his wife and such of his children as he should direct. The wife died, and A. B. appointed the fund exclusively to five out of his seven children. Held, that the appointment was valid.

Where there is a power to divide a fund amongst the members of a particular class, the death of some of the members of that class, before the exercise of the power, will not prevent its exercise in favour of the survivors.

The testator Robert Charles Haselfoot, who died in 1849, gave and bequeathed to his executors so much money as would purchase £4000 £3, 10s. per cent. Bank annuities, which he directed to be purchased accordingly. And he directed them to stand possessed thereof, "upon trust for his cousin Thomas Theophilus Paske for life, and after his death, upon trust to pay one moiety to Ann Paske, the daughter of Thomas Theophilus Paske, and "pay, assign and transfer the other moiety or equal half part thereof to the wife of him Thomas Theophilus Paske alone, or to her and all or such one or more exclusively of the other or others of the child or children of him, Thomas Theophilus Paske, in such shares and proportions, at such ages or times, and in such manner and form, as he Thomas Theophilus Paske should, in and by his last will and testament, or any codicil or codicils thereto, direct, limit or appoint. And in default or such direction, limitation or appointment, and subject to any which should be made, did and should stand possessed of the last-mentioned moiety, in trust

for all the children of Thomas Theophilus Paske who should be living at the time of the decease of Thomas Theophilus Paske.

The testator died in the same year, and the money was duly invested. Susan Emelia, the wife of Thomas Theophilus Paske, died on the 18th of August 1858, in his lifetime. Thomas Theophilus Paske made his will on the 10th of November 1858, in which he stated the death of his wife, and recited the powers above men-[126]-tioned, and professed to exercise it, by dividing the stock equally between his three sons William, Edward and Charles, and his two daughters Anne and Fanny, in equal shares as tenants in common, omitting his two other children. The question was, whether, after the death of his wife, who was named as one of the objects of the power, and who, at all events, was to take something, he could exercise the power, when it was no longer possible to give her any share of the stock.

Mr. Selwyn and Mr. W. Morris, for the excluded children, argued that the power authorized an appointment either in favour of the wife exclusively, or to the wife and any of his children; but that no appointment could be made in favour of the children to the exclusion of the wife. That no appointment could be made to a deceased object, and that the attempted appointment to some of the children was invalid. That consequently the moiety of the fund went, as in default of appointment, between all the seven children living at the death of Mr. Paske.

Mr. Baggallay and Mr. Wickens, for children in whose favour the appointment had been made, argued that the power had not been destroyed by the death of the wife, and could be validly exercised in favour of the children or any of them; *Boyle v. The Bishop of Peterborough* (1 Ves. jun. 299); *Ricketts v. Loftus* (4 Younge & Coll. (Exch.) 519); *Houstoun v. Houstoun* (4 Sm. 611); *Butcher v. Butcher* (1 Ves. & B. 79, 90); *M'Ghie v. M'Ghie* (2 Madd. 368); Sugden on Powers (p. 417, 423 (8th edit.)).

Mr. Hobhouse, for trustees.

Mr. Selwyn, in reply.

[127] *July 31.* THE MASTER OF THE ROLLS [Sir John Romilly]. The point on which I reserved my judgment in this case is a very short one, but one on which I have felt some hesitation. The question is whether Thomas Theophilus Paske has duly exercised a power of appointment conferred on him, which he has attempted to exercise by will in favour of five of his children, excluding two from any benefit therein. In truth, the question resolves itself into this: whether he could, in the events which occurred, exercise the power at all.

After fully considering the cases on this subject, I am of opinion that the appointment is good and must be supported by this Court. It is quite settled, by a series of cases, beginning with *Boyle v. Bishop of Peterborough* (1 Ves. jun. 299), that if a power of appointment be given to a person to divide a fund amongst the members of a particular class, the death of some members of that class before the exercise of the power will not prevent the donee of the power from exercising it in favour of the surviving members of the class; even though, if the deceased persons had been alive, they must have had a share. Most of these cases on the subject were cited in the argument before me, but no one is, in my opinion, more decisive on this point than *Woodcock v. Renneck* (4 Beav. 190, and 1 Phil. 72). There a testator gave to the survivor of a gentleman and his wife power, by will, to divide a sum of stock amongst their children, in such shares and proportions as the survivor should think fit. At the decease of the testator, there were three children; but at the decease of the survivor of the donees of the power, there was but one child, the other two having [128] died. The survivor appointed the whole fund to that one child, and it was held by the Lord Chancellor, affirming the decision of the Master of the Rolls, that the power was well exercised.

The difficulty which occurs in this case is, that the will expressly directs that the appointment shall be made to a person by name, viz., the wife, as one of the class; but, upon consideration, I do not think that this circumstance varies the decision which must be made in such a case. If in the last case, of *Woodcock v. Renneck*, the testator had specified the three children then alive of the donees as objects of the power, and had added such other children as the donees might afterwards have, the result must, I think, have been the same.

Here the class amongst whom the fund is to be appointed consists of the wife and

such of the children as the donee shall think fit to select. One of the class dies, viz., the wife, but, notwithstanding this, I think the power may still be exercised in favour of the surviving class.

The case of *Houstoun v. Houstoun* (4 Sim. 611), which was cited and commented upon in the argument, is very near the present, and must, I think, govern it. There property was given to the donee of the power for life, remainder to his wife for life, and, subject thereto, between the wife and any children he might have, in such shares and proportions as he should by will appoint. He had no children, and he appointed the property, or a large part of it, to his wife, and this was held to be a good appointment. There [129] the class consisted of the wife and the children, the children failed, but the appointment to the wife was good. Here the class also consists of the wife and the children, or such of them as he shall select. The wife dies, the appointment to the children is good. It is exactly the converse of the case of *Houstoun v. Houstoun* (*Ibid.*), and it must, in my opinion, be governed by the same rules and principles.

I am of opinion, therefore, that the appointment in favour of the five children selected by the father out of his seven children is good, and I will make a declaration to that effect, and an order accordingly.

[129] SHEPPARD v. SHEPPARD. July 24, 31, 1863.

[Considered, *In re Roper*, 1890, 45 Ch. D. 127.]

Where costs are ordered to be paid out of a particular fund, that does not determine that that fund is ultimately to bear them.

Costs had been ordered to be paid out of income instead of out of *corpus*. Held, that this did not preclude the matter being afterwards set right.

But an order to pay over a fund to persons, by name, is incidentally a determination that other persons, who are not named, are not entitled.

THE MASTER OF THE ROLLS. This is an application, by petition, to have it ascertained how much of the estate which has been administered in this Court, which consisted of income, has been applied in the payment of costs, and to have that amount recouped out of the capital now in Court, and applied in payment of the arrears of the annuities, towards the payment of which only income was applicable.

It is resisted, on the ground that to make such an order would be, not merely to alter existing orders, which have been made and acted upon, from time to [130] time, but also, that such an order would be inconsistent with those previous orders.

In order to ascertain this, I have obtained a copy of the former petition, which sets forth the orders which have been made. I have also ascertained from the Chief Clerk what orders were made, and have examined several of them. The result of this inquiry has been, that I do not find any order which is inconsistent with, or which would be at variance with, the order proposed to be made on this petition. The prior orders are all of this character: for instance, a sum of £550, 13s. 2d. was received from the estate of one of the trustees, who was a bankrupt; it was ordered that the costs should be taxed and paid out of it, amounting to £75, 9s. 8d., and that the balance, which amounted to £475, 3s. 6d., should be carried to the annuity account, and should be invested and the dividends of it paid to the annuitants. There is nothing in this order, or in orders similar to it, which is inconsistent with an order afterwards made for apportioning and payment of the fund in Court between the persons entitled, and making good to one set the amount that has been paid out of their fund, which ought to have been borne by the other fund.

When the Court makes an order directing the payment of costs out of a fund in Court, it does not thereby determine, and it does not mean to determine, that that fund is ultimately the fund to bear those costs, or that any error may not be set right at any future period. It is true that the usual and more proper mode of doing it is, by adding some words to this, or the like effect, viz., "without prejudice to the question as to what fund is primarily liable to bear such costs." But the absence of

such words does not necessarily imply that the Court has decided that the fund out of which the costs are [131] paid is the fund that must ultimately bear them. Such has never been the practice of this Court, on the contrary, costs are paid first, as soon as possible, out of any funds which are applicable for that purpose, without meaning to determine that no recouping out of the fund primarily liable but not yet realised shall ultimately take place. It is otherwise when the Court divides a fund between several persons; as for instance, if the Court divide £1000 as a part of the residue between four named persons, it thereby determines that these four persons are entitled to that fund, and incidentally that a fifth person not named is not so entitled. It is true that the fifth person may come and have his case adjudicated upon, and, if entitled, obtain his proper share: still, after a long lapse of time, when the parties have disappeared, this Court declines to make an order inconsistent with the former division, unless it can rehear and correct the former order. But this is not so in the case of costs, the Court takes any fund that, in the absence of all others, would be liable to pay costs, and applies it for that purpose, but it does not thereby prevent the fund so exhausted from being recouped out of another fund which is primarily liable for that purpose.

Here, upon examination of the accounts and the Accountant-General's book, it appears to me that £1023, 12s. 3d. is the amount of costs which has been paid out of income, and which ought to be recouped out of the £1343, 15s. 8d. capital now in Court. This, with the £50, 16s. 2d. consols in Court, consisting of income, would make a fund of about £1070, 5s. 3d. to be apportioned amongst the three annuitants, in discharge of the arrears due on their annuities.

There seems to be £605, 15s. 6d. due to the Petitioner [132] Mrs. Griffiths for arrears, £376, 17s. 10d. to Mrs. Moss and £303, 5s. 4d. to Mrs. Wilson. The apportionment of the fund available would give about £504, 3s. 7d. to the Petitioner, £331, 13s. 7d. to Mrs. Moss and £252, 8s. 1d. to Mrs. Wilson, in discharge of the arrears due to them respectively. I do not mean to say that these are the accurate amounts or to bind anyone by my calculation and estimate, but merely to point out the principle on which it may be worked out; and that, if the parties can agree on the result, it may be done without the expense of a reference; but if not, the Petitioner is entitled to have it ascertained by reference, what amount of costs has been paid out of income, to require this to be recouped for the benefit of all the three annuitants, and to have her proportion paid to her, and the other proportions paid to or carried over to the accounts of the other annuitants.

I cannot give the Petitioner the costs of this petition, because it ought to have been embraced in the order made on the first petition presented by her. The Respondents must have their costs out of the estate; but, in other respects, I think the principle of the order is right.

[133] BROUN v. KENNEDY. July 9, 14, 15, 31, 1863.

[S. C. 33 L. J. Ch. 71; 9 L. T. 302; 9 Jur. (N. S.) 1163; 12 W. R. 224; affirmed on appeal, 4 De G. J. & S. 217; 46 E. R. 901; 33 L. J. Ch. 342; 9 L. T. 736; 10 Jur. (N. S.) 141; 12 W. R. 360.]

A conveyance of a large estate by a client to a barrister, who had been successfully engaged for her in recovering the estate, in consideration of his services, set aside for undue influence.

Held, also, that such a deed could not be supported, either on a previous contract to pay her £20,000, or as executed in performance of a moral obligation.

A voluntary deed cannot be reformed in equity, as against the grantor.

This suit was instituted by Mr. Broun and his wife (formerly Patience Swinfen) to set aside a deed executed by her in favour of the Defendant Charles Rann Kennedy, a barrister, who had acted as her counsel and confidential adviser. The principal facts were not in dispute.

Samuel Swinfen died in 1854, seised of large estates, which were stated to be of

the value of £60,000. By his will, he devised the estate to his daughter-in-law Patience Swinfen. After the testator's death the will was contested, and a suit was instituted in this Court, by the heir at law, for an issue to try the validity of it. In July 1855 a decree was made by the Master of the Rolls, directing an issue of *deviansi vel non* to try the validity of the will. The issue was tried in March 1856, and resulted in a compromise, a juror was withdrawn, and the terms of compromise were embodied in an order of the Court. Mrs. Swinfen objected to the compromise, and insisted she was not bound by it, and refused to obey this order. Up to this time Mr. Kennedy had not acted for Mrs. Swinfen as her counsel, nor, indeed, was he in any respect acquainted with her, except from some civilities of hers towards his daughter. Their acquaintance first took place in April 1856. She consulted him respecting her law suit, and, at her request, he saw her solicitor, and in that month he wrote an opinion on her case. From this time forwards, according to the statements made by Mr. Kennedy in his answer, he acted as her confidential adviser, [134] and from August 1856 he seemed to have acted as her counsel on every occasion that she required such assistance. In June 1856 a rule *nisi* for an attachment against Mrs. Swinfen, which had been previously granted, was discharged, on the ground that there was not sufficient evidence of her refusal to perform the order (1 Com. B. Rep. 485); but, in doing so, the Judges expressed their opinion that Mrs. Swinfen was bound by the compromise entered into on her behalf by her counsel, and that she would be compelled to perform it. Application was thereupon again made for an attachment in Michaelmas term, on complete evidence of the refusal of Mrs. Swinfen to obey the order of the Court, but, in January 1857, this rule was discharged (1 Com. B. Rep. (N. S.) 364), in consequence of Mr. Justice Crowder expressing his opinion that the mere relation of counsel and client did not confer on the counsel a general power to bind his client, without her consent, by an agreement of compromise. Thereupon, in February 1857, a suit was instituted in this Court by the heir at law, for the specific performance of this agreement of compromise. This bill was dismissed by the Master of the Rolls in November 1857 (24 Beav. 549), whose judgment was affirmed by the Lords Justices in April 1858. (2 De Gex & J. 381.) The issue was then tried a second time on the 12th of August 1858, and a verdict was given for Mrs. Swinfen. In November 1858 a motion was made for a new trial before the Master of the Rolls, in which he gave judgment in January 1859, refusing to grant a new trial. (27 Beav. 148.)

On the 5th of March following, the bill of the heir at law was dismissed as to the real estate, and a decree was made by this Court establishing the will, by which [135] the long and various litigation connected with this remarkable case terminated, and the title of the Plaintiff to the Swinfen estates was finally and conclusively established. In all these proceedings, from August 1856, Mr. Kennedy had acted both as the counsel and also as the confidential adviser of Mrs. Patience Swinfen.

Two months after the final establishment of the Plaintiff's title, Mr. Kennedy procured from his client a deed of gift in his favour, under the circumstances and in the manner stated in the judgment of the Court. (See *post*, p. 141.)

Such deed was in the following terms:—

"This indenture, made the 10th day of May 1859, between Patience Swinfen, of Swinfen Hall, in the county of Stafford, widow, of the one part, and Charles Rann Kennedy, of the Inner Temple, London, barrister, of the other part. Whereas the said Patience Swinfen has, for a long time past, been engaged in legal proceedings, in and about the defending and establishing her title to the estate hereinafter mentioned, and the said legal proceedings have been brought to a final conclusion, and her title to the said estate is now fully established; and whereas the said Charles Rann Kennedy has been engaged as her counsel in the said legal proceedings, and she the said Patience Swinfen desires to recompense him for his services as such counsel, and to convey to him the reversion of the said estate, subject to her own life interest therein, and chargeable as hereinafter appears: Now this indenture witnesseth that, in consideration of the services rendered to her, as aforesaid, by the said Charles Rann Kennedy, and also in consideration of her esteem and friendship for the said Charles Rann Kennedy, she the said Patience [136] Swinfen doth hereby, of her own free will, give, grant and convey unto the said Charles Rann Kennedy and his heirs,

All that her estate at Swinfen, near Lichfield, in the said county of Stafford" [describing it]. And all the estate, &c., To have and to hold the said estate, &c., "unto the said Charles Rann Kennedy and his heirs, to the use of the said Patience Swinfen for the term of her natural life, and from and after the decease of the said Patience Swinfen, to the use of the said Charles Rann Kennedy, his heirs and assigns, subject to and chargeable with all such debts as shall be due and owing from the said Patience Swinfen at the time of her decease, not exceeding in the whole the sum of £10,000, and also subject to and chargeable with the payment of such sum or sums of money, not exceeding in the whole the sum of £10,000, to such person or persons respectively, as the said Patience Swinfen shall by her last will direct and appoint." In witness, &c.

PATIENCE SWINFEN (L.S.)
CHARLES RANN KENNEDY (L.S.)

Signed, sealed, &c., in the presence of
Edward H. Collis, attorney, Birmingham.
James Ure, attorney, Birmingham.

Mrs. Patience Swinfen also executed a will prepared by Mr. Kennedy, devising her real estate to him and his children, chargeable with £10,000 in favour of her relations.

In December 1861 Patience Swinfen married Mr. Broun, and this suit was afterwards instituted by them against Mr. Kennedy, praying "that the indenture of the 10th of May 1859 might be declared void, and might be delivered up and cancelled," for an injunction, and other relief.

[137] The cause now came on for hearing.

Mr. Cole and Mr. Kay, for the Plaintiffs, insisted that the deed was invalid in equity, having been executed by a client while under the influence of her legal adviser. That the *onus* of proving that the gift emanated from the spontaneous will of the donor, unaffected by his influence, rested on the donee, and that he had not fulfilled that requirement.

Mr. Charles Rann Kennedy, in person, for the defence, contended that the deed had been voluntarily executed without the exercise of any undue influence on his part, and secondly, that the deed could be supported as a contract in consideration of valuable services rendered.

Mr. Cole waived a reply.

The following cases were cited:—*Tomson v. Judge* (3 Drew. 306); *Hoghton v. Hoghton* (15 Beav. 278); *Huguemin v. Baseley* (14 Ves. 273); *Nanney v. Williams* (22 Beav. 452); *Cooke v. Lamotte* (15 Beav. 234); *Forshaw v. Welsby* (30 Beav. 243); *Anderson v. Elsworth* (3 Giff. 154); *Hatch v. Hatch* (9 Ves. 296); *Gibson v. Jeyes* (6 Ves. 266, 278); *Holman v. Loynes* (4 De G. M. & G. 270); *Hobday v. Peters* (28 Beav. 349); *Morgan v. Higgins* (1 Giff. 270); *O'Brien v. Lewis* (4 Giff. 221; 32 L. J. Rep. (N. S.) Ch. 569); *Cooke v. Setree* (1 Ves. & B. 126); *Billage v. Southes* (9 Hare, 534); *In re Whitcombe* (8 Beav. 140); *Stedman v. Collett* (17 Beav. 608); *Blagrove v. Routh* (2 Kay & J. 509); *Nottidge v. Prince* (2 Giff. 246); *Waters v. Taylor* (2 Myl. & Cr. 526); [138] *Moss v. Bainbrigge* (18 Beav. 478; S. C. 6 De G. M. & G. 292); *Welles v. Middleton* (1 Cox, 112; S. C. 4 Bro. P. C. 245); *Wright v. Proud* (13 Ves. 136); *Griffiths v. Robins* (3 Mad. 191); *Allen v. Davis* (4 De Gex & Sm. 133); *Woodward v. Humpage* (3 Giff. 337); *Archer v. Hudson* (7 Beav. 551); *Baker v. Bradley* (2 Sm. & Giff. 531; S. C. 7 De G. M. & G. 597); *Walker v. Smith* (29 Beav. 394); *Hindson v. Weatherill* (1 Sm. & Giff. 604; S. C. 5 De G. M. & G. 301); *Prideaux v. Lonsdale* (4 Giff. 159); *Wright v. Vanderplank* (2 Kay & J. 1; S. C. 8 De G. M. & G. 133); *Pratt v. Barker* (1 Sim. 1; S. C. 4 Russ. 507); *Hunter v. Atkins* (3 Myl. & K. 113); *Kirwan v. Cullen* (4 Ir. Ch. Rep. 322); *Toker v. Toker* (31 Beav. 629).

July 31. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted to set aside a deed, by which the Plaintiff Mrs. Broun granted to the Defendant the absolute interest in reversion of her estate at Swinfen, subject to her life interest in that estate.

Mr. Kennedy contests the right of the Plaintiff to the relief she asks, first, on the ground that the deed was the voluntary gift of the Plaintiff uninfluenced by him, that it was well understood by her, and that it proceeded from her gratitude to him

for his services on her behalf, and he argues that a subsequent alteration of her intention cannot enable her to revoke a gift deliberately made. Secondly, the Defendant contends that the deed is good, because it was either founded on a contract, or that it was nothing more than a due and just return and remuneration for the services he had [139] rendered her and the sacrifices he had made on her behalf.

The facts are very simple, and the main and important facts are not in dispute. [His Honor stated them, see *ante*, p. 33 *et seq.*] The deed which is sought to be set aside was executed on the 10th of May 1859, two months after the final establishment of the Plaintiff's title. It is the common case of both Plaintiff and Defendant that the Plaintiff felt the warmest gratitude to the Defendant for his services and his exertions in her favour, that she attributed her success to these exertions, and she speaks repeatedly in her letters in these or similar terms, viz. :—"The cause he had so nobly won for her." It is also certain, and not contested by the Plaintiff, that the Defendant devoted himself to the winning of her cause, and that he took upon himself, for her sake and for this purpose, labour of no common order, and certainly not of a description usually falling within the province of a counsel, such as writing and publishing a pamphlet narrating the case, and containing an argument in her favour, which, as he believed, had a material influence in producing her ultimate success. His position as counsel and adviser was anomalous in another respect, he had, as he states, refused to take any pecuniary remuneration from her, and he waited until the litigation should be successfully concluded before he made or intended to make any claim upon her justice or her gratitude. It appears, however, that he did receive considerable sums of money for fees out of the money paid by the opposing party, who was condemned in costs, amounting, as I was informed by the counsel for the Plaintiff in the argument, to £750, but which I have not found established in the evidence, and as he admits to upwards of £150, this fact, however, is not, in my opinion, very material. It is certain that he never re-[140]-ceived any remuneration directly proceeding from her; it is also his case, that he always supposed that he was to be amply remunerated when the litigation was successfully concluded, and, as he states, she repeatedly promised that his expectations should be realized. This part of the case I shall, however, have more minutely to consider in dealing with the latter branch of Mr. Kennedy's argument.

The first thing the Court has to consider is, the position of this gentleman and lady towards each other in April and May 1859. I cannot doubt, nay, I should, as I believe, be shutting my eyes to the clearest evidence of the most ordinary motives and feelings of human nature, daily displayed, if I was to doubt that, at this time, the Defendant possessed great influence over the Plaintiff. Undoubtedly she owed much to him, and she believed that she owed everything to him, both her estate and position in society, so far as it was dependent on her fortune. Indeed, the Defendant insinuates that the warmth of the gratitude felt by the Plaintiff towards him extended far beyond ordinary and becoming limits, and that these feelings were reciprocated by him. I cannot, in any of the cases I have met with or that are to be found in the books, nor indeed can I conceive, a case in which, if all that the Defendant states be correct, the influence and controul of a man over a woman would be more complete or absolute, unless it were that of a father over a daughter, or that of a husband over his wife. The rule enforced by the Court of Chancery is that, when a man possesses such influence over another, however such influence was acquired, even if it springs from ties of the most sacred and legitimate character, as for instance, that of a father over his own daughter, he must not exert that influence for his own advantage.

[141] With these observations I proceed to examine the evidence as to the transaction itself. Respecting this, there is no conflict in the evidence, it proceeds from the Defendant himself. His case, as he relates it, is this: that towards the end of March 1859 he heard that she was going to marry a second husband; he asked her about it; she denied it and ridiculed the idea; he doubted her, he perceived (to use his own words in his argument before me) that there was an element of treachery in her, and he determined to ask for some security. He states that he considered it to be a duty that he owed to himself to do so, and that, in consequence, he wrote a letter of the 19th or 20th April for that purpose. What subsequently occurred I take from the 55th, 56th and 57th paragraphs of his answer, it is to this effect:—

"55. This being the period of the General Election, I was advised by some persons

to endeavour to get into Parliament, and, in the first or second week of April, I requested the Plaintiff Patience Broun to raise, if possible, £4000 or £5000 by mortgage, to enable me to become a candidate with advantage. I asked her, in particular, to make inquiries if I had any chance at Lichfield, and I believe that she made such inquiry, as appears by her letter to me of the 16th April 1859, to which I crave leave to refer. This project, however, was soon afterwards given up by me, though I did not immediately inform her of my having relinquished the same. About the 19th or 20th of April I wrote and sent a letter to her reverting to my previous request to make a provision for me. In a letter to me, dated Thursday (being the 21st April), she promised to comply with my request, if in her power; this letter I have lost or destroyed. I had not received it when I wrote to her again on the same subject, and received from her a letter in reply, dated Saturday (being the 23d of [142] April), partly as follows:—‘I have not much to say in this, only I do not like to leave your letter received yesterday unanswered. You will only this morning get my letter of Thursday, in which I have promised to comply with your request, if in my power; I am now waiting to know what it is. I see the action will not come on until after Trinity term—that is a long way off.’ On the same Saturday, I wrote and sent a letter to her, pressing her to come up to London to make some arrangement with me. She replied to this letter by a letter to me, dated Sunday (being the 24th April), containing passages as follows:—‘I again say we will stand or fall together, and I faithfully promise you that all and everything I can do for you I will do it; you may rely on my co-operating with you in all that is for your advantage, present or future. If I live, I will be in town on Wednesday or Thursday next; I cannot be before, and then I must be back in three or four days. In the meantime, you will make all preparations for standing for any place you think proper, and may God prosper you.’ The last-mentioned letter also contained a passage leading me to infer that she had made a will disposing of the property in my favour. This passage was, however, contained in a portion of the said letter which is torn; a fragment remains, and I am unable to supply the lost portion from memory.”

“56. The said Patience accordingly came to London on the 28th of the said month of April, and I met her, by her request, at the railway station, and accompanied her to her lodgings. No conversation on matters of business took place that evening, but it was arranged that we should go the next day to the Zoological Gardens in the Regent’s Park. On the following day, I called at her lodgings and had an interview with her, when, after referring to my position, I said to her ‘That [143] we ought to come to an understanding,’ and I asked her ‘If she considered herself indebted to me in the £20,000, which she had so often referred to,’ to which she replied ‘Certainly; but you know you will have to wait for it some time.’ I replied ‘that was true, but that I ought to have some security.’ She said ‘She was willing to give it,’ but asked me ‘what I wanted.’ I mentioned a mortgage. She said ‘She did not like mortgages,’ and after a while she said, ‘I have sketched out a will as I told you, and I have given you as good as £20,000. This she explained by saying ‘She had left me the whole estate charged with £10,000 to her relations.’ I replied, ‘You know a will is no security at all.’ The conversation was soon after interrupted by her going upstairs to prepare for going to the Zoological Gardens. We then went to the Zoological Gardens, and after some time, we set down on a bench, and I renewed the conversation, and asked her ‘If she would convey to me by deed what she meant to give by will,’ and she said ‘Yes; cheerfully.’ There was a discussion whether it should be made an absolute conveyance or by way of mortgage; and I explained the difference, which indeed she well understood. She said ‘She should like it to be a deed of gift, and added, ‘I wish to give it you; I always meant it for you and your family if you won.’ Presently she said, ‘In case I should wish to sell the estate hereafter, and give you the money, you will of course not stand in the way.’ I said ‘Certainly not; I should prefer the money.’ She then repeated what she had frequently said to me before, that she might like to sell the estate in order to give something to her brothers and sisters in her lifetime, which would do them more good than legacies after her death.”

“57. The next day I drew a draft of the proposed deed, in accordance with our arrangement, and gave it [144] to her to read, and she read it and I left it with her.

A day or two after she said to me that, as she was considerably in debt, she should like to have a clause charging her debts upon the estate, and I asked her to name what sum she thought would be sufficient; £10,000 was thereupon fixed as an outside sum, and I inserted such clause as she required. She said she would make up the difference to me by making me an allowance at some future time, if I wanted it. The draft remained in her possession till May 6th, and she fully understood and approved of it. I then asked her what solicitor she would like to attest it, saying that it ought to be attested by her own solicitor and proposing Mr. Simpson, but she said she should not like the matter to be known in Lichfield at present. I remonstrated with her on this point, saying there was no occasion for secrecy. However, she said she had a feeling about it, and I gave way. I never had any wish to conceal this matter from Mr. Simpson, whom I considered friendly to me. The said Patience then named and chose Messrs. Collis & Ure. She was then on visiting terms with Mr. Collis, and had known him for about three years, and Messrs. Collis & Ure were, at this very time, acting as her attorneys in the action against Lord Chelmsford. Mr. Ure was, at that time, wholly unknown to me except by sight. I believe I wrote to Mr. Collis, at her request, to explain what was required to be done. She left London on the 6th of May, having appointed to meet me at Birmingham on the 10th of May. I went to Birmingham on the 8th or 9th of May."

I regret to say that the account so given only confirms the view I had previously stated of the power which, at this time, the Defendant had over her; it seems to me to point out how difficult, if not impossible, it would have been for her, even had she been so inclined, to [145] have extricated herself from his influence. His case is, that he required this deed as a remuneration for his services, that he first asked her for it, that she consented to his request, that he prepared the draft, that he gave the draft of it to her to read and consider, that she did so, and returned it after several days, approving of the draft, that he appointed to meet her at Birmingham on the 10th of May, at the office of Mr. Collis, to execute the deed itself. I shall presently have to consider the second contention of Mr. Kennedy, whether the deed can be supported on the ground of consideration; but in the view I am now taking of it, viz., as a mere voluntary gift, it is impossible not to see that, in the position in which they then stood to each other, it was not morally in the power of the Plaintiff to resist the Defendant's request for this deed. Every letter she writes, every statement he makes, shew, to my mind, more and more distinctly how completely, at this time, his influence was riveted upon her.

Accordingly, on the 10th of May she was faithful to her appointment; she went to Mr. Collis's office, where she found the deed ready engrossed under the instruction of Mr. Kennedy previously given to him, and she remained a long time with Mr. Collis alone, and when Mr. Kennedy returned, he found the deed duly executed, thereupon the Plaintiff and Defendant went away together to her house at Swinfen.

I do not think it necessary to go through the evidence, in detail, of Mr. Collis and Mr. Ure; it is plainly shewn, by that evidence, that the deed was read over and explained to her by Mr. Collis, and, subject to an observation, I shall presently have to make on the effect of the deed not apparent on the face of it, it is clearly proved that she understood it; indeed, I do not under-[146]-stand that this is disputed on the part of the Plaintiff. But this is not sufficient to support the transaction. A father may obtain from his child the grant of her whole estate, the child may perfectly understand what she is about, but this will not enable the father to hold the property and turn his son or his daughter penniless on the world. The influence so possessed, and however acquired, must not be exercised for the benefit of the person possessing it, and this principle is established in *Hugenin v. Baseley* (14 Ves. 273), and in many of the other numerous cases on the subject. In whatever way the influence over the Plaintiff was acquired by the Defendant, the extent of it appears from his assertions and suggestions; he possessed it at this time, and it was exerted by him, in this instance at least, exclusively for his own advantage.

But this is not all, it is certain that, in one very material respect, the Plaintiff did not understand the effect of the deed, and that it was not explained to her, and, indeed, this effect of the deed does not appear to have been understood, or at least it was not present to the mind of either Mr. Kennedy or Mr. Collis, and certainly not

to Mrs. Swinfen, and yet the effect is a very material one—when she executed the deed she, and not only she, but Mr. Kennedy and Mr. Collis, thought that during her life she was to enjoy the estate as she had hitherto done, that she might grant leases, cut trees, open mines and quarries, pull down cottages, and the like. But this deed, incidentally, takes away from her all this power. The consequence is this:—that if I were to uphold the deed, the Defendant could come for an injunction to restrain the Plaintiff from performing any one of those acts on the first intimation of her in-[147]tention to do so; and with the present feelings between these parties, but a very short time would probably elapse before such an application would be made. The Defendant admits that this circumstance was not explained to her, and simply because, as he states, no one thought of it, and he suggests that the deed might be reformed for this purpose, but in voluntary deeds this is impossible; if the deed do not express the intention of the grantor, the grantor may make a fresh deed, and, with the assent of the grantee, cancel the old one, but this Court cannot compel a grantor to alter the grant, and if the grantor contests it, the deed must stand or fall in its actual condition without alteration.

I find it difficult to explain the transaction which immediately followed, when Mr. Kennedy, at Mrs. Swinfen's request, prepared a will for her exactly as if no such deed had ever been executed. I am confident that she understood the deed to the extent and in the qualified way in which it was explained to her, and, therefore, she must have understood that the deed, if acted upon, would have made any such will inoperative when she executed it, and why Mr. Kennedy, at her request, prepared it, I cannot discover. It is possible that she may have supposed that the Defendant would not enforce the deed, but that she would still have the power over the estate as if the deed had not been executed, but whether these, or what other feelings were present to her mind at this time, I am unable to ascertain; still, this is clear that, at that time she thought, and that the Defendant allowed her to think, that she could dispose of the estate by will. The possible explanation of this part of the transaction, which I have suggested, may perhaps derive strength from the fact that Mr. Kennedy, since the execution of the deed, has, as he states, thrice offered to return it, and that she has thrice refused to [148] accept it. Mr. Kennedy, in argument, lays great stress on this circumstance, and says that the gift has been made to him three times over, but, in my opinion, this circumstance will not assist his case, it is clear that his influence over her mind continued after the execution of the instrument, the letters, and all the evidence, shew it, in fact, it continued until she determined to marry her present husband, and intimated that intention to the Defendant. The same motives and influence which induced her to execute the deed, would naturally induce her not to take it back. If the offer to return the deed had been made after, or shortly before the filing of this bill, it is obvious that the offer would not have been refused, and little stress can properly be laid on the fact of an offer being made which it is reasonably certain will not be accepted.

Mr. Kennedy argues strenuously that the relation of advocate and client did not exist at the moment of time when this deed was executed, for that she was not engaged in litigation. But this Court does not proceed on the mere technicality of the existence of such a relation at that moment, if the fact were so, but upon the proof of the degree of influence existing at the time, which, in the present case, is established conclusively, and also that it arose from the relation of confidential adviser and counsel previously existing and subsequently continued, and which enabled the Defendant to exert over the mind of the grantor a power sufficient to obtain the deed.

Treating it then simply as a mere voluntary instrument, I am of opinion that the transaction cannot be maintained, and that the deed cannot stand.

I come now to the second part of Mr. Kennedy's argument, and I have to consider whether the deed [149] can be supported on any grounds, other than as a mere voluntary gift of the donor.

The way in which Mr. Kennedy puts this part of his argument is twofold. First, he says he had a contract for the deed or its equivalent, which must be supported in equity, or if not, then, secondly, he says that there existed a moral obligation sufficient to support the deed, which was given fairly and equitably in performance of that

obligation. With respect to the first of these grounds, it is in substance disposed of by the decision in the Court of Common Pleas in *Kennedy v. Brown* (13 C. B. Rep. (N. S.) 677). Mr. Kennedy, in his affidavits, states that the Plaintiff repeatedly promised to give him £20,000 for his services, and he refers to various occasions when she uttered these or similar expressions, viz., "Your £20,000 is safe." No contract, in the proper sense of that word, is even alleged by the Defendant, but it was in respect of this species of promise that he brought his action and obtained a verdict at Warwick for £20,000 against the Plaintiff. The Court of Common Pleas has held that such promises, if established, constitute no obligation on which an action could be maintained. I therefore abstain from going more at large into that part of the subject. If I dissented from it, I should be bound by that decision, but in every word of the able judgment delivered on that occasion I concur. It is strictly applicable to the case before me, so far as it depends on contract or promises, the only difference being, in that case, a promise to pay £20,000, and in this, a deed in performance of such a promise conveying a reversion worth £20,000. As a contract, it cannot be supported, and if the deed of the 10th of May 1859 be but substituted for the words, verdict for [150] £20,000, in a passage from the judgment of the Chief Justice, which I am about to read, the observation of the learned Judge will apply accurately to the present case.

The Lord Chief Justice points out strongly the injurious consequences which would follow from such a contract, could it be maintained. "The facts of the present case," observes his Lordship, "forcibly shew some of the evils which would attend both on the advocate and on the client if the hiring of a counsel were made binding. In this case, the advocate, by disclosing words of intimate confidence, which passed in moments of helpless anxiety, has raised the phantom of a contract for a sum of monstrous amount; and of this we hope we may say that there is no one in the profession of the Plaintiff who would be willing to accept from him this verdict for £20,000 as a gift." (13 C. B. Rep. (N. S.) 736.)

I say I hope and believe there is no one in the profession who would be willing to accept from the Defendant the gift of the reversion of the Swinfen estates as a gift.

The transaction then cannot be supported on the ground of contract, and if the transaction cannot be supported on the ground of contract, how can it be supported on the ground of a moral obligation, the fair and equitable performance of which required this deed to be given.

The facts supposed to raise this moral obligation are the following:—A gentleman of knowledge and ability in his profession becomes acquainted with a lady involved in a very peculiar and intricate mass of litigation, engrossing a large amount of public interest. She consults him on the subject, he gives her advice, she is [151] struck with his views and requests him to see her solicitor, and to act as her counsel. He consents, he refuses to take any fees from her, and he ably conducts the litigation to a successful result. What moral claim do these facts give him upon her? I am unable to see any. If he pleased, he might have required to be paid as other advocates are paid; he preferred to act gratuitously. What was his motive for so doing? Did he do so from motives of friendship, or because he thought that by so doing he should ultimately obtain a larger remuneration than if he had consented to take fees in the ordinary manner? If he acted purely from motives of friendship, then his services and sacrifices are repaid by friendship, and it is a violation of that friendship to make it the cover to obtain a larger reward than he would have obtained if he had been paid in the ordinary mode of remunerating counsel. But in neither case does any moral obligation rest with the client to remunerate the advocate in any other than the ordinary way. If he acted from motives of friendship, he is repaid by the regard and friendship of his client; if he acted from the desire for money then he is entitled to be paid as other advocates are paid, but he cannot, in a Court of Equity, make that friendship the means of obtaining from his client lucrative advantages far exceeding what any man in the character of counsel could be entitled to, whatever might have been his services or his sacrifices.

But another view is wholly passed over by Mr. Kennedy; in no case, not even when the counsel acts gratuitously for his client as a friend, can the obligation be

considered as resting all on one side. It is no slight advantage to a gentleman, toiling up the arduous path of the profession of the law, to obtain the distinction of conducting to a successful termination a long and intricate litigation of great public interest, which attracts the attention of the public, and turns upon him the eyes of the profession. This distinction Mr. Kennedy obtained, and he did so by means of the Plaintiff's aid; it requires no great amount of foresight to predict that this distinction would have rapidly raised him to the eminence in the profession which his knowledge and abilities entitled him to fill, had it not been for the unfortunate and ill-advised course he has latterly thought fit to pursue.

Mr. Kennedy began his long and elaborate address to the Court with the expression of satisfaction that he should now have, which he had never had before, an opportunity of fully stating and explaining his whole case from the beginning to the end. To this I have listened attentively, but I have been both surprised and grieved at the mode in which he has done so, and at the tone with which he has thought himself justified in treating his opponent in this case, and he has compelled me to allude to a circumstance in his defence, which I do with reluctance and pain. He has more than once insinuated that the friendship between himself and the Plaintiff assumed a warmer aspect than that of mere gratitude, and he has dwelt elaborately on such passages in her letters as seemed to him to assist his argument in that respect. In his address he boasted that by reason of the intimate knowledge he acquired of this lady, in his private relations with her, he was able to do what the Lord Chief Justice of England, when at the Bar, had failed to do, and, to use his own expression, "that he was able to make her stand at Warwick a spectacle of scorn and derision to the whole Court." Whether such insinuations are or are not founded in fact, it is not my province to inquire. If they are true, I should have supposed that a sense of honour and consideration for [153] any lady so circumstanced would have induced him to abstain from any such allusion, the more so, as they can only be prejudicial to his case, which rests on the absence of his possessing any undue influence over her. If the imputation be true, it proves how completely she was in his power; if it be untrue, I cannot venture to permit myself to express my opinion respecting such insinuations.

This, however, is certain that from the moment she informed him of her intention to marry a second husband, his conduct towards her has been marked with the most vehement animosity, and he now seems surprised, and in his address complains, that this has been met with a similar return of corresponding animosity on her part, and he complains that instantly on the decision in her favour by the Court of Common Pleas, she exacted the payment of the costs of the action within four days, by the exercise, or by the threat of every form of execution which the law allows, and he then asks, "Whether it is likely that he should have possessed any influence over a person actuated by such motives, and imbued with such feelings towards him." But Mr. Kennedy should remember that when former friends become enemies, the intensity of their mutual hostility is usually proportioned to and measured by the depth of their former friendship; and the question before me is, not what are the feelings of the Plaintiff now, or what they were towards him after the trial at Warwick, but what they were in April and May 1859, when he obtained from her the execution of this deed.

After listening to Mr. Kennedy's long and elaborate speech, and after reading and considering the evidence, I have arrived at the conclusion that the Defendant possessed a great and overpowering influence over the [154] mind of the Plaintiff at that time, and that he exerted that influence to obtain from her this deed. I am also of opinion that the deed cannot be supported on any ground of contract or of promise; and that it cannot be supported on any ground, to the effect that it was made in the due performance of any moral obligation.

My decree therefore is that the deed must be delivered up to be cancelled, Mr. Kennedy must reconvey the reversion, and he must pay the costs of this suit.

NOTE.—Affirmed by the Lords Justices, 29 January 1864. [4 De G. J. & S. 217.]

[154] DALLY v. WONHAM. July 22, 31, 1863.

[S. C. 32 L. J. Ch. 790 ; 9 L. T. 75 ; 9 Jur. (N. S.) 980 ; 11 W. R. 1090.]

Sale by a retired solicitor to his agent of property at a distance, which had been proposed and pressed by the vendor and completed without any compulsion or fraud, set aside, it appearing to the Court, that the consideration (a life annuity) was inadequate, that the vendor, who had not seen the property for twenty years, was ignorant of its value, and that the vendor was known to be in a precarious state of health.

The absolute interest in some freeholds belonging to a wife for life, with remainder to her husband in fee, was sold by the husband. The wife dissenting: Held, that the contract could not stand as a sale of the reversion at an apportioned price.

This was a suit to set aside a purchase of some property by an agent. The property consisted of a piece of land fronting the sea at Bognor, with nine wooden cottages thereon, and a pew in Bognor chapel.

At the time of the purchase, which took place on the 26th of July 1861, the property was thus situated:—it was settled on the Plaintiff, Mrs. Dally, for her separate use for life, and subject thereto, her husband, Mr. Dally, was entitled to the reversion in fee-simple; but the Plaintiff's interest in the property seemed to have been unknown to anyone, including herself.

[155] Mr. Dally had long acted as a solicitor in England, but, from ill-health and reduced means, he had gone to Guernsey, to reside there with his wife. He had not seen the property for twenty years, and during the whole of that time the Defendant, Mr. Wonham, who was a builder and house-agent at Bognor, had acted as Mr. Dally's agent, he had received the rents, repaired the buildings, which were wooden cottages, with slate roofs, part of which was let out to the coast guard, and all of which were constantly requiring repairs. Several offers had been made to purchase the premises, but they had gone off, and in January 1861 Mr. Dally suggested that Mr. Wonham should become the purchaser. This led to a correspondence, in which Mr. Dally expressed great anxiety that Mr. Wonham should purchase the property. It was ultimately arranged between them that Mr. Wonham should become the purchaser, in consideration of an annuity of £40 per annum, payable quarterly, during the lives of Mr. Dally and his wife and the life of the survivor of them, their ages being respectively sixty-two and forty-nine. This annuity was to be secured by the bond and personal security of the Defendant, and not by any charge on the property.

On the 26th July 1861 Mr. Dally conveyed the premises in question to Mr. Wonham in fee, nominally in consideration of £600, but this was not really paid, the only consideration being, the bond of Mr. Wonham in the principal sum of £600, conditioned to be void on due payment of the life annuity of £40.

The Plaintiff was no party to the deed, nor did she, in any way, concur in the sale, although she was cognizant of it; in fact, she appeared to have been ignorant of her title in it, of which the Defendant was also ignorant. Her husband, if he knew it, had forgotten it, **[156]** and acted throughout as the absolute owner of the property.

It was clearly proved that Mr. Dally had been very anxious to complete the transaction, and that though he at first required a sum to be paid to him, by way of premium or in addition to the annuity, he abandoned this, and was very desirous to complete the transaction as it stood. He pressed the Defendant to complete the purchase and himself prepared the deed, which he sent over to the Defendant's solicitor to engross and to get it executed, and he executed it himself without any compulsion or persuasion.

Mr. Dally died in April 1862, having previously made a will, by which he gave all his real and personal estate to his wife.

Mrs. Dally instituted this suit, in October 1862, against Mr. Wonham. The bill alleged as follows:—

"Neither the sum of £600 mentioned in the deed, nor the sum of £600 mentioned

as the penalty of the bond, nor the annuity to Frank Fether Dally and his wife, was at all equal to the value of the property, or the remainder or reversion to which Frank Fether Dally was entitled therein, nor in any way a good or proper consideration for the purchase of the same, as the Defendant well knew; but he availed himself of his situation of manager and agent of the property, and his long acquaintance therewith, and the state of health and straitened or embarrassed circumstances in which he knew Frank Fether Dally was at the time, to persuade him that such annuity of £40 was the real and full value of the same property or the estate and interest of the said Frank Fether Dally therein, and [157] that not only no greater consideration could be obtained for the same, but also that property at Bognor, and especially this, was decreasing in value, and thus induced him to convey the property and the fee-simple thereof to the Defendant upon receiving such bond as aforesaid."

The bill alleged that Mr. Dally was ignorant of the value of the property, and had relied on the statements of the Defendant, as his manager and agent, and it complained that the annuity had not been charged on the property, but had been secured by the personal security only of the Defendant. It insisted that, if the conveyance was binding on Mr. Dally, it was inoperative as against the life-estate of the Plaintiff, and it prayed that the purchase and sale to the Defendant might be declared invalid and set aside.

With respect to the value of the property, the following appeared to the Court to be the result of the evidence:—The gross annual rent, on the average of eleven years prior to the sale, was £53, 13s. 6d.; the net rental, after deducting commission to the Defendant at £5 per cent., was £37, 6s. 10d. The average, however, of the last four years a little exceeded £40, and in the year 1860 the net rental was £38, 3s. 6d. In the year 1861 the net produce of the property was £50, 1s. 10d., and in the year 1862 it amounted to £66, 16s. The amount which had been received for the first half of the present year was £33, 8s.; this, however, the Defendant said he had produced by the outlay he had made for the improvement of the premises. There were various estimates made by surveyors on both sides of the value of the property, but the Court said that the test seemed to be—what could have been obtained for it in the market? It appeared also that, had it not been for the [158] claim of the Plaintiff, the Defendant would have been able to sell the property for £950, and a contract to that effect had been entered into, which, in consequence of this suit, was abandoned. The pew in the church was valued at £5 by one side and £50 by the other.

The cause now came on for hearing.

Mr. Selwyn, Mr. Jessell and Mr. Roberts, for the Plaintiff.

Mr. Southgate and Mr. Babington, for the Defendant.

Mr. Selwyn, in reply.

July 31. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit to set aside a purchase of certain property at Bognor, obtained from the husband of the Plaintiff, who died shortly afterwards. The purchase was made by the Defendant, who had been for many years the agent and receiver of the vendor. [His Honor stated the circumstances of the case and the facts as to the value of the property, and proceeded:—] It seems to me obvious that the price given for this purchase was grossly inadequate; in fact, the Defendant obtained the property on payment of an annuity, which the annual rents were and are more than sufficient to discharge; and which annuity was practically only to last during the life of the Plaintiff, for the husband was known to be in a very precarious state of health, a circumstance frequently referred to in his correspondence, and he in fact died within a year after the transaction.

It is, however, clearly proved that the husband was [159] very anxious to complete the transaction, and that, though he at first required a sum to be paid to him by way of premium or in addition to the annuity, he abandoned this, and was very desirous to complete the transaction as it stands. He pressed the Defendant to complete the purchase, and prepared the deed himself, and he sent it over to the Defendant's solicitor to engross and to get it executed, and he executed it himself without compulsion or persuasion.

These are strong facts in favour of the Defendant; but notwithstanding they are proved, still, having regard to the circumstance that the agent was residing on the spot, that he had done so for twenty years previously, and that he perfectly well knew the value of the property, which the vendor did not, for he had not seen it for twenty years, I should have been of opinion that the transaction could not have been maintained, unless the agent had told him the real value of the property and what it might have been sold for. If, for instance, he had said to him, "Though I will not give it, still you may sell this property for £900 or upwards" (a price which in my way of regarding it would have been far more valuable to the vendor), and if, after this, the vendor had insisted on the Defendant taking the property for the payment of this annuity, it might have been supported partly on the ground of bounty towards the Defendant, which indeed some expression in one or two of the husband's letters would seem to support. But it is I think clear that the husband did not know the value of the property, or what it would fetch if offered for sale, and that the Defendant, from his position, must be taken to have been cognizant of these facts.

I think, therefore, that this sale could not have been [160] supported even if the husband had possessed the absolute interest in the property; but he had not, and this circumstance makes this case very peculiar.

The first life-estate was vested in the wife for her separate use, and this the husband could not sell, although it is obvious, as I have already stated, that all parties believed that he had the fee-simple in it, and could sell it as he thought fit. When this was pointed out to the Defendant and his legal adviser, after the bill was filed, this proposal was made—viz., that the Plaintiff should enjoy the property for her life, and that the Defendant should have the reversion. This, as might be expected, was rejected by the Plaintiff, who made the counter proposal, as little likely to be accepted, that she should take the rents for her life, and that the Defendant should, in addition to the rents she received, pay her £40 per annum for the reversion which belonged to her husband.

It is manifest that the Plaintiff is entitled to be put in the possession of the rents of the property for her life, and the question is, what is to be done with the reversion after her decease, and how the deed and arrangement between her husband and the Defendant affects this reversion? If the whole transaction be set aside, then the Plaintiff is entitled in fee-simple, as she is the sole devisee under her husband's will; and if the reversion was his to dispose of, it passed at his death to her absolutely, and her life-estate in it would merge.

In order to consider how the matter stands in this respect, I have thought it useful to consider how the matter would stand if the husband were now alive, and the wife had enforced her right and had taken possession of the property, and if she were now in receipt of the rents for her separate use, and insisted on her right, and to continue so during her life; what, in that case, would be the rights and corresponding obligations between the husband of the Plaintiff, on the one hand, and the Defendant on the other? It is clear that the husband, if he resorted to this Court to enforce the arrangement, could not compel the Defendant to pay the annuity of £40, which was given solely in consideration of the Defendant obtaining immediate possession of the estates. On the other hand, I am equally clear that the Defendant could not insist on his right to keep the conveyance of the husband's inheritance in fee-simple in the lands without paying anything whatever for it. It is plain that it was not intended to be a gift, and if it be a purchase, there must be some consideration paid for it. If it rested in contract, it is clear that the husband could not maintain a bill for the specific performance of such a contract when he could not give the thing intended to be bought. It is equally clear that the Defendant, if he pleased, might take the reversion, which was all the husband had to convey on paying the consideration he had offered for the whole estate in possession. But I doubt whether the Defendant could have maintained a suit for the purchase of the reversion on the footing of making such a deduction from the purchase-money (that is, from the £40 per annum) as the Court might think properly apportionable to that interest in the property. It would, in fact, in making a decree to that effect, be making a new and totally different contract between these parties. The husband might naturally and reasonably say, "I thought I had the fee-simple, and that I intended to sell and

nothing else, and I object to being compelled to sell the reversion for the proportion of the annuity of £40, nor can I properly be compelled to complete, with an abatement [162] of the purchase-money, a contract which, if I had known of my wife's estate, I should never have entered into." But if the Court could not have done this during the life of the husband, as little can it do this after his death against his real or his legal personal representatives.

Even where sales of reversion have been completed, this Court has frequently set them aside on slight proof of undervalue, and it could not convert a contract for sale of the entirety into a contract for sale of a reversion, and then compel the specific performance of it, in terms which, if it had been actually carried into effect between the parties themselves, this Court would probably have afterwards set aside on proof of the undervalue. Assuming this Court, in such a case, to act on the principle on which it has thought fit to deal with the sales and purchases of such species of property, and if, in order to avoid this defect, the Court were to attempt to fix the value of the reversion, by estimate or by evidence, such a proceeding would be still more at variance with the rules of the Court, and would be to compel one man and the representatives of another man to enter into a contract for the purchase of an interest in a property never intended to be sold by the parties themselves, at a price never contemplated by either.

I have therefore come to the conclusion that the conveyance and bond entered into and executed by and between the deceased, Mr. Dally and the Defendant, and the contract on which they were founded, are wholly inoperative and incapable of taking effect, or of being enforced by this Court, and that, therefore, these two instruments must be delivered up to be cancelled, that the Defendant must be compelled to reconvey the estate, that the Plaintiff must be put into possession of [163] the rents and profits of the estate, and that an account must be taken of the rents and profits of the estate received by the Defendant, or by his order or for his use, since the 27th of July 1861, and that, in taking such account, he must be allowed all sums of money properly expended by him in the repairs or lasting improvements of the property, and that he must also be allowed all sums paid by him in respect of the annuity. He must also pay the costs of the suit.

[163] *Re RICHARD ARNOLD'S ESTATE. July 24, 31, 1863.*

[S. C. 9 L. T. 530 ; 9 Jur. (N. S.) 1186 ; 12 W. R. 4.]

In the will of a testator, who died in 1804, he devised real estate to his daughter for life, with remainder to her sons successively in tail, with remainder to her daughters as tenants in common [without words of limitation], and, "in default of such issue," to his son in fee. Held, that, contrary to the decision in *Doe v. Taylor*, 10 Q. B. 718, the daughters took for life only.

Held, that a devise for life contained in a will could not be enlarged by a recital in a codicil that such devise was in tail.

Devise of "my moiety" of closes at L. : Held insufficient, prior to the last Wills Act, to pass the fee.

In a gift over on the death of A. before the estate became vested in him : the word "vested," Held to mean vested in interest and not vested in possession.

Richard Arnold, by his will dated in 1801, devised to trustees "all that his undivided moiety or full half part, the whole into two equal parts to be divided, of and in his closes or ground enclosed and meadows, with the appurtenances, situate" in Liebnam, and the impropriate tithes arising out of the said premises, and another undivided moiety of meadow ground in Marston, upon trust to pay £20 a year to his wife for life, and to apply the residue of the rents as follows :—

"To and for the sole and peculiar use and benefit of my daughter Mary Arnold, for and during the term of her natural life, and from and after her decease, I give and devise my said moiety, hereditaments and premises to the use of the first son of the body of my said daughter Mary lawfully to be begotten, and to the heirs of the

body of such first son lawfully issuing, and in default of [164] such issue, to the use of the second, third, fourth and all and every other the son and sons of the body of my said daughter Mary, severally, successively and in remainder," according to their seniority, and the heirs of their respective bodies; "and in default of such issue, to the use of *all and every the daughter and daughters of the body of my said daughter Mary lawfully to be begotten as tenants in common and not as joint-tenants*; and in default of such issue, I give and devise the said moiety and premises with the appurtenances unto my son John Arthur Arnold, his heirs and assigns for ever."

The testator, by his will, made similar dispositions of other estates in favour of his daughters Dorothy, Anna, Maria and Harriott respectively, and their respective children, with an ultimate limitation to John Arthur Arnold in fee.

The testator made a codicil, dated the 11th of June 1803, which was in part as follows:—"Whereas I have, in and by my said will, given and devised the reversion in fee of and in divers lands, tenements and hereditaments expectant on the several deceases of my daughters Mary, Dorothy, Anna, Maria and Harriott *without issue of their respective bodies* unto my said son John Arthur Arnold, his heirs and assigns for ever; and whereas I have also, in and by my said will, as well as by this my said codicil, limited divers other lands, tenements and hereditaments (subject to certain annuities or rent charges therein specified) for the use and benefit of my said son John Arthur Arnold, his heirs and assigns until he attains his age of twenty-five years, and upon his attaining the said age of twenty-five years, then I have given and devised the same to him, my said son, his heirs and assigns for ever: Now I do hereby declare my will to be, that in case my said son [165] shall *happen to depart this life* without having lawful issue of his body living at his decease, and *before the said several estates shall become vested in him* by virtue of the said several limitations aforesaid, then and in such case, I give and devise the same estates (chargeable as by my said will and this my said codicil is before mentioned), and such of my said several daughters Mary, Elizabeth, Dorothy, Anna, Maria and Harriott as shall be then living, and the issue of such of them as shall be dead.

The testator died in 1804, leaving his son and five daughters surviving him. The son John Arthur Arnold attained twenty-five, and died in 1844 without leaving any issue.

The testator's daughter Mary married and had four children, viz.:—Richard, Thomas and the Petitioners Catherine and Mary. Of these Richard died in 1844 without leaving any issue, and Thomas died in 1841 a bachelor.

The testator's daughter Mary died in 1861, having devised her estate and effects to her two daughters. They presented this petition for payment out of Court of a fund which represented part of the devised lands taken by a railway company.

The Petitioners submitted that, according to the true construction of the will and codicil, and the events which had happened, they became, upon the decease of the testator's daughter Mary, entitled in possession, in equal shares as tenants in common, for an estate of inheritance to the moiety and premises comprised in the devise, except such parts thereof as had been taken by the company; and that they became, at the same [166] time and now were, absolutely entitled, in equal shares, to the sum of £545, 4s. 7d. Bank annuities, and the dividends accrued due thereon since the decease of the testator's daughter Mary. But if not, then that they were, by virtue of the limitations contained in the codicil, absolutely entitled to one equal fourth part thereof, and were entitled to the remaining three equal fourth parts thereof as tenants in common for their respective lives, with cross-remainders between them for life.

Mr. Selwyn and Mr. Cadman Jones, in support of the petition. First, the daughters take as tenants in common in tail, notwithstanding there are no words of limitation; *Doe d. Harris v. Taylor* (10 Q. B. Rep. 718), is expressly in point; *Clements v. Paske* (3 Doug. 384). Secondly, the devise is of my undivided moiety, which is the same thing as if the testator had said, "I devise to them my estate," and then there could be no doubt that the daughters took estates of inheritance without any words of limitation; *Doe d. Atkinson v. Fawcett* (3 Q. B. Rep. 274); *Montgomery v. Montgomery* (3 Jones & Lat. 47); *Uthwatt v. Bryant* (6 Taunt. 317); *Rudall v. Tuchin* (6 Taunt. 410); *Wilkinson v. Chapman* (3 Russ. 145). Thirdly, all doubt

is removed by the codicils. There is clearly an omission in copying in the will, and the testator in the codicil states what he thought he had and what he really intended to have devised to his daughters by his will. He recites that he had given the estate over to his son on the deaths of his daughters "without issue of their respective bodies." This must be imported into the will, and would give them an estate tail. Besides, he gives over the estates to them if the son died before the estates became "vested" in him; this meant "vested in possession," and the very event has happened.

[167] THE MASTER OF THE ROLLS [Sir John Romilly]. If the case stood on the will alone, I should have had very great difficulty in coming to the conclusion contended for by the Petitioners; but the question is, whether there is not such a doubt on the face of the will that it can be aided by the codicil.

Mr. Hobhouse and Mr. W. Pearson, *contra*. There are no words of limitation in the devise of the daughters, and they, therefore, can only take life-estates. The gift over in default of "such issue" means "issue aforesaid," namely, that of the sons of the daughter; *Denne v. Page* (11 East, 603, n.); *Hay v. Coventry* (3 Term Rep. 83); *Doe d. Liversage v. Vaughan* (5 B. & Ald. 464); *Ashley v. Ashley* (6 Sim. 358); *Bridger v. Ramsey* (10 Hare, 320).

Secondly, as to the codicil, the recital is a mere incorrect statement of the devise in the will, and cannot affect it, it is totally at variance with it; *Bamfield v. Popham* (1 P. Wms. 54); *Re Smith* (2 John. & Hem. 594); *Vaughan v. Foakes* (1 Keen, 58); *Adams v. Adams* (1 Hare, 537); *Jarman on Wills* (vol. 1, pp. 492, 495 (3d edit.)); *Smith v. Fitzgerald* (3 Ves. & B. 22). A gift in a will can only be destroyed by something equally clear in the codicil: *Doe d. Hearle v. Hicks* (8 Bing. 475, and 1 Cl. & Fin. 20).

Thirdly, in the gift over in the codicil, the word "vested" means vested in interest and not in possession; *Parkin v. Hodgkinson* (15 Sim. 293).

[168] Mr. Baggallay, Mr. West, Mr. Fordham and Mr. G. Smith, for other parties.

Mr. Cadman Jones, in reply, cited *Jarman on Wills* (vol. 1, p. 688 (2d edit.)); *Boraston's case* (3 Coke's Rep. 19); *Sillick v. Booth* (1 You. & C. C. C. 117).

July 31. THE MASTER OF THE ROLLS [Sir John Romilly]. The question that arises on this petition is, what estate the daughters of Mary take? The words are these. [See *ante*, p. 163.] These certainly are very common and familiar words. Generally, no difficulty would be felt in saying that they gave an estate for life. It is to be observed that in this will, where the testator intended to give estate of inheritance, he has done so with apt words for that purpose, but here such words are omitted, and they are also in several other devises of a similar character. I agree with Mr. Cadman Jones that it is probable that a mistake occurred in the draft of the will, which is evidently prepared by a professional man, and that it probably arose from the conveyancer omitting a line in the first limitation to the daughters, and in copying the words he had before written in the four next devises, where similar interests were intended to be given. It is impossible, however, for the Court to act on any such speculation: to supply such an omission, however probable, would be to make a will for the testator. And this being necessarily the rule of the Court, the suggestion of the omission, if intentionally made, leads the mind to the conclusion that [169] the will as it stands does contain the proper words to express the meaning imputed to the testator, viz., that the daughters of Mary were not intended to take an estate of inheritance, which, if that had been his meaning, he knew so well how to express.

It has long been settled that a gift over in the event of a person dying without such issue, merely refers to the issue above mentioned, and that this clause cannot enlarge the estate of the first taker. The cases on this subject are so numerous and so conclusive that it would be waste of time to refer to them in detail, several of them which most closely resemble the present case were cited in the argument.

I believe that the case would not, on this point, have been seriously contested on the part of the counsel for the Petitioners, had it not been for the case of *Doe d. Harris v. Taylor* (10 Q. B. Rep. 718; and see 1 Jarm. (2d edit.) 413; 2 Jarm. 388). I must say that I was much startled when I first read that case, the more so, as the Court

thereby overruled the judgment of the Vice-Chancellor Shadwell on the very same will, a Judge of great authority in all cases of construction. But this case, if law, does more, for it expressly overrules a long series of decisions, and besides this, it gives a reason for the conclusion come to by the Court, which it is difficult to understand how it can be supported. With all deference for the learned tribunal which decided that case, I am placed by it in a considerable dilemma, because it manifestly governs the present; and if it be correct, it is not the daughters of Mary, but Mary herself, who took an estate in tail general in the property devised, and I am compelled either to follow that case on the present occasion, or to follow the long series of cases of [170] an opposite character to which I have referred; and I regret to say that the case in the Queen's Bench appears to me to be unsustainable on the ground stated by their Lordships, and that I feel myself unable to follow it in this case.

Mr. Cadman Jones argued that, independently of any other question, the testator had, by the use of the word "moiety," given to the daughters of Mary the absolute interest in the land devised, but I am unable to concur in that view in the present case; although quite correct in the cases cited, it does not appear to me to govern the present. Here the testator carefully adds words of limitation to pass the inheritance in the other cases in this will, with the exception of the five instances of the devises given to the daughters. It is justly observed that the same argument was open in the case of *Denne v. Page* (11 East, 603), and several of the other cases cited, but that the Court nevertheless held that the estate could not be enlarged beyond a life-estate, and my opinion on the will alone is that the daughters of Mary took no more than a life-estate.

So treating it, the question next arises, whether the words in the codicil will give the daughters an estate in tail (see *ante*, p. 164), and I regret to say that here also I think that the codicil cannot have that effect. The observations of the Vice-Chancellor Sir James Wigram on this subject, in the case of *Adams v. Adams* (1 Hare, 537), are extremely valuable and very pertinent. They draw the accurate distinction between the interpretation of a devise or a bequest, by means of the references made to it, when both occur in the same instrument, and when the [171] recital of what has been done is contained in one instrument and the gift itself is contained in a former one.

I admit that if the construction of the devise or bequest contained in the will is ambiguous, the expression of the testator in a codicil, as to the way in which he understands or construes his own words, is conclusive and must be followed; but if the testator, in the codicil, recites that by his will he has made a devise or bequest which does not there appear, then the codicil does not, by such recital, create that bequest or devise.

Upon referring once more to the words in the codicil, it is, I think, impossible to say that the recital is absolutely false. If the sentence in the will be correct and as the testator intended it, then, if it be read as it stands, the testator uses the word "issue" for children, for the will gives the estate to the sons in tail general, and then to the use of all the daughters of the body of my daughter Mary as tenants in common, and in default of such issue, to John Arthur Arnold. Here "issue" means "children" of Mary, which he had previously spoken of. If, therefore, in the codicil he means the words "without issue of their respective bodies" to mean "without children," then his recital of the previous devise is correct, and if this codicil is to be read as if he meant that he had, by his will, given such a devise as is expressed in the exact words, it is inaccurate, for that would give Mary an estate tail, and no such devise is contained in the will. Indeed, the argument which is addressed to me seems to contain within itself its own refutation, the argument is this:—the legal meaning of the words as they stand, if contained in a devise, is to give to Mary and the other daughters an estate tail, and, therefore, it is argued that the codicil must be read just as if it ran thus: "Whereas I have by my will devised [172] the reversion in fee of and in the devised hereditaments expectant on the failure of estates tail given to my daughters Mary, &c., to John Arthur Arnold, his heirs and assigns;" and that so construing this passage it furnishes the construction to the passage contained in the will, and converts that devise also into an estate tail in Mary. But if I did this I should alter the whole will, and should have enabled Mary, by a disentailing deed, to exclude her sons and daughters. If there be any

error in the will, by the omission of any words, I believe it rather to have been by the omission of words giving an estate tail to the daughters of Mary, not an estate tail to Mary herself. But whether this be so or not, my opinion is that I cannot introduce any words into the will, but that I must read it as it stands, and that, so reading it, the daughters of Mary only take estates for life, upon failure of which the devise over takes effect in John Arthur Arnold, and that these devises to the daughters cannot be varied or affected by the inaccurate recital contained in the codicil.

The only remaining question argued before me is, what is the effect of the devise over, contained in the codicil, in the event of John Arthur Arnold dying without leaving lawful issue before the estates become vested in him. The words are these. [See *ante*, p. 165.] It is argued that the word "*vested*" must not here receive its ordinary legal acceptation; but that it must mean "*vested in possession*" and not vested in interest, for the reason that the devises became vested in interest in him immediately on the death of the testator. But I think the word "*vested*," here, must mean "*vested in interest*," and that the only effect of this devise over is, that it would have taken effect in case John Arthur Arnold had died before the testator.

[173] It is important to give words their ordinary meaning, particularly when a testator makes use of a word which, for the most part, has a received, plain, legal, technical meaning. A devise is vested in the devisee when the right to it is ascertained, and the possession only is postponed. It is true that the Courts have occasionally been compelled to give the word the meaning of "*vested in possession*," as in *Taylor v. Frobisher* (5 De Gex & S. 191) before the Vice-Chancellor Parker, but the Court always does this with reluctance, and only where the rest of the will and context inevitably fix this meaning upon it. Here I see no reason for departing from the ordinary legal meaning of the term, and, accordingly, in my opinion, the interest of John Arthur Arnold in the remainder expectant on the decease of the daughters of Mary vested in him in fee-simple on the death of the testator, and the devise over in favour of the daughters thereupon ceased to be capable of taking effect.

[174] TUCKEY v. HENDERSON. July 22, 23, 27, 31, 1863.

[See *Cresswell v. Cresswell*, 1868, L. R. 6 Eq. 76.]

Gifts of legacies of different amounts to the same persons, by two different instruments. Held substitutional, and not cumulative.

By her will, a testatrix, under an existing power, appointed £1000 to A. B. By a subsequent testamentary instrument she bequeathed £1000 to A. B. Held, that the gifts were cumulative.

The testatrix made a will, dated the 13th of April 1860, and another dated the 10th of June 1861, and she died on the 25th of December 1861. They were both admitted to probate, and the question arising upon them was, whether the legacies given by them to the same legatees were cumulative or substitutional.

The distinctions between the two instruments were as follows:—

By the first, she gave pecuniary legacies to fifteen legatees. These she repeated in the second (with one exception), varying the amounts in seven instances by a reduction, and, in the second instrument, she introduced eight additional pecuniary legatees. By the first, she appointed £1000 to Jane Hodgson, with a gift over to her two children if she died in the testatrix's lifetime. By the second she gave £1000 to Jane Hodgson for life only, with a gift over at her decease. By the first, she bequeathed £1500 to trustees for Harriet Rhodes for life, with remainder to her two children by name; by the second, she gave £2000 to Harriet Rhodes absolutely. By the first, she bequeathed £100 to the rector of Winterbourne Bassett, "in trust for such poor old women above the age of sixty years, resident in the said parish at the time of her decease, as he should judge to be most deserving and most to require the same." By the second, she gave £100 to the poor inhabitants of the

same parish, "to be distributed among them, in such proportions and in such way or manner as the officiating minister and churchwardens of the said parish should, in their discretion, think fit." She gave [175] her plate by both instruments to the same two legatees, and the residue was, in both cases, given to John Henderson. A third executor was appointed by the said instrument.

The estate was insufficient to pay all the legacies.

Mr. Baggallay and Mr. W. W. Cooper, for the Plaintiff, contended that the second will was substitutional. They relied on the identity of the legatees, the similarity of the legacies, and the fact that the second will was called "my last will." They cited *Hemming v. Gurrey* (2 Sim. & St. 311, and 1 Bl. (N. S.) 479); *Lee v. Pain* (4 Hare, 201); *Kidd v. North* (2 Phil. 91); *Jackson v. Jackson* (2 Cox, 35); *Plenty v. West* (16 Beav. 173).

Mr. Selwyn and Mr. Boyle, for legatees, argued that the gifts were cumulative, being given by different instruments, and of different amounts, and from different motives. They cited *Armstrong v. Millar* (4 Ir. Eq. Rep. 659); *Allen v. Macpherson* (5 Beav. 469; 1 Phil. 133, and 1 H. of L. Cas. 191); *Freeman v. Freeman* (5 De G. M. & G. 704).

Mr. Dewsnap, for other legatees.

Mr. Baggallay, in reply, referred to *Walsh v. Gladstone* (1 Phil. 294).

July 27. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the cases of *Hemming v. Gurrey* (2 Sim. & St. 311); *Jackson v. Jackson* (2 Cox, 33); and *Kidd v. North* (2 Phil. 91), [176] govern this case, and that, upon the construction of these two wills of the testatrix, the second instrument was meant to be in substitution for the first. It is true that both are wills of the testatrix, and that both are admitted to probate, and that it is, therefore, simply a question of construction. But as a question of construction, I am of opinion that the second is substitutionary for the first, as regards the legacies in the first will to legatees who are also named as legatees in the second. This differs from the case of a codicil, a codicil is professedly an addition to the will, but this is professedly a substitution for it. Though it is called "the last will," that does not prevent the proof of the prior will, which is not revoked: therefore both are proved, and if there be legacies given in the first will to objects of bounty not mentioned in the second will, they are not revoked, but, in all other respects, I think the legacies are substitutionary and not cumulative.

Various matters seem to me to establish this. In the first place, I do not find the name of one person in the first will who is not mentioned in the second, with the exception of Mrs. Summers, who died before the testatrix. The first will contains an appointment of £1000 to Jane Hodgson, with a gift over to her two children if she should die in the testatrix's lifetime; by the second, £1000 is given to her for life only, with a gift over after her decease. By the first, £1500 is given to trustees for Harriet Rhodes for life, with remainder to her two children by name; by the second, she gives £2000 to Harriett Rhodes absolutely.

There is a gift to the rector of Winterbourne, in trust for the aged poor women of the parish in the first will, and the same sum is given by the second will for the poor generally of the parish, as the minister and church-[177]-wardens shall think fit; I consider that a mere substitution of the one for the other. The gifts of the plate and plated articles are all but identical in both wills, and the residue is given to John Henderson in both.

In the case of five legatees the sums are identical, and in all the other cases the same legatees take different sums.

I am of opinion, regarding it as a question of construction, as the Lord Chancellor did in the case referred to, and considering that, although the testatrix calls the second instrument "my last will," yet both have been admitted to probate, you must look at the general scope of both and see if substitution is intended. I am of opinion that it is, and I will make a declaration to that effect.

Mr. Boyle then pointed out that the gift in the first instrument of £1000 to Jane Hodgson was by an appointment under a power contained in the will of the testatrix's father, but that the bequest to her of £1000 by the second will was out of the testatrix's own assets.

July 31. THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the appointment of £1000 in favour of Jane Hodgson by the first will is not superseded by the legacy of £1000 to her for life by the second will, as it relates to a separate and distinct fund, and as the second will cannot operate as an appointment of this fund.

I am of opinion that both must stand, that is, the appointment by the first will and the legacy given by the second will.

[178] THOMPSON v. CARTWRIGHT. *July 27, 31, 1863.*

[S. C. affirmed on appeal, 2 De G. J. & S. 10; 46 E. R. 277; 33 L. J. Ch. 234; 9 L. T. 431; 3 N. R. 144; 9 Jur. (N. S.) 1215; 12 W. R. 116. See *Cave v. Cave*, 1880, 15 Ch. D. 644.]

A surety who makes his estate liable for an annuity, although he incurs no personal obligation to pay it, is a "grantor" within the 53 Geo. 3, c. 141, s. 10.

The grant of an annuity, secured on land of which the grantor was seised in fee, was prepared by the solicitor of the grantee, and thereby the grantor covenanted that there were no incumbrances whatever on it. But it afterwards turned out that the solicitor himself, with other persons, had a mortgage on the property. Held, that the grantee had not, through his solicitor, constructive notice of the mortgage, and that, although the interest on the mortgage rendered the annual value insufficient to pay the annuity, still that the deed was within the exception contained in the 53 Geo. 3, c. 14, s. 10, and did not require enrolment.

The rule is, generally, that a client must be treated as having had notice of all the facts which, in the same transaction, have come to the knowledge of his solicitor, and that the burthen of proof lies on the client to shew that there is a probability, amounting to a moral certainty, that the solicitor would not have communicated those facts to his client.

A. B. granted a life annuity of £139 for five years secured on fee-simple lands, and after that period the annuity was to be increased to £199. Held, that in determining the annual value, under the 53 Geo. 3, c. 14, s. 10, the land must be considered as charged with the larger annuity.

The question in this case related to the validity of an annuity deed, and was, whether, by reason of its not having been enrolled in pursuance of the statute of the 53 Geo. 3, c. 141, the deed was altogether void.

It appeared that, in 1828, Francis Cartwright agreed to grant Arthur Downes a life annuity, and Thomas Cartwright agreed to make his undivided moiety of certain hereditaments at Ewell in Surrey, of which he was seised in fee, liable for its payment in the manner presently stated.

Accordingly, a deed, dated the 11th of March 1828, was made between Francis Cartwright of the first part, Thomas Cartwright, his brother, of the second part, Arthur Downes (the grantee of the annuity) of the third part, and a trustee for him of the fourth part. It recited certain deeds of 1823 and a recovery (to which William Montriou, who will be presently mentioned, was a party), and under which Thomas Cartwright was seised in fee [179] of the property. It recited the contract for the purchase of the annuity, to be secured by the judgment of Francis Cartwright, and other the hereditaments after described, which Thomas Cartwright, at the request of Francis Cartwright, has agreed "to render an additional and further security for the same." It then proceeded to witness, that in consideration of the sum of £1998 paid by Downes to Francis Cartwright, he, Francis Cartwright (alone), granted to Downes an annuity of £139, 17s. 6d. for five years if five persons therein mentioned should so long live, and after the expiration of these five years, if this annuity should not then have been redeemed, the annuity was to be increased to £199, 16s., and to last for ninety-nine years if the five persons above referred to or any of them should so long live. Francis Cartwright alone covenanted to pay this annuity. Thomas Cartwright then granted and agreed that the annuities should be issuing out

of and charged upon his moiety of the hereditaments, with powers of distress and entry; and he demised the property to a trustee for a term for securing the annuities by mortgage, sale or other disposition. And he, Thomas Cartwright, covenanted with Downes that he had good right, &c., to charge the hereditaments with the annuities; that they should thereafter remain subject thereto and be held by the trustee of the term free from all former mortgages and charges whatsoever. The annuity was redeemable by Francis or Thomas Cartwright at any time after the expiration of the two years on payment of £1998 and the arrears of the annuity.

The annuity deed thus granted was not enrolled under the 53 Geo. 3, c. 141, but the annuity being secured on fee-simple lands, the question was, whether it was exempted from the necessity of being so enrolled, by reason of its [180] falling within the exception contained in the 10th section of that Act. That section is to this effect:—This Act shall not extend to any annuity or rent-charge secured upon freehold lands “of equal or greater annual value than the said annuity, over and above any other annuity and the interest of any principal sum charged or secured thereon, of which the grantee had notice at the time of the grant, whereof the grantor is seised in fee-simple.”

The annual income of the property in question exceeded the amount of the annuity, for the undivided moiety of Thomas Cartwright amounted to £200 a year.

But it turned out that Thomas Cartwright had previously mortgaged the property by a deed dated the 6th of February 1826, which was made between Thomas Cartwright of the first part, William Montriou of the second part, George Mayer, William Ancrum and William Montriou of the third part; and thereby Thomas Cartwright mortgaged the hereditaments in question to the three parties named of the third part, to secure the sum of £1000, with interest thereon at £5 per cent. per annum.

Deducting the interest on this mortgage (£50), the annual value was still sufficient to pay the annuity of £139, 17s. but was insufficient to pay the substituted annuity of £199, 16s. The question therefore arose, whether “the grantee had notice, at the time of the grant,” of this mortgage.

It was not pretended that Mr. Downes (who had since died) had any direct notice of this mortgage, but it was attempted to fix him with notice from the following circumstances:—Mr. Montriou, who was one of the mortgagees named in the deed of the 6th of February 1826, prepared the mortgage and executed it [181] twice over; he was also the solicitor of Downes and prepared the annuity deed of the 11th of March 1828.

Some of the lives were still in existence, but Thomas Cartwright being dead, and his estate being under the administration of the Court, the representatives of Downes carried in a claim against this estate for the annuity. This was resisted by the other creditors, on the ground that the annuity, not having been enrolled under the statute, was void. The case was adjourned into Court.

Mr. J. Pearson, for the claimant. First, the annuity was secured on fee-simple lands of greater annual value, for even taking the interest on the £1000 mortgage into account, there remained £150 a year to provide for the annuity of £139, 17s. For the purpose of construing the Act, regard must be had to the amount secured at the date of the deed, and that was £139, 17s. *Non constat* that the annuity of £199, 16s. might ever come into existence; it might have failed by the deaths of the *cestuis que vie*, or by a repurchase. Therefore, assuming Downes to have notice of the mortgage, it was not necessary to enrol the deed.

But the grantee had no notice of this mortgage at the time of the grant. Actual notice is not suggested, and all that is relied on is a constructive notice. It will be said that Montriou, the solicitor of Downes, had notice of the mortgage, and that, therefore, Downes is constructively affected by the notice of his solicitor. But the 10th section is to be construed strictly, and it must mean actual and not constructive notice. Montriou, no doubt, was guilty of a gross fraud towards his client, in concealing (as he must have done) the mortgage made to himself. He represents on the annuity deed, drawn [182] by himself, that the estate was unincumbered. It is therefore manifest that he concealed from his client the existence of the mortgage; consequently, constructive notice cannot be imputed to the grantor. Again, if

Montriau had been the sole mortgagee, he could not, after concealing the mortgage and representing the estate to be unincumbered, have set it up as against the grantee of the annuity; and, in that view, the estate would, as regards the annuitant, have been perfectly unincumbered and the income of ample value.

It is now admitted that the doctrine of constructive notice has gone too far, and is not to be extended; *Jones v. Smith* (1 Hare, 43, and 1 Phillips, 244); *Espin v. Pemberton* (3 De Gex & Jones, 554); and see *Wyllie v. Pollen* (L. C. 21 July 1863).

He also relied on the length of time (thirty years) during which the annuity had remained unimpeached, the fact of the deaths of the parties, and the absence from England of Montriau.

Mr. Hetherington, for the Plaintiffs. The annuity is void for want of enrolment. The 10th section excepts only those annuities which are secured on lands whereof "the grantor is seised;" but here the grantor was Francis, who alone granted and covenanted to pay the annuity. Thomas was, in no sense, a grantor; he was not liable, and he only pledged his estate as surety. Secondly, the annual value was less than the annuity, for the larger annuity must be taken as the limit, to cover which the rental is to be sufficient, and which is the annuity now actually in existence. Thirdly, the grantee had clearly constructive notice of the mortgage [183] through the solicitor whom he employed in the transaction.

Mr. F. Bacon, for the executor.

Mr. Pearson, in reply. Thomas Cartwright was one of the grantors within this Act. Lord Tenterden lays this down distinctly in *Darwin v. Lincoln* (5 Barn. & Ald. 449); he says, "I am of opinion that a man who makes his estate liable to the payment of an annuity is a grantor of that annuity within both those Acts of Parliament," . . . and "consequently, that no memorial was required."

July 31. THE MASTER OF THE ROLLS [Sir John Romilly]. The questions are, first, whether the annuity must be treated as an annuity for £139, 17s. or for £199, 16s. Secondly, whether, for the purposes of this Act, Thomas Cartwright is to be treated as a grantor of the annuity; and thirdly, whether the grantee Mr. Downes had notice of the prior charge at the time he purchased this annuity.

On the first question, I am of opinion that this annuity must be treated as an annuity for the larger amount of £199, 16s., for although this is a *bond fide* transaction, it is obvious that the provisions of the statute would be easily evaded, if, by reason of a grantor covenanting to pay a small sum for the first period, a larger for the second and third periods, and thus progressively augmenting the annuity, the necessity of enrolment could be dispensed with. I do not mean, by this, to state my opinion, that if the annuity granted were one gradually [184] increasing to the larger amount after a considerable number of years, the Court would always treat that as an annuity of the largest amount that would ultimately become payable unless previously redeemed; but the Court, I apprehend, would have to regard each case on its own merits, and could not lay down any fixed rule on the subject. It may be that, in some cases, it would be equitable to ascertain the probable duration of the annuity and take the average value of it in each year. But it is not necessary to consider that circumstance more minutely in the present case, for, whether that course be adopted here, or whether the annuity be treated as one for £199, 16s., this is clear:—that the amount of it would exceed the sum of £150, which was the net rental of the estate upon which it was charged at the time it was granted.

Upon the second point the case of *Darwin v. Lincoln* (5 Barn. & Ald. 444) is conclusive, and settles that Thomas Cartwright must be treated, for the purpose of considering the effect of the 10th section, as one of the grantors of the annuity.

The only real question in the case is, whether Mr. Downes had notice of the fact of this prior charge. That Mr. Montriau, his solicitor, had notice of it is certain, and the question is, whether the ordinary rule, that the client is affected with the notice given to his solicitor, applies to this case. The mortgage in question bore date the 6th of February 1826. [His Honor stated it, see *ante*, p. 180.]

Mr. Montriau was one of the mortgagees, he prepared the deed and he executed it twice over, and he was the solicitor of Mr. Downes in the preparation of the annuity [185] deed. In this state of circumstances is it to be presumed that Mr. Montriau must have concealed the fact of that mortgage from his client Mr. Downes? The

case of *Kennedy v. Green* (3 Mylne & K. 699), which is always cited on these occasions, establishes a very important principle, but one which must be very cautiously applied to the cases of notice of facts given to the solicitor employed by the client. That case establishes, that if the solicitor employed by the client was the actual perpetrator of a fraud, it is reasonably certain that he would not communicate that fact to his client, and that consequently the client cannot be treated as having had notice of that fact.

I take the rule to be, generally, that the client must be treated as having had notice of all the facts which, in the same transaction, have come to the knowledge of the solicitor, and that the burthen of proof lies on him (the client) to shew that there is a probability, amounting to a moral certainty, that the solicitor would not have communicated that fact to his client.

The question here is, whether the applicant, Mr. Downes, discharges the burthen so imposed on him? Upon the whole I think that he does. Mr. Montriou, as his solicitor, knowing of the mortgage affecting the property, prepares a deed, by which the owner of the property covenants that there is no mortgage, charge or incumbrance on it or affecting it. He prepares this deed and causes his client, the grantor, to execute to his client, the grantee, a solemn instrument by which he deliberately puts his hand and seal to an assertion which is false. I think that this amounts to a solemn declaration by Mr. Montriou to his client, that he, Mr. [186] Montriou, was ignorant of any charge affecting the property, and that he did not believe that any such charge existed.

It was well observed by Mr. Pearson, in argument for Mr. Downes, that if Mr. Montriou had been the sole mortgagee in the deed of February 1826, he would have been compelled, by this Court, to postpone his mortgage to the charge of the annuity; but upon what ground would he have been so compelled? Only on the ground so frequently acted on by this Court, that, in transactions between men, this Court compels one man to abide by and not dispute the truth of his own representations to another, upon the faith of which that other has acted.

I must, in the same manner, treat this as a proof that Montriou deliberately and intentionally asserted that there was no charge on the property, and concealed the fact of his prior mortgage from Mr. Downes; and if he did so, then, I think, the case falls within the exception contained in the 10th section of the statute, and that the deed did not require to be enrolled. I am of opinion, therefore, that the present claimant is entitled to his annuity.

I have not noticed the fact that, by arrangement between the parties, the higher annuity has not, in fact, been paid, but only the lesser one. It would not, I think, have affected the case, which depends on the terms of the deed itself which grants an annuity for £199, 16s., and not on any subsequent arrangement; but, as far as it goes, this fact is favourable to the annuitant.

NOTE.—Affirmed by the Lords Justices, 25 Nov. 1863. [2 De G. J. & S. 10.]

[187] ASH v. ASH. Nov. 23, 1863.

[S. C. 9 L. T. 673; 10 Jur. (N. S.) 142; 12 W. R. 189.]

By his will, a testator said he proposed to bequeath his residue by a codicil, "or otherwise to allow the same to go to his next of kin according to the Statute for the Distribution of the Estate of Intestates." He made no codicil. Held, that he died intestate as to the residue, and that his widow took her share thereof.

The testator, William Ash, by his will dated the 2d of November 1860, bequeathed a sum of £24,000 on certain trusts for his widow and his nephews and nieces, and he bequeathed to each of his brothers and sisters a legacy of £1500.

His will then proceeded in these words:—

"The residue of my personal estate and effects, not hereinbefore disposed of, I propose to bequeath by a codicil to this my will, or otherwise to allow the same

to go to my next of kin, according to the Statute for the Distribution of the Estates of Intestates."

The testator died on the 17th of November 1860, without having made any codicil to his will. He left the Plaintiff, his widow, him surviving, but he had never had any children, and the Defendants, his three brothers and his sister, and the children of a deceased sister, were his next of kin.

He left a large residuary estate, and the question was to whom it belonged.

Mr. Baggallay and Mr. Bristowe, for the widow, contended that the disposition of the residue contained in his will amounted to a declaration, that in case he should not make a codicil, he intended to die intestate as to his residuary estate, and that *Garrick v. Lord Camden* (14 Ves. 372), [183] which decided that a wife could not take under a gift to "my next of kin as if I had died intestate," she not being of kindred to the testator, was inapplicable. That the devolution of the residue was to be governed by some future act which the testator "proposed" to do, and having done no such act, the will was inoperative as regarded the residue, which became distributable as in the case of intestacy.

Mr. Hobhouse and Mr. Brodrick, for the brothers, sister and the children of the deceased sister, argued that the clause amounted to a gift to the next of kin, to the exclusion of the widow, in the event, which happened, of the testator making no codicil disposing of the residue. That the widow, who had been provided for by the will, could not participate in the residue as next of kin.

Mr. W. Forster, for the executors and trustees.

THE MASTER OF THE ROLLS [Sir John Romilly] held that the will contained no gift of the residue, and that there was simply a declaration, on the part of the testator, that he intended to dispose of his residue by a codicil; but that if he should not do so, he intended "to allow the same to go" as if he had died intestate. That, consequently, the testator died intestate as to his residuary personal estate, and that the widow was entitled to a moiety of the clear residue. (NOTE.—Reg. Lib. A. 1863, fol. 2214.)

[189] BURDELL v. HAY. Nov. 25, 1863.

A second motion for the same object, which had previously failed with costs, cannot be made until those costs have either been paid or been secured by a payment into Court.

Mr. Selwyn and Mr. Beales moved, on behalf of the Plaintiff, for an injunction.

Mr. Hobhouse and Mr. W. W. Cooper objected that the motion could not be made until the Plaintiff had paid the costs, which he had been ordered to pay, of a former motion for the same object; *Oldfield v. Cobbett* (12 Beav. 91).

Mr. Selwyn. That is impossible, as they have not yet been taxed.

THE MASTER OF THE ROLLS [Sir John Romilly]. Then you must bring a sufficient amount into Court.

[189] CHORLEY v. LOVEBAND. Dec. 3, 1863.

[S. C. 9 L. T. 596; 12 W. R. 187.]

The words "entitled to an estate for life" held to mean entitled in possession.

The testator devised to the Plaintiff a life interest in remainder in the T. estate, and he also bequeathed to him a charge of £250 issuing out of it, which was to be paid to him at twenty-one. The will contained a proviso, that in case the Plaintiff should "become entitled, under the provisions of the will, to an estate or interest for his life" in the T. estate, the legacy should sink into the estate. Held, that this meant "entitled in possession, and have the beneficial enjoyment of the estate."

The testator devised his estate, called Triscombe, in trust to raise thereout £1000, and, subject thereto, he devised the estate upon trust for his second son Francis

Chorley for life, with remainder to his grandson Robert Chorley (eldest son of Francis) for life, with remainder to his first and other sons in tail, with remainder to his grandson William (the second son of [190] Francis) for life, with remainder to his second and other sons in tail, with remainder to his grandson Francis (the third son of Francis the son) for life, &c., &c.

He directed the interest of £250 (part of the £1000 charge) to be applied to the maintenance and education of his grandson William, until he attained twenty-one, and then the £250 to be paid to him. And he directed the remaining £750 to be similarly applied and paid to his grandson Francis. And he authorised his trustees to apply any part of these sums before they "became vested" in the advancement, &c., of his two grandsons.

The will contained the following proviso:—"Provided also, and I hereby will and declare, that in case both or either of them my said grandson William Chorley and Francis Chorley the younger shall die unattaining the said age of twenty-one years, or in case either of them *shall become entitled*, under the provisions of this my will, to an estate or interest for his life in the said farm and hereditaments called Triscombe, then and in either of such events and immediately thereupon, the legacies or legacy lastly hereinbefore provided for them or him, respectively, or so much of such legacies respectively as may not have been paid under the power of advancement hereinbefore contained, shall not be raised or paid or payable, but shall sink into the said farm and hereditaments called Triscombe, which shall henceforth be discharged therefrom respectively."

The testator died in 1857, and his grandson Robert died in 1858, without issue. The grandson William thereupon became and was still tenant for life of Triscombe in remainder immediately expectant on the death of his father Francis.

The grandson William, having attained twenty-one [191] in 1862, instituted this suit to have the £250 raised. His father, Francis the elder, was still in possession as tenant for life, and the Plaintiff was tenant for life in remainder. The trustees said that they had been advised that it was not clear that this sum ought to be raised, the Plaintiff being now tenant for life.

Mr. T. H. Terrell, for the Plaintiff, argued that the words of the proviso, "shall become entitled" to "an estate or interest or interest for his life," meant "entitled in possession," for otherwise the Plaintiff would be excluded altogether, for he was tenant for life from the death of the testator, though his chance of beneficial enjoyment was accelerated by the death of his eldest brother without issue.

Mr. W. M. James and Mr. Rowcliffe, for the trustees, argued the charge was not now raiseable, for the words of the proviso were distinct, that the legacy was to sink into the estate if the Plaintiff became entitled to an estate for life. That no additional words could be introduced into the will so as to alter the effect of the terms actually used by the testator. That the intention really was, that no child who took the estate should take a portion issuing out of it; *Macoubrey v. Jones* (2 Kay & J. 684). That this construction was strengthened by the fact that no legacy was given to Robert the eldest son.

Mr. Lonsdale, for the Plaintiff's father.

Mr. Terrell, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will read the will, but, generally speaking, where a testator says "entitled," he means entitled in possession, and beneficially.

[192] Dec. 3. THE MASTER OF THE ROLLS. This question is, whether, on the construction of the will of William Chorley, the Plaintiff is entitled to have a legacy of £250 raised and paid to him, although he is tenant for life of the Triscombe estate in remainder, expectant on the death of his father, who is now the tenant for life in possession.

The proviso is in these words, "Provided also," &c. [see *ante*, p. 190]. *Prima facie* these words would import "become entitled in possession;" but it is argued, against this, that the whole scope and character of the will shew the contrary, for that the testator excludes Robert, the eldest son, from any legacy, apparently because he gives him an absolute vested estate in remainder on the decease of his father Francis. But I do not arrive at this conclusion from a perusal of the will. It is

true that no legacy is given to Robert, but the legacies to William and Francis the younger are not equal, and they are also to be paid to them at twenty-one, though they may afterwards come into possession of the estate, and besides this, a power is given to the trustees to advance them a portion of the legacies during their minority for their establishment in life, which, if exercised, wholly defeats the proviso.

I think, therefore, that the words of the proviso must be read in their ordinary plain, commonsense meaning, and not in their technical legal sense, and that these words mean "shall become entitled in possession and have the beneficial enjoyment" of the estate.

I will make a declaration accordingly.

[193] THE ATTORNEY-GENERAL v. GREENHILL. Dec. 3, 4, 7, 1863.

[S. C. 33 L. J. Ch. 208; 9 L. T. 500; 3 N. R. 236; 9 Jur. (N. S.) 1307; 12 W. R. 188.]

A testator devised a real estate at L. to two colleges for charitable purposes, and he proceeded thus:—"and the lease of the said L. to be, at one-third part under true value, to my said wives' kindred for ever, viz., brothers and sisters there and at Harrow." Held, that the direction as to the lease was void as a perpetuity, and that the colleges took discharged of it.

Upon an information insisting on the invalidity of the above gift: Held, that the existing lessee under the gift sufficiently represented the other kindred, if any.

The testator, Francis Coombe of Hemel Hempstead, by his will, dated in 1641, devised as follows:—

"I will and ordain that all my houses and lands and tithes and goods I have in Hempstead shall be in possession of my father, Greenhill, and my aforesaid trusty servant, Francis Hodges, and two other sincere and impartial men as aforesaid, to pay the said debt on Abbots Langley and my legacies, and do presently infeofe the two colleges aforesaid [Sydney College, Cambridge, and Trinity College, Oxford], and their successors for ever with all I have in Abbots Langley and the lordship there, and the meadow in St. Stephens, with the appurtenances, equally between the said colleges, for the only use, education in piety and learning, of four of the descendants of my brothers and sisters, and three of the descendants of the brother and sister of my first wife, and three of the descendants of the brothers and sisters of my second wife, and in default of such, to their next poor kindred, for the first by the father's side, for the second by the mother's side, *and the lease of the said Langley to be at one-third part under true value to my said wives' kindred ever, viz., brothers and sisters there and at Harrow.*"

The testator died in 1641.

The two moieties of the estate devised to the two colleges had always been treated and dealt with as distinct foundations, and had always been demised by the two colleges separately and by separate instruments.

[194] Leases had been, from time to time, granted by Trinity College, Oxford, of the moiety belonging to them of the estate of Abbots Langley to various members of the family of Greenhill, claiming to be descendants of a brother or sister of a wife of Francis Coombe. Such leases had been for terms not exceeding twenty-one years, and at rents varying from £30 to £243, 9s. 6d. It was alleged, by the Defendant, that this estate had always been in lease to a brother or sister or a descendant of a brother or sister of one of the wives of Francis Coombe, and always at a rent not exceeding two-third parts of the true value.

The moiety belonging to Trinity College was now leased for twenty-one years from 1853, at a rent of £163, 6s. 8d., to the Defendant, who claimed to be a descendant of a brother or sister of one of the wives of Francis Coombe, and, as such, to be entitled thereto, by virtue of the direction to lease contained in the testator's will.

This was an information filed by the Attorney-General, at the relation of Trinity

College, Oxford, against Mr. Greenhill alone, and it prayed that the validity of the direction in the will, as to leasing the manor and estate at Abbots Langley, so far as related to the moiety devised to Trinity College, Oxford, might be determined, and that it might be declared, whether or not such direction, if purporting to create, in favour of all generations of persons connected in affinity with the testator, a perpetual right to a lease of the estate "at one-third part under true value," was invalid and void in law, and if so, that it might be declared that the whole interest in that moiety, discharged from the direction as to leasing, belonged to Trinity College. It [195] also prayed that the construction of the charitable bequest might be determined.

The Defendant claimed to have the lease renewed to him at the expiration of the present term at one-third part under true value.

Mr. Selwyn and Mr. F. V. Hawkins, in support of the information. The direction to lease was limited to the brothers and sisters of the wife, and so limited it was valid; but if the direction was to lease for ever, then it was too remote and void as a perpetuity; *Hope v. The Mayor, &c., of Gloucester* (7 De G. M. & G. 647). A lease renewable for ever to relatives, varying from time to time and at a variable rent, is an estate quite unheard of and unknown to the law. It is not a charity and is inalienable; and the *cy près* doctrine which would give an estate of inheritance to the first taker, *Pitt v. Jackson* (2 Bro. C. C. 51), is inapplicable.

This gift being void, the charity is entitled to the whole estate; for it has long been settled that there is no resulting trust in favour of the heir at law; *Thetford School case* (8 Co. Rep. 130 b.). In *Attorney-General v. Catherine Hall* (Jacob, 395), there was a devise of an estate to charitable purposes with a direction that the rents should not be raised. Lord Eldon held that this direction was void, and that there was no resulting trust in favour of the heir.

Mr. Willcock and Mr. C. Hall, for the Defendant. After an enjoyment of more than two centuries, the Court will presume that the estate has been held under some sufficient authority so as to legalize what has [196] hitherto been done. It may well assume that the Defendant takes as descendant of the brothers and sisters referred to in the will. There is nothing illegal or invalid in the gift; the trust would have been satisfied by the granting one lease to the brothers and sisters with a covenant to renew at two-thirds of the annual value. Such a renewable lease is a common tenure in Ireland, and the rental is more variable than a corn rent under the statute of Elizabeth. In *Hope v. The Corporation of Gloucester*, the gift was for the benefit of persons to be ascertained from time to time; here the gift is in favour of the brothers and sisters *for ever*, and the estate is alienable. But if the direction to lease be void, the colleges take subject to the trust in favour of the brothers and sisters, and there is therefore a resulting trust in favour of the heir at law of the testator, between whom and the lessees alone the only contest can exist. If one of these constructions be consistent with the law and the other opposed to it, the former is to be preferred.

Lastly, the suit is defective for want of parties, the heir at law and Sydney Sussex College and the other representatives of the brothers and sisters ought to be represented.

Mr. F. V. Hawkins, in reply. The clause in question is a mere condition, which being void, the college takes the whole estate discharged of it, for the charitable purposes mentioned in the will.

Dec. 7. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, I must make a decree to the effect asked by the informants. The will is very peculiar, but that part which relates to the subject is set forth in the information. I think there is a gift of the whole of the [197] property to the colleges, but to be employed by them for the charitable purposes stated in the will, and that the direction to lease the property to his "wives' kindred ever, viz., brothers and sisters," is no part of the charity, but an attempt to give a beneficial interest in perpetuity to persons who cannot take it. The case of *Hope v. The Corporation of Gloucester* (7 De G. M. & G. 647) establishes that point very clearly, and this is confirmed by the decision in *The Attorney-General v. Catherine Hall* (Jacob, 381).

The result will be, they may let to whom they please, at their own discretion. But if this devise were in other respects valid, it would be difficult to say what was

meant by "my wives' kindred ever, viz., brothers and sisters there and at Harrow." I suppose it meant those only who were residing at Langley and Harrow; but I express no opinion on this. I am of opinion that the whole estate was given to the colleges for a charity, and that this gift to the wives' kindred is void and cannot take effect.

A question was raised whether the Defendant properly represented all the wives' kindred, and I think he does, and that it would be a needless employment of the functions of this Court, if I sent an inquiry to Chambers as to who were meant by the words "kindred, viz., brothers and sisters," and who represents them. The Defendant having had the lease granted in that character makes him sufficient to represent them.

The absence of Sydney College is not material as I decide in their favour.

The Defendant should have his costs, for he has behaved quite properly.

[198] JENNINGS v. RIGBY. Nov. 9, 10, 1863.

[S. C. 33 L. J. Ch. 149; 9 L. T. 308; 9 Jur. (N. S.) 1144; 12 W. R. 32.]

Followed, *In re Williams's Estate*, 1872, L. R. 15 Eq. 270.]

Judgments against executors and administrators need not be registered in the Common Pleas, under the 23 & 24 Vict. c. 38, s. 3, in order to retain their preference in the administration of the estate.

James Rigby died intestate in September 1862.

On the 14th of November 1862 Mr. Gordon, a creditor of the intestate, obtained a judgment against his administratrix for £196.

On the same day, Mr. Openshaw obtained a like judgment for £205.

On the 29th of November 1862 Mr. Maxwell obtained a like judgment for £134.

On the 1st of December 1862 an order was made, under an administration summons, issued on the 17th of November, at the instance of simple contract creditors, for the administration of the intestate's estate, and the usual accounts and inquiries were directed.

The estate proved deficient for the payment of all the debts, and the Chief Clerk, by his certificate, reserved the question, whether the judgments obtained against the administratrix had priority over the simple contract creditors, none of the judgments having been docketed or entered.

Mr. Selwyn and Mr. De Gex, for the Plaintiffs, who were simple contract creditors. The statute of the 23 & 24 Vict. c. 38, s. 2, is express, that no judgment which is not entered or docketed "shall have any preference against heirs, executors or administrators in their administration of their ancestor's, testator's or intestate's [199] estates." These judgment debts, none of which have been docketed or registered, have, therefore, no priority over the simple contract debts.

Mr. Bird and Mr. Pearson, for the judgment creditors. Prior to the 4 & 5 Will. & Mary, c. 20, executors or administrators who paid simple contract debts before judgment debts, of whose existence they were wholly ignorant, committed a *devastavit*. That statute recited the hardship and difficulty in finding judgments, and provided for their being docketed alphabetically, and then enacted that judgments not docketed should not affect purchasers or have any preference in the administration of estates. The 1 & 2 Vict. c. 110, omitted to provide for this, and the docket having been closed by the statute of the 2 & 3 Vict. c. 11, the Court in *Fuller v. Redman* (26 Beav. 600), held that there was no protection for executors and administrators who paid simple contract debts in ignorance of the existence of judgment debts. The 23 & 24 Vict. c. 38, was passed in consequence of that decision, and to remedy the omission. It recites that "executors or administrators had been held to have *lost the protection* which they enjoyed under 'the statute of Will. & Mary,' and that it was expedient that the same should be restored."

The only object of the last statute was, to restore to executors and administrators the protection they enjoyed under the former statute. The decisions therefore under

the former Act are strictly applicable to the last Act, and in *Gaunt v. Taylor* (3 Man. & Gr. 886, and 3 Scott (N. S.) 700) it was held that it was not necessary to docket a judgment recovered against executors in order to give it preference in the administration of an estate.

[200] Mr. H. Humphreys, for the administratrix.

Mr. Selwyn, in reply.

Nov. 10. THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the case of *Gaunt v. Taylor* is too strong to get over, and on looking carefully into it, I think that the reasons pointed out by Mr. Bird are the real reasons why the Court held that the statute did not apply to judgments against executors and administrators.

I held in *Fuller v. Redman* (26 Beav. 600) that the 2 & 3 Vict. c. 11, having put an end to dockets in every case, the old law was revived, and that an executor or administrator might become liable for a *devastavit* by paying simple contract debts before judgment debts, of which he could know nothing. This was justly considered to be a great hardship, and Lord St. Leonards introduced the 23 & 24 Vict. c. 38, which afterwards passed, not for the purpose of restoring the old law, but merely to remove the difficulty noticed in *Fuller v. Redman*, and to restore the old law as regards judgments against the testator or intestate. The Court had already held that executors and administrators must know of judgments against themselves, and it was therefore unnecessary to provide that they should not be guilty of a *devastavit*. I am of opinion that *Gaunt v. Taylor* governs this case, and that in the administration of this estate, which appears to be insolvent, you must pay the costs of all the parties as between solicitor and client, and next pay the specialty debts and then the judgment debts.

[201] Mr. Bird. The judgments must be paid according to their priorities.

Mr. Pearson. I agree to that, the cases are too strong to dispute it.

[201] *Re ILDERTON*. Nov. 1863.

An order of course to tax a solicitor's bill incurred by three persons, obtained on the application of two of them, is irregular.

Three gentlemen, named Scott, Lister and Hobler, employed Mr. Ilderton as their solicitor.

Scott and Lister alone obtained an order of course to tax his bill. A motion was now made to discharge the order on the ground that the order could only be obtained on the application of the three clients.

Mr. Welford, in support of the application, cited *In re Chilcote* (1 Beav. 421); *In re Lewin* (16 Beav. 608); *In re Perkins* (8 Beav. 241).

Mr. Henry Stevens, *contrà*.

THE MASTER OF THE ROLLS [Sir John Romilly]. The difficulty is that the third client must be bound by the taxation, and that, after this taxation by two only, he might have the bill taxed again. If he will not allow his name to be used you must make a special application.

The order has been obtained on an allegation that Scott and Lister jointly employed Mr. Ilderton as their attorney, and on that, they ask for the taxation of his [202] bill. It appears, however, that they have not so employed him, but that he has been employed by the three. This order is clearly irregular, and I must discharge it. You must make a special application.

[202] *ROWLANDS v. EVANS* (No. 2). Dec. 3, 1863.

[S. C. 3. N. R. 233. See *Curtius v. Caledonian Fire and Life Insurance Company*, 1881, 19 Ch. D. 537.]

Pending the taking of partnership accounts under a decree, one of the partners died. His will, by which he gave his estate to his widow and appointed her sole

executrix, was in litigation in the Probate Court. This Court declined, under the 15 & 16 Vict. c. 86, s. 44, to appoint the widow to represent the estate in the suit, pending the litigation.

By the decree made in November 1861 (30 Beav. 302), the partnership between Jones, Evans and Williams was dissolved, and the usual accounts were directed to be taken.

Pending this, Williams, who was a lunatic, died in July 1863, and his will, by which he appointed his widow executrix, and devised and bequeathed to her his real and personal estate, was contested in the Court of Probate, and the accounts could not proceed. A motion was now made by his widow, Sarah Evans (who was a Defendant to the suit, as committee of her husband), that she might be appointed, pending the proceedings to obtain probate of the will, to represent the estate of her deceased husband, under the 15 & 16 Vict. c. 86, s. 44.

Mr. E. Rodwell, in support of the motion, argued that the Court had jurisdiction to make this appointment, for if the will should be established, the widow would be the executrix and sole and beneficial owner of the estate, but if it should not, then that she would be entitled to administration and to one-half of the estate. [203] He cited *Hele v. Lord Bezeley* (15 Beav. 340); *Dean of Ely v. Gayford* (16 Beav. 561); *Gibson v. Wills* (21 Beav. 620); *Jones v. Foulkes* (10 W. R. 55).

Mr. G. N. Colt, for the Plaintiff, did not object to the order asked, provided the Plaintiff would thereby get a complete discharge, but he observed that a difficulty arose from the circumstance that the deceased was an accounting party.

THE MASTER OF THE ROLLS [Sir John Romilly]. I doubt whether, if I made the order, the Plaintiff would get a complete discharge; though, if the person appointed to represent the estate of the deceased should ultimately be the legal personal representative, it is possible that the proceedings would be binding.

I will consider the point.

Dec. 4. THE MASTER OF THE ROLLS. The more I have considered this case, the more I feel that I cannot properly make the order asked.

[204] *Re THE WATERLOO LIFE, &C., ASSURANCE COMPANY. PAUL AND BERESFORD'S CASE.* Dec. 15, 1863; Jan. 13, 1864.

The projectors of a company registered under the 7 & 8 Vict. c. 110, sold to the provisional directors of an insurance company a treatise on the subject, and a leasehold at rack rent in consideration of a percentage on the policies. Within a fortnight afterwards, the projectors became directors. The transaction was acted on, but was not confirmed by a general meeting under the 29th section. Held, that it was binding on the company.

Afterwards, the same projectors, while directors, released their rights in consideration of annuities: Held, that however beneficial the arrangement might be to the company, it required the confirmation of a general meeting to give it validity.

This company was formed under the 7 & 8 Vict. c. 110. It was provisionally registered on the 4th of February 1851, and completely registered on the 24th of the following month of November, and the deed of settlement bore date the 10th November 1851. The original promoters of the company were three gentlemen named Beresford, Paul and Baylis (since deceased), and the object was to carry on the business of an insurance company, upon certain principles in relation to life assurance, which were embodied and described in a work intitled "*A Treatise on the new Application of the Principles of Life Assurance*," of which treatise the projectors were proprietors. The projectors had also taken a lease of a house, No. 355 in the Strand, for thirty-five years, at a rent of £230, for the purposes of the company.

It was arranged that this treatise and lease should be purchased for the projected company.

At a meeting of the directors, held on the 16th of September 1851, at which the three projectors were present, it was determined that the eleventh clause in the draft of the deed of settlement, as it then stood, which referred to the claims of the promoters, should be assented to and incorporated in the deed. This clause was not, however, incorporated in it, because the Regis-[205]-trar of Joint Stock Companies would not have registered it in that form. In consequence of this, the substance of the clause was carried into effect by an indenture of the 27th October 1851, which was to this effect:—It was made between the promoters of the one part, and Mr. Deacon and Mr. Teulon, described as the provisional trustees of the company, of the other part. It recited that Deacon and Teulon, as such trustees, had contracted with the promoters for the purchase from them of all the benefit and advantage in the premises and the book at the price of £750, to be paid to them by the company in manner thereafter mentioned, on complete registration thereof; and that it had been also agreed that the company should and would pay the promoters, respectively, during their lives, if the company should so long continue, for their own absolute use and benefit, £2 per cent. commission on all premiums paid to, or received by and on behalf and in respect of the life policies effected therewith. The deed then witnessed that, for the consideration therein mentioned, the promoters assigned to the trustees, for and on behalf of the company, their right in the premises in the Strand, and to the said book or pamphlet.

The £750 consideration referred to in the deed was paid to the promoters in shares of the company, with five shillings credited thereon, duly allotted in or about the 24th October 1851.

At this time the three promoters were not directors of the company, but they were subsequently appointed directors by the deed of settlement executed on the 10th of November 1851, and registered on the 24th of that month. On the 22d of December 1851, at a meeting of the board, at which the projectors were present but took no part and did not vote, it was resolved that the [206] deed of assignment and contract of the 27th of October 1851 should be adopted and confirmed by the directors, for and on behalf of the company. This resolution was not submitted to or approved of by any general meeting of the shareholders of the company.

The commission of £2 per cent. was paid to the promoters out of the funds of the company, but about September 1856 new arrangements were suggested, and ultimately an agreement, dated the 24th of March 1857, was entered into between the three projectors and four of the directors, by which the four directors did, "for and on behalf of the said company, agree and undertake that the said company should pay to Mr. Baylis £200, to Mr. Beresford £100, and to Mr. Paul £100, in the last week of the month of November in each and every year during their respective lifetimes;" and, in consideration thereof, the three projectors "agreed and undertook to release all claims and rights which they had against the company as the promoters thereof."

This new agreement was not submitted to any general meeting of the shareholders, but the annuities were paid down to November 1860, and it was admitted, as a fact, "that the amounts so paid in annuities were considerably less than the amounts which would, but for the new arrangement, have been payable and paid in respect of the £2 per cent. commission." The vouchers for the commission and annuities were always submitted to and passed by the auditors of the company, and the amounts were included in the annual accounts.

In July 1862 the company sold its business, but retaining its assets and liabilities, and on the 6th of December 1862 an order was made for winding up the company. Under this, Paul and Beresford claimed [207] for the arrears of their annuities and for the value thereof, and the claim was allowed by the Chief Clerk. The case was adjourned into Court.

Mr. Selwyn and Mr. W. W. Cooper, for Paul and Beresford. The provisional directors had power to enter into the agreement of the 27th October 1851 for the purchase of the premises and book, which were "necessary for constituting the company," and were "necessarily required for the establishment" of it; 7 & 8 Vict. c. 110, s. 27. The projectors were not, at the date of the contract, directors of the company, and therefore the contract did not require the confirmation of a general or

special meeting under the 29th section. Besides this, grants of annuities like the present are expressly excepted from the operation of that section. The first contract was, therefore, valid.

The second contract was also valid ; for it was for valuable consideration, and was acted on and acquiesced in by the company, and the payments were allowed by the auditors and included in the annual accounts, *Burt v. The British National Life Assurance Association* (4 De G. & J. 174), and sanctioned by the company. The arrangement was highly beneficial to the company ; but if it be void, then the claimants are entitled to fall back on their first contract with the company.

Mr. Baggallay and Mr. Swanston, for the official liquidator. The second agreement, made in 1857, when the claimants were directors, is clearly void under the 29th section, which precludes any director, who is directly or indirectly concerned or interested in any contract proposed to be made on behalf of the company, from acting as a director. And it provides, "that if any contract or dealing (except a policy of as-[208]-surance, grant of annuity or contract for the purchase of an article, or of service which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, that the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and that no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting." This contract, never having been confirmed at a general or special meeting, has therefore no force. The case of *Ernest v. Nicholls* (6 H. of L. Ca. 401) decides, "that there can be no remedy against a company, registered under the 7 & 8 Vict. c. 110, on any contract in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed."

The first agreement of 1851 is equally void ; the lease at rack rent and the treatise were valueless, and the contract was beyond the powers of provisional directors, who cannot, before the incorporation of a company, do what directors cannot do after its incorporation ; *The Leominster Canal Company v. The Shrewsbury and Hereford Railway Company* (3 Kay & J. 654).

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a claim by two gentlemen of the name of Beresford and Paul, claiming to be entitled to £100 per annum each, during their lives, to be set off against the [209] moneys which they may be called upon to contribute as shareholders of the company towards the liquidation of the debts of the company.

The first question is as to the validity of this deed of the 27th of October 1851. The official liquidator insists that it is void ; first, for want of a sufficient consideration, and next, because the 29th section of the statute (7 & 8 Vict. c. 110), which requires the approval of a general meeting of the shareholders of the company, was not obtained.

The want of consideration is pressed but lightly, and, in truth, it cannot be doubted, even assuming the work itself in question not to contain any valuable suggestion, and also assuming that the premises of which they had taken the lease were let at a rack rent, still that a sufficient consideration is to be found in the assignment of the lease to support the transaction.

The real question is whether the 29th section of the statute applies to this case, and I am of opinion that it does not. The clause is a disabling clause, it must, therefore, be construed strictly, and it applies exclusively to the case of contracts entered into between the company, on one side, with directors of the company on the other side.

It is true that, within a fortnight afterwards, the three gentlemen became directors of the company, but they were not directors at the time, and unless I could find in the transaction some collusive acts done in order to evade the statute, I must hold that the greater or less time which elapsed between the transaction and their becoming directors does not affect the contract itself. The owner of a large concern, such as a mine or a [210] brewery, might, as I conceive, legally and properly sell

that concern to an incipient joint stock company, for the purpose of being made the subject of business to be carried on by it; and such purchase and sale would not, as I apprehend, become invalid, by reason of the vendor subsequently joining the company and becoming a director of it, even though the 29th section were not afterwards complied with. The case of *Burt v. The British Nation Life Assurance Company* (1 De G. & J. 158) is, I think, an authority to support this view, and which I should not hesitate to follow.

This, however, is not the contract in respect of which these gentlemen claim, and the subsequent contract is of a most questionable character. The second agreement was entered into on the 24th of March 1857, at which time these three gentlemen were unquestionably directors. The contract is a very material variation from the original agreement, and though the surrender of their interests under that agreement constituted a good consideration for the new one, yet as it was, in truth, a distinct and perfectly new agreement entered into with directors, I am of opinion that it required the assent and approval of the shareholders at a general meeting to give it validity.

It is suggested that, in truth, this arrangement was a beneficial one to the company, and that by it these gentlemen were abandoning to the company a part of what they had already got secured to them; for it is ascertained that £2 per cent. on the premiums or the policies would have far exceeded the £100 per annum. But assuming this to be so, still I am of opinion that it required the sanction of the shareholders in general [211] meeting. The clause of the statute draws no distinction between one species of contract and another; it makes no exception in the case where the contract is more or less beneficial to the company, it includes all contracts. It may well be that if these three gentlemen had simply given up 1 per cent., and agreed only to take 1 per cent., instead of 2 per cent., on the policies, this would not have required the assent of the shareholders; but if so, it would have been because it was no contract, and that no mutuality existed between them and the company; it would have been, in that case, a mere relinquishment to the company, without consideration, of a benefit they had possession of, and which benefit they might, if they pleased, confer on the company. But that is not the character of this transaction; this agreement of the 24th of March 1857 is a new and distinct contract, made in consideration of the surrender of the former one, and whether it was beneficial to the company is a question on which it might well happen that the shareholders or any indifferent persons might have entertained very different views, and they might have dissented from those held by the directors. It is to be observed that the contract of the 27th of October 1851 was to continue so long only as the company itself lasted, and the profit to the claimant was proportioned to the business done by the company, and consequently to the benefit obtained by the company. But, by this latter agreement, the claimant obtained a payment of an annuity of £100 per annum, whether the business of the company might be large or small, and, in addition, the duration of the annuity was not confined to the period of the existence of the company, but extended to the duration of the lives of the claimants.

I am, therefore, of opinion, in this case, that in [212] order to give the transaction validity, the provisions of the twenty-ninth section of the 7 & 8 Vict. c. 110, ought to have been followed, and that these not having been complied with, this transaction is invalid, and that the claimants cannot derive any benefit from it.

The result of this will be that the original indenture, which was abandoned only for the purpose of this new contract, remains in force, and that Mr. Beresford and Mr. Paul will be entitled to £2 per cent. on all policies effected since the 24th of March 1857, until the sale of the business in July 1862. An account must be taken of these, and against the amount to be found due, on taking such account, the £100 annually received by them must be set off, and the balance so to be ascertained to be due to them must be set off against the calls they are required to pay as contributories of the company.

[213] *Re TIDSWELL*. Dec. 17, 1863.

[S. C. 10 Jur. (N. S.) 143.]

An arbitrator, in taking accounts, allowed two bills of costs sent to him by one side after the last meeting, without communicating them to the other side, and he, being authorised under the reference to appoint an accountant, "not objected to by any of the parties," appointed one without communicating with the parties. The award was set aside.

An arbitrator awarded that a sum which he found due from one party should "be forthwith paid and accounted for by him and brought into the trust accounts." Held, that this was too uncertain and fatal to the award.

Observations as to remitting an award back to the same arbitrator under the 17 & 18 Vict. c. 125, s. 8.

Disputes having arisen between Richard Tidswell, Benjamin Tidswell and persons named Royle and Barrett, who were interested under the will of a testator, and there being a suit pending for administering the estate, they agreed to refer the matters to arbitration. Accordingly, by an agreement dated the 14th day of April 1863, all the above parties agreed that the "suit and all other disputes and differences between" them should be referred to Mr. Slater, and that the "arbitrator should, if he should think necessary, be at liberty to appoint some person *not objected to by any of the parties thereto* as an accountant to assist him."

This submission having been made an order of this Court, three meetings were held before the arbitrator, the last of which was on the 22d of May 1863. Claims were made before the arbitrator by Benjamin Tidswell, for the amount of five bills of costs; two of them, amounting together to £278, were not produced to the arbitrator until the 2d of June after the last meeting.

The arbitrator, without communicating with any of the parties, had, after the last meeting, appointed a Mr. Haworth, an accountant, but merely, as he stated in his affidavit, to assist him in calculating the interest on the accounts stated in the summary.

The arbitrator made his award on the 13th of June [214] 1863, whereby he awarded, amongst other things, that these two bills of costs, amounting together to £278, should be allowed to Benjamin Tidswell, and should stand as disbursements in the accounts. He also found and awarded as follows:—

"I find and award that, including interest on the excess of value in the property apportioned to and taken by Benjamin Tidswell, the sum of £446, 10s. 4d. is due from him to the trust estate, to equalize his share in the trust property with the shares of his brothers and sisters; and I award and direct that this sum *be forthwith paid or accounted for* by him, and brought into the trust accounts." The award contained similar findings as to other sums.

After the award had been made an order of this Court, a motion was made, on behalf of Richard Tidswell, that it might be set aside.

The objections to the award were three: first, on the ground that the arbitrator had, after the last meeting, received the two bills in the absence of the party complaining; secondly, that he had appointed an accountant without communicating with the parties and giving them an opportunity of "objecting" to him; thirdly, that the award was neither certain nor final in the statement, "that the £446 should be forthwith paid or accounted for by him and brought into the trust accounts."

Mr. Southgate and Mr. T. A. Roberts, for Richard T. Tidswell, in support of the motion.

Mr. Jolliffe appeared for other parties not moving, but the Court held that they could not be heard.

Mr. Selwyn and Mr. C. Hall, in support of the award.

[215] The following authorities were referred to; *Dobson v. Groves* (6 Q. B. Rep. 637); *Stonehewer v. Farrar* (Ib. 730); *Re Plews and Middleton* (Ib. 845); *Walker v. Frobisher*

(6 Ves. 70); *Re Haigh* (3 De G. F. & J. 157); *Harvey v. Shelton* (7 Beav. 455); and as to remitting back the award for the reconsideration of the arbitrator, 17 & 18 Vict. c. 125, s. 8.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this award is defective upon all the grounds which have been stated. The first of them appears to me to raise a serious difficulty. Here is a submission to arbitration which requires the arbitrator to take the accounts of the testator's estate, and it happens that a very large portion of those accounts consist of certain bills of costs to be sent in by Mr. Benjamin Tidswell. The arbitrator receives these bills, knowing that Mr. Richard Tidswell had not seen some of them, and who was thereby deprived of an opportunity of examining these accounts, and of ascertaining whether he had any objection to them or not. And accordingly the arbitrator allows those bills of costs, which Mr. Richard Tidswell has never seen, and that, in the course of taking the accounts between these parties. It is quite settled by several cases, and particularly by the one referred to, that even where arbitrators take any evidence, however trifling or slight, in the absence of one of the parties, that vitiates the award. In the case of *Re Plews and Middleton* (6 Q. B. Rep. 845), the arbitrators wanted some explanation as to the amount of interest due from a third person; they each examined such person separately, and having come to the same conclusion, they acted upon [216] the evidence and made their award. Though it was perfectly *bond fide* on their part, still the Court set aside the reward, because the arbitrators carried on the examination apart from each other, and that, in the absence of the parties to the reference, who were interested in contesting any evidence which might be given. But, in taking accounts between contending parties, to allow to one bills which have not been seen by the other, is a matter much more open to objection, and one which cannot possibly be submitted to, or permitted to bind the rights of the parties. It is true that it is very easy to determine the principle upon which an account is to be taken, without seeing the account itself. For instance, in this case, it would have been very easy to determine that Mr. Benjamin Tidswell, the trustee, should be allowed his costs, charges and expenses, and also his remuneration as solicitor, though he was a trustee. The arbitrator might have determined that without seeing any of the bills of costs; and if, as I assume, that was so settled at the last meeting, it could not now be complained of. But to allow all the items of the bills without the other side seeing or knowing anything about them, is, in my opinion, in the absence of an express and specific agreement to that effect, a fatal objection to the award. It is a matter of indifference whether they were seen before or after they were sent to the arbitrator; but it was essential that they should be seen by the party sought to be charged before the arbitrator made his award.

The objection relating to the employment of an accountant is also one which cannot be got over. Here is a submission to arbitration which expressly provides that the arbitrator may appoint a person "not objected to by any of the parties" as an accountant. Then an accountant is employed, who was never previously heard [217] of by one of the parties, and who, therefore, has had no opportunity of objecting to him. I assume that he was a very proper person, but I think the objection is a fatal one.

If this had been the only objection to the award, I should have been much disposed to have sent the matter back to the same arbitrator. But the former objection is, in my opinion, one which would make it inexpedient to do so; because, notwithstanding the perfect honesty and *bond fides* of an arbitrator, it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to favor one side, and a disposition to make it appear that the objections to the award were useless, and that the sending it back was productive of no good.

I think the last objection, with respect to the uncertainty appearing on the face of the award, is also fatal. The award finds that certain sums are due from various persons, but it does not express with sufficient distinctness how they are to be dealt with. I will take one as an illustration. A sum of £446, 10s. 4d. is found to be due from Benjamin Tidswell to the trust estate, to equalize his share in the trust property with the shares of his brothers and sisters; thereupon the arbitrator says, "And

I award and direct that this sum be forthwith paid." Well, supposing it had stopped there, he does not say to whom it is to be paid, how or in what manner paid. But the award is even more indistinct, for it proceeds to state that it is to be "paid or accounted for by him, and brought into the trust account." What the arbitrator ought to have done is, to have specified how this sum was to be divided, to whom it was to be paid, and when and in what shares and proportions, as he had [218] done with respect to the rest. Then how is this award to be enforced? how could it be determined whether this sum had been accounted for without taking the trust account? It is probable that this would merely give rise to fresh litigation. This is, in my opinion, a substantial uncertainty in the award, which the Court cannot carry into effect; and concurring as I do in the observations made by Mr. Justice Wightman in the case which has been cited, and in which, it appears to me, the uncertainty was not so great as in the present case, I am of opinion that this also is a fatal objection to the award, and that it must be simply set aside.

[218] DAW v. TERRELL. Dec. 19, 1863.

[S. C. 3 N. R. 285. See *Ex parte Broderick, In re Beetham*, 1886-87, 18 Q. B. D. 383, 770.]

A. B., being entitled to three properties, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with C. D. as a security for a debt, and he gave him an order to the bankers (written by himself, but not signed) to deliver over the deeds of the third property when their lien had been satisfied. Held, that this gave C. D. a valid equitable mortgage on the property mortgaged to the bankers.

The intestate was entitled to two leases for lives of some property at Alphington, which he had deposited with his bankers Messrs. Sanders & Co. as a security for a debt. He was also entitled to a lease of property at Little Crab Marsh and Cross Park for his life.

In September 1856 the intestate, being indebted to the Plaintiff Daw, agreed to secure the amount by a charge on this property, and he thereupon wrote and delivered to the Plaintiff the following memorandum:—

"Messrs. Sanders & Co. will be pleased, as soon as their lien is satisfied, to deliver to Mr. Daw the assignment from Kerslake to myself of a field and garden in Alphington and Little Crab Marsh and Cross Park."

"Bartholomew Yard, September 11, 1856."

The memorandum was not signed by the intestate.

[219] The intestate also handed over to the Plaintiff the lease of Little Crab Marsh and Cross Park, his interest in which, however, ceased on his death.

The intestate died in December 1859.

The debt to the bankers had been discharged, and the documents formerly held by them had been handed back to the intestate, and were now in the possession of the solicitor of his administratrix. No notice of the Plaintiff's claim appeared ever to have been given to the bankers.

The suit was instituted against the administratrix and heir at law of the intestate, and the question was, whether the Plaintiff was entitled to a good equitable mortgage on the property at Alphington.

Mr. Southgate and Mr. Kekewich, for the Plaintiff, argued that the deposit and memorandum were sufficient to constitute a valid equitable mortgage. They cited *Dighton v. Withers* (31 Beav. 423); *Ex parte Arkwright* (3 Mont. D. & D. 129); *Ex parte Weiherell* (11 Ves. 398); *Lacon v. Allen* (3 Drew. 579).

Mr. Selwyn and Mr. Wickens, for the administratrix, did not dispute the mortgage, and admitted that notice to the bankers was unnecessary as between the debtor and creditor. They cited *Willes v. Greenhill* (29 Beav. 376, 387).

Mr. Swanston, for the heir at law, admitted that there was a valid equitable mortgage as to Little Crab Marsh and Cross Park, the lease of which had been handed over

to the Plaintiff, but had expired. He, however, [220] contended that, as regarded Alphington, there being no signed memorandum and no deposit of deeds relating to it, no equitable mortgage had been created. He cited *Ex parte Perry* (3 Mont. D. & D. 252); and see 29 Car. 2, c. 3, s. 3.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this is a good equitable mortgage. If it were not, it would follow that if a person, intending to make an equitable mortgage of property held under different titles, deposited all the title-deeds he could, but some relating to a portion of the property happened to be in the hands of a prior mortgagee, the equitable mortgage would, as regards that portion, fail.

I regard this as one entire transaction. The memorandum professes to give an equitable mortgage on the three properties, and there is a deposit of the deeds relating to two, and a written direction to the bankers to deliver over the title-deeds of the third when their mortgage has been satisfied. This, I think, constitutes a good equitable charge on the property in question.

[221] GRUNING v. PRIOLEAU. Dec. 3, 1863.

By an order giving leave to serve a bill upon a Defendant in France, he was to have six weeks after service of the interrogatories to plead, answer or demur, or to obtain time to make his defence to the suit. Held, that this did not deprive the Defendant of his right to demur alone to the bill within twelve days after his appearance, under the 37th Consolidated Order.

By the XXXVIIth Consolidated Order, rule 3, "A Defendant may demur alone to any bill within twelve days after his appearance thereto, but not afterwards."

And by the Xth Consolidated Order, rule 7, the Court may order service of a bill to be made on a Defendant who is out of the jurisdiction, but (article 2) "where an answer is required, such order shall also limit a time within which such Defendant is to plead, answer or demur, or obtain from the Court further time to make his defence to the bill."

In this case, an order had been made on the 11th of September 1863 to serve a Defendant in France with the bill, together with a copy of the interrogatories filed in the cause. This order directed that the Defendant should appear within fourteen days after service of the bill, and that the time within which he was "to plead, answer or demur to the said bill, or to obtain from the Court further time to make his defence to the said suit, was to be six weeks after service of the said interrogatories." (Reg. Lib. 1863, A. fol. 1912.)

On the 3d of October the Defendant was served with the bill and interrogatories, and the six weeks expired on the 14th of November.

Afterwards, on the 20th of November, the Defendant [222] appeared and filed a demurrer to the whole bill. A motion was now made to take the demurrer off the file.

Mr. Baggallay and Mr. Karlake, in support of the motion. The order for service abroad gave the Defendant six weeks after service of the interrogatories to demur; it was, therefore, irregular to file this demurrer after the expiration of that period.

Mr. Cotton, *contra*, was stopped by the Court.

Brown v. Stanton (7 Beav. 582) and *Blenkinsopp v. Blenkinsopp* (8 Beav. 612) were referred to.

THE MASTER OF THE ROLLS [Sir John Romilly]. The XXXVIIth Consolidated Order is distinct, that a Defendant "to any bill" may demur alone within twelve days after his appearance, but not afterwards. That applies to all Defendants and to all bills, and every Defendant is, therefore, entitled to have twelve days after appearance for the purpose of demurring; that is distinct. The question is, whether this applies when the Defendant is out of the jurisdiction. In that case, when an answer is required, the Court, under the Xth Consolidated Order, is to limit a time to plead, answer or demur. This would overrule the former order, so far as a Defendant out of the jurisdiction is concerned, if he were not to have twelve days from appearance to demur alone; but it is clear that it does not. It would also

introduce an uncertain practice if some Defendants were to have twelve days from appearance to demur, and other Defendants were to have six weeks from service [223] of the interrogatories. The case cited shews that Lord Langdale so understood the matter with respect to this order, which has since been incorporated in the general consolidated orders. It is clear that in all cases a Defendant is to have twelve days after appearance to demur alone, and that the order as to Defendants abroad means, that he is to have the time specified in the order for service in which to make his defence to the bill.

I must refuse the application with costs.

[223] ANDERSON v. ANDERSON. Dec. 3, 4, 1863.

A testator directed a sale of his estate and a sufficient sum to be laid out in the funds to produce annuities for his nieces, and he gave his residue to his wife for life. Held, that the surplus income, after paying the annuities which occurred prior to the sale and investment being made, was liable to make up the fund necessary to produce the annuities, and that it did not belong to the widow.

The testator, Dr. Anderson, by his will, after bequeathing his household furniture, &c., &c., to his wife, devised and bequeathed the residue of his real and personal estate to trustees in trust, "as soon as conveniently might be after his decease," to sell and convert and invest. He proceeded thus:—"Provided always and I do hereby declare that, notwithstanding the trusts for sale and conversion hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being to defer and postpone the sale and conversion of any part of my said real or personal estate, for such period as to them or him shall seem expedient; and that, until such sale and conversion and until the money to be produced thereby shall be invested in the manner hereinafter directed, the rents, interests and annual income arising therefrom shall, from the day or time of my decease, be paid and applied in such manner and for the benefit of such persons as the dividends, interest and annual produce arising from the produce of such sale, in case the same had been converted and invested, would have been payable under the trusts hereinafter declared concerning the same."

He then empowered his trustees to demise any part of his trust estate which should remain unsold at a rack rent from year to year, or for any time not exceeding twenty-one years in possession. And he directed that the trustees should stand and be possessed of the moneys arising from the real and personal estate thereinbefore devised and bequeathed, as aforesaid, upon trust, in the first place, to pay thereout all his just debts, funeral and testamentary expenses, and also all the expenses, incidental to the execution of the trusts thereof, and, in the next place, to lay out, and invest a sum of money in the funds sufficient to produce £200 a year, which, during the life of his wife, he bequeathed to his nieces Caroline and Anne Anderson for life. He gave the income of his residue to his wife for life.

The testator died in 1838.

The whole of his estate now consisted of about £7515 £3 per cents., £1243 of which the widow alleged was surplus income accrued since the testator's death. No funds had been set apart to answer the annuity, which, however, had heretofore been paid. Besides this the costs of this suit had to be provided for.

It was a matter in contest whether this £1243 was *corpus* or income; but it was contended by the nieces that, whether the one or the other, it was still liable to the payment of the annuity.

Mr. Hobhouse, for the representative of the widow.

Mr. Selwyn and Mr. Karlake, for the annuitants.

[225] Dec. 4. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon reading and considering this will, I am of opinion that the contention of the Plaintiff fails. The question is this, how is the income to be disposed of until the conversion took place?

It all turns upon the proper meaning to be put on these words, "be paid and applied in such manner and for the benefit of such persons." Now when I look at

what is to be done in the case of the investment, I find that this occurs :—In the first place, the testator gives a power to the trustees to demise, next he directs the trustees to stand possessed of the moneys arising from the real and personal estate in trust to pay his debts, and then to invest sufficient to produce the annuity and finally to pay the income of the residue to his wife.

I am of opinion that the words “moneys arising from the real and personal estate hereinbefore devised and bequeathed” are not confined to the purchase-money, but that they also include the rents, which are to be applied in the same manner and for the benefit of the same persons as the dividends of the fund directed to be invested. I am of opinion that it was the duty of the trustees to deal with it in this way :—There is no gift to the widow except of a life interest in the residue, which residue is not to be ascertained until after the investment had been made for providing the annuity. It was the duty, therefore, of the trustees, before they attempted to ascertain the residue, to see how much of the estate was properly applicable for the purpose of providing for this annuity, and £6666, 6s. 8d. consols would be necessary for that purpose. Subject to that, and when that sum had been taken out of his estate, but not until then, all the rest was residue. Accordingly, [226] he expressly directs, in the passage which I have read, that the rents arising from the leases granted by the trustees shall be applicable for the purpose of making that investment. In my opinion that affords a clue to and explanation of what goes before; and I am of opinion that the first charge on the whole of the property, and whether the investment took place at once or afterwards, was the purchase of a sum of stock sufficient to produce dividends amounting to the clear yearly sum of £200 per annum. The result of that will be that the question whether this is income or capital does not arise.

My opinion is to the same effect as I expressed yesterday, and the further looking into the will has confirmed me in that opinion, which is, that, whether it be income or capital, it was, in my opinion, available, in the first instance, if necessary, for the purpose of making the investment of the £6666, 6s. 8d. consols, and that it is only subject to this that there can be any residue.

The whole fund in Court, whether consisting of principal or interest, is, therefore, liable to provide the £6666, 6s. 8d. consols.

[227] CLARKSON v. EDGE. Dec. 15, 16, 17, 18, 1863.

[S. C. 33 L. J. Ch. 443; 10 Jur. (N. S.) 871; 12 W. R. 518.]

A., a trader became bankrupt, whereupon B. agreed to purchase the business from the assignees, and to enter into partnership with A.'s son, if A. would enter into a bond not to carry on the same business within twenty miles. A. gave the bond. Held, that there was a sufficient consideration for the bond to entitle B. to an injunction to restrain A. from carrying on the business within the limits prescribed.

In December 1860 Thomas Edge the elder, who had for many years carried on the business of gas engineer and gas meter maker in Great Peter Street, Westminster, became bankrupt.

The business was a profitable one, and was continued by the assignees for about two years, but in January 1863 they advertised the stock-in-trade, plant and tools of the business for sale by auction. Thereupon an arrangement was entered into, by which the Plaintiff Mr. Clarkson agreed to purchase the business and enter into partnership with Thomas Edge the younger (a son of the bankrupt) for a period, which was left in blank. The terms were embodied in articles dated the 7th of January 1863, which, though not executed, were acted upon, and on the 9th the Plaintiff purchased the stock, &c., for £2200 from the assignees.

This arrangement was entered into with the concurrence of Thomas Edge the elder, who, on the 15th of January 1863, executed a bond to the Plaintiff and his son in the penal sum of £5000, which, after reciting the purchase of the stock-in-trade, plant and tools by Clarkson, and that Clarkson and Edge had agreed to become

partners, in henceforth carrying on the trade of a gas meter maker and gas engineer, and matters connected therewith, subject and on condition that Thomas Edge the elder would give his bond to the partners, that he would not set up or exercise the trade or business of a gas meter maker and gas engineer within twenty miles from Great Peter Street aforesaid, which Thomas Edge the [228] elder had agreed to do. The condition of the bond was that Thomas Edge the elder should not within ten years "set up, exercise, carry on, or be employed in carrying on, the trade or business of a gas meter manufacturer and gas engineer or matters connected therewith within twenty miles from Great Peter Street, Westminster, or do any wilful act or thing to the prejudice of the said trade or business of a gas meter manufacturer and gas engineer, and matters connected therewith, as hereafter carried on."

On the same day, Thomas Edge, junior, and Mr. Clarkson agreed to employ Thomas Edge the elder in the business at £2 a week, and they gave him the following undertaking:—

"15th January 1863.—Dear Sir,—If you will sign the bond for £5000 penalty not to carry on the business of a gas meter maker, we undertake to employ you in the conduct and management of the business we intend to carry on in partnership, at a reasonable remuneration, to commence from Monday next.

"THOMAS EDGE, jun.
"JOSEPH CLARKSON."

The amount of remuneration agreed upon was omitted at the request of Thomas Edge the elder.

After entering into this bond, Thomas Edge the elder insisted that he had a right to carry on the business of "*gas fitting*" on his own account, and that such business was not comprised within the terms "gas meter manufacturer and gas engineer or other matters connected therewith." He had, on the occasion of the marriage of the Prince of Wales, obtained large orders for gas illuminations, which he had effected with the assistance of the partnership workmen.

[229] This suit was then instituted against Thomas Edge the elder for an injunction and for an account and payment of the profits made by him.

Mr. Hobhouse and Mr. Haddon, for the Plaintiff.

Mr. Selwyn and Mr. Roxburgh, for the Defendant Thomas Edge the elder.

Mr. Hobhouse, in reply.

Butler v. Powis (2 Colly. C. C. 156); *Barrel v. Blagrove* (5 Ves. 555); *Saintier v. Ferguson* (1 Mac. & Gor. 286); *Sloman v. Waller* (1 Bro. C. C. 418); *Fry on Specific Performances* (p. 27) were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. There are two questions to be considered in this case, the principal and important one being as to the validity of the bond, and the other as to its construction.

But as to the third question, which gave rise to this suit, namely, the profits of the illumination, I have no hesitation in saying that the money derived from all the work done on the partnership workshops and premises belong to the partnership, and that the partnership is entitled to an account of the sums, if any, which have been received by the Defendant in respect of such works.

The first question is, whether the Plaintiff is entitled to an injunction to restrain the Defendant from carrying on the business of a gas fitter at any distance within [230] twenty miles of Great Peter Street, Westminster. That depends upon whether the bond is a valid one, and if valid, what the construction of it is. I am of opinion it is a valid bond.

It is said that there was no consideration for it, for that it is simply a bond executed by the Defendant, by which he undertakes not to carry on the business within twenty miles of Great Peter Street under a penalty of £5000. But the consideration is not, in my opinion, the thing which makes this bond of value, or if it is to be called consideration, although it is one of a very thin character, it is quite sufficient to support the equity on which the Plaintiff relies.

It appears that the Defendant had become bankrupt, and that his assignees, after carrying on the business for some time, determined to sell it. The Plaintiff and the Defendant's son proposed to buy the whole of that business, machinery and stock-in-

trade, and to carry on the business in partnership, and the Defendant and his son having no capital, the Plaintiff was to advance the necessary capital. But the Plaintiff refused to do this, unless the father undertook not to carry on the same business, and further to do everything he could to gain over to the new partnership the customers of the old establishment, so as to prevent competition. The Defendant thereupon entered into this undertaking, and executed this bond. The Plaintiff advanced his money and engaged in the partnership and trade, on the faith of the engagement so entered into by the Defendant.

I am of opinion, on the principle on which I have so frequently acted, that this is a case in which the Court would restrain the Defendant from violating his promise and breaking his word. It not being a contract to be [231] specifically performed, but an engagement, on the faith of which the Plaintiff has entered into serious obligations and advanced various moneys for the benefit of the undertaking.

I am of opinion the bond is a valid one, and that quite independently of the fact that a letter was written at the same time, stating that, in consideration of it, the partners were willing to engage the Defendant "at a reasonable remuneration" to conduct and manage the business.

The next question is, what is the construction of the bond, the words being, "the trade or business of a gas meter manufacturer and gas engineer or matters connected therewith." The Defendant says that the business of a *gas fitter* is neither that of a gas meter manufacturer nor of a gas engineer, but a business perfectly distinct in its nature. Upon this there is a great deal of contradictory evidence, and I think the proper thing to be done, and which will try the whole matter, is to give the Plaintiff liberty to bring such action against the Defendant, upon the bond, as he may be advised, and, in other respects, to make a decree similar to what I have stated, and on that, the equity will be reserved in the usual terms.

[232] *TERRY v. TERRY.* Nov. 10, 11, 1863.

[S. C. 9 L. T. 469; 12 W. R. 66.]

Bequest of "the use of the book debt or capital" employed in the testator's trade at his death. Held, upon the context, to pass the absolute interest therein.

The testator, a butcher, gave and bequeathed to his wife and to his son Thomas Terry, all the stock-in-trade, horses, carts, carriages, harness, tools, implements and other articles used in his trade or in husbandry, which should belong to him at the time of his death, to be used by them in the said trade or business, which he thereby willed and directed to be carried on by them, after his death, upon and for their joint use, account and benefit, in equal shares as partners in trade, so long as his said wife should live or continue his widow; and for that purpose they were to have the use of the *book debts or capital* which he, at his death, might have employed therein. And upon the death or marriage of his said wife, which of those events should first happen, then he gave and bequeathed the said house, shop, outbuildings and premises (for the remainder of the term then unexpired therein), and also all the said household furniture, plate, linen, china, glass, books, pictures and other property whatsoever therein, and also all the horses, carts, carriages, harness, tools, implements and other articles used in the said trade or business or in husbandry, unto his son Thomas, for his own sole use and benefit.

The testator died in 1840, leaving his wife and nine children surviving.

The testator's widow and his son Thomas carried on the business until June 1861, when they dissolved partnership; but the son continued to carry on the business alone.

[233] The question was, whether the widow and the son Thomas took a partial or an absolute interest in the "*book debts or capital*," the value of which was alleged to be about £1100.

Mr. Baggallay and Mr. H. F. Shebbeare, for the Plaintiff, argued that the widow and son were only entitled to the use of "the capital or book debts" so long as they

carried on the trade in partnership together, for which "purpose" they were to have the "use" of them. That when their partnership ceased, or, at all events, after the death of the widow, they were accountable for the amount, as for a temporary loan to them out of the testator's estate for the purpose of the business.

Mr. Selwyn and Mr. Prendergast, for the Defendants. The context shews that the gift is absolute; but if not, then it is a right to trade with the "book debts or capital," which amounts to a direction that they shall be subject to all the contingencies of trade. The Defendants, therefore, are not accountable for any losses which may have occurred since the testator's death.

Nov. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. I have looked over the will, and I am satisfied that the testator meant to give to his widow and son an absolute interest in "the book debts or capital" to enable them to carry on the business, and without which they would not have been able to do so.

[234] MACLEOD v. BUCHANAN. Nov. 14, 1863.

[S. C. affirmed on appeal, 4 De G. J. & S. 265; 46 E. R. 921; 33 L. J. Ch. 306; 10 L. T. 9; 3 N. R. 623; 10 Jur. (N. S.) 223; 12 W. R. 514.]

The operation of a stop-order, whether general or particular, is confined to the amount on which the order is founded.

A. purchased of X. one-seventh of a fund in Court, and obtained a general stop-order on the whole fund. A. afterwards purchased another one-seventh of Y., but obtained no further stop-order. Y. subsequently mortgaged to B., for a pre-existing debt, the one-seventh which he had already sold and assigned, and two years afterwards B. obtained a stop-order on Y.'s share. Held, that B. had priority over A. in respect of Y.'s share.

In 1845 a sum of £3402 consols was standing in Court in this cause to "the account of Jane Macleod and her children."

This sum had been bequeathed to Jane Macleod for life, with remainder to her children.

In 1845 the General Reversionary and Investment Company bought the one-seventh reversionary share in the fund of Mary Ann Macleod (one of the children), and also the one-seventh reversionary share of George (another of the children), and these shares were assigned to the trustees of the company by a deed dated the 15th of August 1845.

The company presented a petition for a stop-order, which set forth the assignment of the 15th of August 1845, and they obtained a stop-order on the whole fund, and not one limited to the shares assigned.

In 1846 the company bought the one-seventh reversionary share of Henry R. Macleod (another child) for £199, and it was assigned to their trustees by a deed of the 23d of April 1847. Having already a stop-order on the whole fund, they obtained no further stop-order on Henry's share.

In 1860 Henry R. Macleod, being indebted to Messrs. Rousselle & Steir of Paris, assigned to them his one-seventh reversionary share to secure the debt; [235] but, at that time, they obtained no stop-order, and, as far as appeared, made no inquiry.

Jane Macleod died on the 25th of June 1862, and on the 11th of July 1862 Rousselle & Steir obtained, by consent, in Chambers a stop-order on the one-seventh share of Henry R. Macleod, their solicitor having shortly previous examined the original petition on which the stop-order of the company had been obtained.

Petitions having been presented to obtain payment out of Court of the fund, a question arose whether the assignment to the company of Henry R. Macleod's share in 1847 had priority over that of Messrs. Rousselle & Steir of 1860.

Mr. Selwyn and Mr. Beavan, for the company. The object of a stop-order is merely to prevent the assignor obtaining payment of a fund which he has assigned to another. Where a stop had been placed on the whole fund, no additional security could be obtained by any further stop on it, or on any portion of it, and the general

stop gave notice of every interest possessed by the company on the fund, and imposed on the subsequent incumbrancers the necessity of inquiry as to the extent of their interest.

Greening v. Beckford (5 Sim. 195), which was the first decision on the subject, was founded on the then recent cases of *Dearle v. Hall* (3 Russ. 1) and *Loveridge v. Cooper* (3 Russ. 30), and the second incumbrancer, before advancing his money, had inquired whether there was any stop-order, and had advanced his money on the faith of there being [236] none and no prior charge on the fund. But here Messrs. Rousselle & Steir made no such inquiry, and were not misled. They were not purchasers for valuable consideration, and they made no advance on the security of the fund; they merely obtained an assignment for a pre-existing bad debt, and, therefore, merely took the interest of their assignor.

Mr. Baggallay and Mr. G. Simpson were not called on.

Mr. Hobhouse and Mr. Whitehead, for other parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. This point has come before me before, probably in Chambers. I entertain a strong opinion that a stop-order, in general terms, upon the whole fund in Court does not give priority to any charges, except those existing at the date of the stop-order, and that it cannot go beyond that. The effect of an opposite conclusion would be to work great injustice or to produce great insecurity. Upon an application for the stop-order you are obliged to state your charge, and that is the foundation of the order: if, by obtaining a stop-order in respect of £100, you could found on it any future additional charge, the greatest frauds might be practised, and no one could safely lend money on a fund in Court affected by a stop-order to any amount, however small. A stop-order is like notice to the trustees of a fund; there, when a person is about to make an advance on the security of a trust fund, he applies to the trustee, and not to the prior incumbrancer, and he ascertains from the trustee the extent of the prior incumbrance. So a person who wishes to advance money on the security of a fund in Court inquires for the stop-orders [237] on it, and the documents on which they have been obtained, and does not apply to the persons who have obtained them. If he finds that the charge affects only a particular portion of the fund, he is enabled safely to advance his money on the rest. Suppose that in this case an advance of £100 had been made on the share of Henry, to secure which a general stop-order had been obtained, and that afterwards a second incumbrancer had made an advance on that share and obtained a second stop-order, and that subsequently to such second advance the first incumbrancer had made a further advance of £100 on Henry's share, then, according to the argument, the first incumbrancer, by virtue of his general stop-order, would obtain priority for his second advance of £100, and oust the second incumbrancer, who advanced his money when only £100 was charged on Henry's share. That cannot be so.

I am satisfied that the only proper effect of a stop-order, whether general or particular, is confined to the amount on which the order is founded, and does not extend further. The company, therefore, take Henry's share subject to the charge of Messrs. Rousselle & Steir.

NOTE.—Affirmed by the Lords Justices, 27th Feb. 1864. [4 De G. J. & S. 265.]

[238] LEAK v. MACDOWALL (No. 2). Dec. 5, 1863.

[S. C. 3 N. R. 185. See *Stockdale v. Nicholson*, 1867, L. R. 4 Eq. 367.]

A testator, in 1841, bequeathed 200 guineas to such of the representatives as might be alive at his death of Messrs. P. & H., then both dead, with whom, in 1793, he had had some business, by which they were losers to the amount of about 200 guineas. Held, that the legal personal representatives of P. & H., and not the partners in the firm at the death of the testator, were entitled; and, secondly, that such representatives took in equal moieties, and not in the proportion of their shares in the partnership.

The testator, John Merrite, by his will dated in 1841, bequeathed as follows :—

"Next, my executors are respectfully requested to attend to the following bequest : At the beginning of the year 1793, when I had some business with Messrs. Pease & Harrison, bankers, of Hull, a transaction took place, by which those gentlemen were losers to the amount of about two hundred guineas. It is my will and request that my executors should, as soon as conveniently may be after my decease, pay unto such of the *representatives of the said Messrs. Pease & Harrison*, now both dead, as may then be alive, the said sum of two hundred guineas, with interest on the same at the rate of four per cent. from the 1st of January 1793 to the time when the money is paid."

The testator died in 1845.

It appeared that, in 1793, Joseph Pease and Thomas Harrison composed the firm of Pease & Harrison, and that Joseph Pease was entitled to two-thirds of the capital and property, and Harrison to one-third. In August 1793 Harrison retired, and assigned his one-third share to Robert Pease. The business was afterwards carried on by Joseph Pease, Robert Pease and Henry Bedford. In 1795 Robert Pease and Henry Bedford retired, and the business was then carried on by Joseph Pease, who died about 1803, having bequeathed his business and the residue of his estate to [239] the Petitioner, Joseph Robinson Pease the younger, who carried on the business.

The Respondents were the executors of Harrison, who died in 1804.

The legacy had been paid into Court, and now amounted to £711, 17s., and a petition was presented praying payment of that sum to Joseph Robinson Pease. The Respondents, the executors of Thomas Harrison, claimed one-half of the fund.

Mr. Bevir, for the Petitioner, contended that the testator's intention was to repay the losses or debt due to the firm. That such of the representatives of the firm as might be alive at the testator's death were entitled to the fund; and that the Petitioner alone, as representing the firm, and as entitled to the whole assets and credits at the testator's death, was alone entitled to the benefit of the bequest. Secondly, that if the legacy was divisible between the representatives of Joseph Pease and Thomas Harrison, then that they took in proportion to their losses by the testator, and that the Petitioner, therefore, was entitled to two-thirds, and not to one-half of the fund.

Mr. Selwyn and Mr. Jenkinson, for the executors of Harrison, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. Although there may be some question as to the precise meaning of the word "*representatives*," still I have no doubt as to the construction of it which has been contended by Mr. Bevir.

The testator never intended to make a gift to the firm as to a corporation, that is, to the persons who [240] might compose the firm at his death, merely because fifty years previously he had been engaged in a transaction with the firm, by which the then partners had suffered a loss. If such had been his intention, he ought to have expressed it. Out of gratitude to two persons named Pease and Harrison, who had been kind to him, he wished, as he could not give the 200 guineas to them, they being, as he says, then both dead, to give it to the representatives of those two gentlemen, and not to any members of the firm who might be carrying on the business at his death.

Indeed, it would be a strange notion to return the obligation of a person formerly the member of a firm, by giving a bequest to the persons who happened to be carrying on the business, though under the same style and title and in the same house, in 1845: though if the testator had expressed his intention to give a legacy to the firm treating it as a corporation, the Court would carry it into execution.

But he has not done so. He has not referred to the firm, but has given the legacy to the representatives of Joseph R. Pease and Thomas Harrison, quite irrespective of the circumstance whether the firm were or were not then in existence.

As to the second point, the gift is unto such of the representatives of Messrs. Pease & Harrison as may then be alive, that is, at the testator's decease. This does not mean one-third to one and two-thirds to the other; I should be making a new will for the testator if I so held. I am of opinion that the representatives take in equal moieties.

Mr. Selwyn next observed that the word "representatives" in the will meant the executors, who took the [241] legacy as part of the testator's estate. He cited *Re Henderson* (28 Beav. 656); *King v. Cleveland* (26 Beav. 26).

THE MASTER OF THE ROLLS referred to *Long v. Watkinson* (17 Beav. 471), and concurred.

[241] WILLIAMS v. ALLEN. Nov. 19, 1863.

A sum of £390, being the whole property to which a lunatic (not so found by inquisition), aged fifty, was entitled, ordered by the Master of the Rolls to be paid to her mother, who had previously maintained her, on her undertaking to maintain her for the future.

A sum of £390, 5s. 1d. cash was standing to the credit of "the account of Margaret Williams." In 1853 she had become of unsound mind, and she still continued so, but had not been so found by inquisition. She had been maintained by her mother, who, in 1854, placed her in a private asylum. Her mother had expended more than £800 in her maintenance, &c., including her expenses at the asylum, which amounted to £378.

Caroline Williams was now fifty years of age, and she had no other property besides the fund in Court available for her support.

This was a petition presented by Margaret Williams by her mother as her next friend, praying that the £390, 5s. 1d. might be paid to her mother "on her undertaking to maintain her for the future."

Mr. Whitehorne, in support of the petition, cited *In re Law* (30 L. J. (Chanc.) 512); and see *Re Macfarlane* (2 John. & H. 673).

[242] THE MASTER OF THE ROLLS [Sir John Romilly] made the order, expressing, however, a doubt with respect to the extent of the undertaking, as in all probability the mother would predecease the daughter, and the undertaking would then cease.

[242] POWNALL v. GRAHAM. Nov. 11, 12, 1863.

Construction of a trust for division amongst the children of brothers so long as the law would allow.

A testator gave his real and personal estate to his seven brothers and to the survivor for life, and after the death of the survivor, in trust to apply the income yearly to such of their children as should appear to them to stand in need of the same, and after the law admitted of no such further division, then to convey to the eldest son of his brother B. then living. Held, that the trust for division ceased twenty-one years after the decease of the surviving brother.

The testator John Pownall died in 1791. He left seven brothers surviving him, viz., Hugh, Samuel, Joseph, James, William, Thomas and Benjamin.

By his will, dated in 1791, the testator gave his real and personal estate to trustees, upon trust to permit his brothers Hugh, Samuel and Joseph to receive, during their lives, the income in certain shares; and after their decease, he gave their shares unto his brothers James and Benjamin equally during their lives, and after their decease he gave their shares to his brothers William and Thomas equally during their lives; and he gave the shares to the survivors of his brothers.

And after the decease of all his brothers therein mentioned, he directed as follows:—"5thly. I do desire and request that my trustees P. and A., their executors, administrators and assigns, to apply the whole net annual income to and for the use and benefit of such of my brothers' children as shall appear to them to stand most in need of the same, and that regularly, from year to year, as the law in such cases admits."

"6thly. That my said trustees, their executors, administrators and assigns, as lastly, assign over (after the law, as mentioned aforesaid, admits of no further division [243] among such of my brothers' children as shall appear to my trustees, &c., to stand

most in need of help or assistance as aforesaid) and give full possession of all my "freehold and personal property unto the eldest son of my brother Benjamin Pownall that may be then living; and in case all my brother Benjamin's children shall be defunct, then to prefer, in the exact same manner, the eldest son of my brother James Pownall; in case he has no children then living, then the eldest son of my brother Hugh Pownall is to succeed as above, and so on in the same manner. In case of want of issue, as aforesaid, my brothers Samuel, Joseph, Thomas or William's children, i.e., the eldest son of Samuel first, Joseph second, Thomas third and William's second son fourthly, are to succeed to all my property as aforesaid," &c. "And in default of all such issue, my next of kindred, whether male or female, to claim of course as aforesaid, with respect to or as my brothers' children."

The testator gave all the residue of his estates and effects, real and personal, unto his brothers equally.

The testator's youngest brother Benjamin was stated to be the last survivor of the testator's brothers, and he died in 1840.

The Plaintiffs were the only children of James, and the Defendants (other than the trustees) were the children of Benjamin, and the Plaintiffs and Defendants were believed to be the only surviving children of the testator's brothers. They were all born in the lifetime of the testator.

The Defendant George Hall Pownall was the eldest son of the testator's brother Benjamin, who was living on the 5th of July 1861, being twenty-one years after [244] the death of the testator's last surviving brother, and, in that character, he claimed to be absolutely entitled to the trust estates.

This was a special case, and the questions for the opinion of the Court were these:—1st. Whether the Defendant George Hall Pownall was or not now entitled absolutely to the trust estates, and to have a conveyance and assignment thereof. 2d. Upon the true construction of the will, at what period was the trust for distribution of the income of the real and personal estate of the testator determined. 3d. Whether the power of distributing the income of the trust estate still subsisted, and if so, in whom was it now vested, and who were the objects thereof.

The Plaintiffs contended that, upon the true construction of the will, the trust therein contained for distribution of the income of the real and personal estate would not expire until the end of a period of twenty-one years from the death of the testator's last nephew or niece, being a child of one of his brothers who was living at the testator's death, and that, therefore, the Defendant George Hall Pownall was not now entitled absolutely to the trust estates, and that neither he nor any other person was yet entitled to any conveyance and assignment.

Mr. Baggallay and Mr. Swan, for the Plaintiffs. The discretionary trust is to go on so long as the law admits a division, that is, during a life and lives in being and twenty-one years afterwards: therefore the gift over takes effect twenty-one years after the death of the survivor of the testator's nephews and nieces living at his death.

[245] [THE MASTER OF THE ROLLS. The difficulty is, that the law would permit the division to last for twenty-one years after the decease of every person living at the testator's death. It might be the survivor of a school.]

Mr. A. E. Miller, for the trustees, argued that "children" must be read "issue." He stated that the present trustees were the representatives of trustees appointed by the Court in 1825 in a suit, and that it might be a question whether they could exercise the discretion.

THE SOLICITOR-GENERAL (Sir R. Palmer) and Mr. Hobhouse, for the other Defendants. There is nothing executory in this gift, and the Court, in order to ascertain the period which the law allows the division to take place, must discover, from the words of the will and not by speculating on the testator's intention, what are the lives during which the property is to be tied up. You find that the testator gives a series of life-estates to his brothers, and they, therefore, must be the lives during which and for twenty-one years after which the division is to take place. They referred to *Cadell v. Palmer* (1 Clark & Fin. 372), and to the class of cases where personal estate is limited to like uses as the real estate, with a direction that it shall not vest until twenty-one; *Vaughan v. Burslem* (3 Bro. C. C. 101); and see *Gosling v. Gosling* (32 Beav. 58, and 1 De G. J. & Sm. 1).

Mr. Baggallay, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think that I can hold "children" to mean "issue," and I have not much doubt as to the trustees' right to exercise the discretion.

[246] *Nov. 12.* THE MASTER OF THE ROLLS. The question in this special case is the period of time during which the trust in favour of the children of the testator's brothers is to endure. The first matter I have to consider is, what is the scheme of this will. There is an estate to the brothers for life, and after the death of the survivor, to their children. If it stopped here, the case would be very simple, and the class would be ascertained at the death of the surviving brother. But after this the net income is to be divided amongst such of the brothers' children as should stand most in need. This class must obviously be ascertained at the death of the surviving brother, at which period all the objects of this trust must necessarily be alive. This trust is to last so long as the law admits, which simply is during twenty-one years after any life in being at the death of the testator. It is obvious that if this were a gift of the fund to the brothers for life and afterwards to their children, then that the period of division would be the death of the brothers, and from that period the time would run. The law would admit this trust for division amongst the children to go on as long as any person living at the moment of the testator's death was in existence, and during twenty-one years after the life of the longest liver of any person then in existence. But it would be impossible to ascertain when that period would cease, and, if it were, all the children of his brother would probably be then dead, and the gift over would fail of taking effect. I am of opinion, therefore, that it is impossible so to construe it, and that the period from which the twenty-one years must begin to be calculated is the death of the last surviving brother.

In no other way can effect be given to this trust, for the testator might have directed it to endure as long as [247] any of the children in a charity school should live and twenty-one years after, but unless he so expressed it, it could not be maintained, as it would be impossible for the trustees to ascertain when the trust ceased. The general scope and object of the will itself gives the explanation. No one contends that the trust is to go on until the death of everybody in existence at the testator's death, and both parties have referred to the will as being the guide from which the period from which the twenty-one years is to begin to run is to be ascertained.

I concur in the argument derived from the decisions in those cases, where realty and personalty are given on similar trusts, with a direction that the personalty shall not vest until twenty-one, and where the Court construes one part of the will by the other.

Here I see a series of life-estates given to the brothers of the testator, and after the death of the survivor, amongst their children. I am of opinion, therefore, that the period at which the twenty-one years is to begin to run is the death of the surviving brother, and when the twenty-one years from that period shall have expired, being the time during which the law admits of the continuance of this trust for division, then the trust for the eldest son of the brother Benjamin then living arises.

ABSTRACT OF ORDER.

1. Declare that George Hall Pownall is now absolutely entitled to the trust estate.
 2. That the trust for distribution of the real estate and personal estate of the said testator amongst his brothers' children determined at the expiration of twenty-one years from the death of Benjamin Pownall, the last surviving brother of the testator.
- Reg. Lib. 1862, B. fol. 2185.

[248] *Re SMITH. Dec. 3, 1863.*

A solicitor who, by a slip, neglected to produce his certificate to the registrar within a month, as required by the 23 & 24 Vict. c. 127, s. 21, relieved from the consequences, and it was ordered that the certificate should have effect from the time of stamping the same.

A gentleman, who had been long on the Rolls as a solicitor, took out his certificate in April 1861, but by a slip he did not produce it to the registrar until August 1861.

Mr. Lovell moved, under the 23 & 24 Vict. c. 127, s. 21, that the certificate might nevertheless operate as from April. He referred to the 6 & 7 Vict. c. 73, s. 21, which enables the Court to make an order directing that any certificate not produced to the registrar as required by that section "shall have effect upon and from the time of stamping the same or any subsequent period." He stated that the object was to enable the solicitor to recover fees earned during the interval between April and August.

THE MASTER OF THE ROLLS [Sir John Romilly]. When there has been a mere slip I generally relieve, without requiring the ordinary notice to be given to the Law Institution. You may take the order.

[249] COATES v. COATES. Dec. 16, 1863; Jan. 14, 1864.

[S. C. 33 L. J. Ch. 448; 9 L. T. 795; 10 Jur. (N. S.) 532; 12 W. R. 634.
Approved, *Gee v. Mahood*, 1874, 23 W. R. 71.]

A legacy may be set off against a debt of the legatee to the testators, though such debt is barred by the Statute of Limitations.

A. was indebted to B. in two sums of £1000 each, for one of which S. was surety. B. afterwards obtained from A. a life policy as a security for both debts. A. subsequently became bankrupt, and B. proved for £1500 on the two debts, and he received a dividend of £97 and a sum of £97, 10s., upon the surrender of the policy. Held, first, that by surrendering the policy the surety was not released; and, secondly, that the surety was only liable for half the debt proved, after deducting half the dividends and half the produce of the policy.

In 1836 the testator, Benjamin Coates, lent John Green £1000 on the joint promissory note of John Green and William Green, payable six months after date, but William Green joined in the note as surety only. The testator afterwards, in 1838, lent John Green a further sum of £1000 on his several promissory notes.

In 1839 John Green deposited with the testator a policy of assurance for £2000 upon his own life as a further security for both debts.

In 1841 the testator, by a codicil to his will, bequeathed to William Green a legacy of £1000, payable out of his residuary estate six months after the death of the testator's widow.

The testator died in 1843. In 1845 John Green became bankrupt, and in 1846 the testator's two executrices surrendered the policy to the Rock Office in consideration of £97, 10s. William Green stated "that he was no party to the surrender of such policy, and did not consent thereto, and was not consulted upon the subject previous to such surrender." The executrices proved against the estate of John Green in the bankruptcy for £1500, the balance due on the two notes, and they afterwards received a dividend of £97 upon their proof.

The testator's widow (who was entitled to the residue for life) died in 1859, having by her will released Wil-[250]-liam Green from the payment of all interest due on the promissory notes at the time of her decease.

The legacy of £1000 having become payable upon the death of the widow, the surviving executrix insisted that she had a right to set off the legacy against the debt for which William had become surety, although such debt was barred by the Statute of Limitations.

Mr. Southgate and Mr. Robinson, for the Plaintiff, and Mr. J. H. Palmer and Mr. Bovill in the same interest. First, the Statute of Limitations does not bar the right of set-off, or destroy the debt, it only bars any remedy by action to recover it. The right of retainer under such circumstances was determined in *Courtenay v. Williams* (3 Hare, 539, affirmed 15 L. J. (Chanc.) 204); *Rose v. Gould* (15 Beav. 189).

Secondly, the release by the executrix by her will only affected her beneficial life interest.

Thirdly, although a surety is discharged *pro tanto* by the negligent loss by the creditor of some of the securities for the debt, *Capel v. Butler* (2 Sim. & Stu. 457); *Strange v. Fooks* (4 Giff. 408); *Mayhew v. Crickett* (2 Swanst. 185), still that principle does not apply to a security subsequently taken; *Newton v. Chorlton* (10 Hare, 646); *Pledge v. Buss* (John. 663); *Pearl v. Deacon* (24 Beav. 186; 1 De G. & J. 461); there being no obligation to keep them up, and the surety being only entitled to such of them as subsisted at the time he paid off the debt; C. P. Cooper's Rep. (p. 617): *Purdon v. Purdon* (1 Hudson & Brooke, 271). Here the policy of assurance was onerous, and there was no obligation on the part of the principal debtor to keep it up, the creditor was clearly not bound to pay the pre-[251]-miums, and the policy would have become forfeited. By the sale, the executrixes realised a sum of £97, 10s., which would otherwise have been lost. The policy was not a part of the original arrangement, and William Green was no party to the subsequent transaction.

Mr. Baggallay and Mr. Peck, for other parties.

Mr. Selwyn and Mr. Turner, for William Green, argued that the testator intended a benefit to the legatee to the full extent of the legacy. That the surety was released by the loss of the policy, which the creditor had no right to surrender without communicating with the surety, and giving him the opportunity of keeping it up; *Straton v. Rastall* (2 Term Rep. 366); *Watson v. Alcock* (1 Smale & G. 319; 4 De G. M. & G. 242); *Rees v. Berrington* (2 Ves. jun. 540); *Samuell v. Howarth* (3 Merr. 272). That the surety was entitled, at all events, to the benefit of the proof in bankruptcy, and of the produce of the policy; *Pearl v. Deacon* (24 Beav. 186; 1 De Gex & Jones, 461).

Mr. Robinson, in reply.

Jan. 14, 1864. THE MASTER OF THE ROLLS [Sir John Romilly]. It is admitted that all proceedings at law against William Green on the note are barred by the Statute of Limitations, but the executrix claims to set off the legacy against the debt. William Green, however, raises three objections to this. He says, first, that the debt, as against him, is barred by the Statute of Limitations. Secondly, that the widow, who was one of the executrixes, has released him from the debt; and, thirdly, that the sale or surrender of the policy discharged his suretyship.

[252] I think all these points must be decided against him. As to the first, it was settled by *Courtenay v. Williams* (3 Hare, 589), which was affirmed on appeal, that a legacy may be set off against a debt, though barred by the Statute of Limitations. As to the second objection, it was merely a release of the interest on the debt due to her personally, and it only bound her own interest. The third point has more to support it, but I think that the surrender of the policy cannot be treated as a discharge of the surety. John Green was a bankrupt, and it was not probable that he would keep up the policy, from which he could derive no benefit, and the executrixes were not bound to do so. To keep it up would have been a mere speculation on their part, which might or might not have turned out beneficial, and if it had turned out unfavourable, might have been complained of by the surety. They realised what they could by surrendering it to the office, and whether the policy was surrendered before or after the proof in bankruptcy, I think it did not release the surety. It was the duty of the creditor to sell and to realise the security; by so doing, he alone could make the estate of the principal debtor available for the payment of a dividend on the debt for which the surety was liable, and consequently the benefit of which dividend is obtained by the surety in further discharge of his debt.

Upon the authority of *Pearl v. Deacon* (24 Beav. 192; 1 De Gex & Jones, 1), which was affirmed, I must also hold that £97, 10s., which was the produce of a collateral security for both debts, ought to be set off rateably against the amount due on the two notes, on one of which William Green was liable as surety.

The result will be, that one-half of the £1500, or [253] £750, will be the amount due from William Green, and from this must be deducted one-half of the £97 received for dividends, and one-half of the £97, 10s. received in respect of the produce of the policy. This will leave a sum of £652, 15s., as the balance of the debt due from

William Green, to be deducted from his legacy of £1000, and will leave £347, 5s. due to him.

NOTE.—Reg. Lib. 1854, A. fol. 331.

[253] *Re THE CARLISLE AND SILLOTH RAILWAY COMPANY. Dec. 19, 1863.*

Lands were taken by three separate companies from the same owner. After which one of the companies leased its line for 999 years. Held, that each company must bear one-third of the costs of the reinvestment, with a proportionate part of the *ad valorem* stamp.

Lands were taken compulsorily from the same owner by three railway companies, the Carlisle, the Lancaster, and the North British, and the purchase-moneys had been paid into Court. Afterwards, the Carlisle Company had, under the powers contained in an Act of 1862, leased its line and property for 999 years to the North British Railway Company.

This was a petition to have the moneys reinvested, and the question was, how the costs ought to be borne.

Mr. Wickens, in support of the petition, argued that the costs ought to be borne by the three companies in thirds, upon the authority of *Ex parte The Bishop of London* (2 De Gex F. & J. 14).

Mr. Salmon, *contra*. No part of the costs ought to be paid by the Carlisle and Silloth Company, for after the granting of the lease that company became defunct, [254] except for the purpose of receiving and distributing the rental.

Mr. Robinson, for another company.

THE MASTER OF THE ROLLS [Sir John Romilly]. This was an obligation which attached to the Carlisle Company at the moment they took the land, and from which they have never been relieved. I must make all these three companies pay the costs on the principle laid down in the authority cited, that is, each must pay one-third, with a proportionate part of the *ad valorem* stamp. (See *In re Maryport, &c., Railway Act*, 32 Beav. 397.)

NOTE.—Reg. Lib. 1863, A. fol. 2417.

[254] *Ex parte MORSHEAD; Re "THE DEFENCE ACT, 1860." Dec. 12, 15, 18, 1863.*

Upon a petition to obtain out of Court the purchase-money for lands taken under "The Defence Act, 1860" (23 & 24 Vict. c. 112), it is not necessary to serve the Secretary of State, who paid it in. A fund paid into Court for the purchase, under "The Defence Act," of lands which were subject to contingent charges was ordered to be paid out to the trustees, they having powers to sell the lands and to give discharges for the purchase-money.

Under the will of a testatrix, who died in 1846, some property in the parish of Chorley was charged with sums of £2000, £6000, £5000 and £500, and with life annuities of £100, £50 and some other contingent charges.

Other estates in Egg Buckland and Saint Budeaux were thereby charged with the deficiency only, and they stood settled on John Phillip A. Morshead for life, with remainder to his eldest son John George A. [255] Morshead (an infant) in tail. It was stated that the trustees of the will had a power to sell, and give discharges for the purchase-money.

In 1863 the trustees of these latter estates agreed to sell a portion of them to the Secretary of State for the War Department for £25,000, under "The Defence Act," and the purchase-money had been paid into Court.

The Defence Act, 1860 (23 & 24 Vict. c. 112, s. 21), provides that where the compensation for lands taken for the public service, or the defence of the realm is

paid into Court, "there shall be added thereto a sum of £30, as an equivalent for the expenses consequent upon such payment, and upon such compensation, with such additional sum (which shall be deemed part of such compensation) being so paid, the said Secretary of State shall be discharged from all liability in respect thereof," &c.

By the 20th section, the compensations are to be applied in manner directed by the Defence Act, 1843, as amended, which empowers the Court (5 & 6 Vict. c. 94, s. 27) to make such orders and directions for paying the said money or placing it out, &c., or otherwise concerning the disposition of the said money "as the Court shall think just and reasonable."

A petition was now presented by the three trustees, and the tenant for life, and first tenant in tail (an infant), praying that the fund might be paid out of Court to the three trustees.

The petition was served on no one.

[256] Mr. Selwyn and Mr. Rowcliffe, in support of the petition, submitted, first, that the Secretary of State need not be served; secondly, that it was not necessary to retain the fund in Court, the trustees being willing to administer it.

THE MASTER OF THE ROLLS thought that it was not necessary to serve the Secretary of State, whom the Act "discharged from all liability;" but he doubted whether the fund could properly be paid out of Court in the present state of the title to it. He directed the petition to stand over to make inquiries as to the practice in such cases.

Dec. 15. Mr. Selwyn stated that such orders had been made in Chambers, in the cases of *In re Elliott* (23d June 1863); and *Re Tolcher* (3d Feb. 1863). He said that in this case the trustees had a power to sell and give receipts for the purchase-money, and that if the fund were reinvested in land, such land would be vested in the trustees. That the money must, therefore, be considered as land, and that, whether land or money, it would, but for a *vis major*, be vested in the trustees. He observed that if the fund were administered in Court, the expenses might be ten times as great as the £30 allowed by the Act.

THE MASTER OF THE ROLLS. I will consult the other branches of the Court.

[257] Mr. Selwyn now mentioned *Re Sadler's Trust* (Vice-Chancellor Wood, 27th June 1863).

THE MASTER OF THE ROLLS [Sir John Romilly]. I find the question has not been before the other branches of the Court, but in this case I think I may order the fund to be paid to the trustees.

[257] RE MERTON COLLEGE. Dec. 16, 1863.

Four distinct railway companies took portions of the lands of a college, and paid the purchase-money into Court. A portion of one fund had already been reinvested, leaving a balance in Court, and a petition was presented for reinvesting the three other funds and a part only of such balance. Held, that the costs were payable by the four companies equally.

Lands belonging to this college had been taken by four separate railway companies under their compulsory powers. The purchase-moneys for the four purchasers had been paid into Court, and consisted, originally, of £505, £260, £557 and £631 consols.

The £631 had been paid in by the London, Chatham and Dover Railway Company, and part of it had, on a former occasion, been laid out in the purchase of other lands, whereby the £633 had been reduced to £206. On that occasion this company paid the whole costs.

The college had since purchased lands for £1350 for the purpose of reinvesting the funds, and they presented a petition praying that the £260, £557, £631, and so much of the £206 as would be sufficient to raise the £1350, might be applied in payment of that sum, and that the four railway companies might be ordered to pay the usual costs according to the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18, s. 80).

Mr. Law, in support of the petition, asked that the [258] costs might be paid by

the four companies in equal shares in conformity with the decisions of the Lords Justices; *Re The Bishop of London* (2 De G. F. & J. 14), followed in this Court, *In re The Maryport Railway Act* (32 Beav. 397).

Mr. Kekewich, for the London, Chatham and Dover Company, argued that the rule as to equality was not applicable to cases where its application would produce great hardship, and that it had been so laid down in *Re The Bishop of London* (2 De G. F. & J. 14), and *In re Byron's Estate* (9 Jurist, 838). That this case was an exception to the rule, for this company had already paid the costs of a former investment, and ought not to be made liable, equally with the other companies, for the costs of the present investment, and also solely liable on any future application in respect of the balance left in Court. That it would be more just to exhaust the fund paid in by this company, and take the residue out of the other funds.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not see how I can compel the college to resort to any particular fund.

I must make the common order.

NOTE.—Affirmed by the Lords Justices, 20th February 1864.

[259] ROBERTS v. EDWARDS. Nov. 9, 1863.

[S. C. 9 L. T. 360; 9 Jur. (N. S.) 1219; 12 W. R. 33.]

A testator bequeathed his residue to his widow for life, and, after her decease, to be divided between his two brothers "or their heirs," in proportion to the number each might have then living, share and share alike. Both brothers died before the widow. Held, that "heirs" was to be construed "children," and that all the children living at the widow's death took in equal shares.

Bequest of £2000 insured on my life with the H. Company. Held, to pass a bonus due at the testator's death.

The Rev. William Edwards, by his will dated in 1817, gave a life interest in his property to his widow, and his will, amongst others, contained the following clauses, on which the questions arose:—

"I give and bequeath to my beloved wife, Sarah Edwards, the £2000 insured on my life with the Hope Insurance Company, to be wholly and entirely disposed of as she may deem proper."

"And lastly, it is my wish, and I will, that all my property, after her decease, except such part as is disposed of otherwise at the beginning of this deed, be divided between my two brothers, namely, Thomas Edwards and Evan Edwards, or their heirs, in proportion to the number of children each may have then living, share and share alike. Such is the manner in which I wish my property after my decease and my said wife's decease to be disposed."

The testator died in 1827 having no real estate.

The widow died in 1862.

Two questions arose on this will, first, as to the construction of the gift to "Thomas Edwards and Evan Edwards, or their heirs in proportion, &c.;" and secondly, as to whether the bequest of the policies to the widow carried the bonus.

As to the first point, it appeared that the testator's brother, Evan Edwards, predeceased the testator, but [260] the other brother, Thomas Evans, survived him and died in 1830. That such brothers had respectively, at the time of the testator's decease, three and seven children, but at the decease of the testator's widow there were only two children of Evan Edwards and four of Thomas Edwards then living.

As to the second point, it appeared that the testator had, at the date of his will, two policies on his life with the Hope Insurance Company for £1000 each, and that he had afterwards surrendered one of them, and that one insurance only for £1000, with bonuses of £112, 10s., was existing at his death; which was received by the executors.

Mr. T. A. Roberts, for the executors of the widow, claimed the bonus on the policy.

Mr. E. G. White, for the heir at law of Evan Edwards, argued that the word "heirs" must be construed strictly, and that the heir at law was entitled to a moiety of the property by substitution. He cited *Bull v. Comberbach* (25 Beav. 540); *De Beauvoir v. De Beauvoir* (15 Sim. 163, and 3 H. of L. Cas. 524); and referred to *Gittings v. M'Dermott* (2 Myl. & K. 69).

Mr. Selwyn and Mr. Boys, for the next of kin, contended, first, that the whole gift was void for uncertainty; *Waite v. Templer* (2 Sim. 524); and that there was consequently an intestacy; *Store v. Evans* (2 Atk. 86). Secondly, that there was a lapse as to Evan Edwards' share, who predeceased the testator. *Mounsey v. Blamire* (4 Russ. 384) was also referred to.

[261] Mr. Hobhouse and Mr. G. N. Colt, for the children of Thomas Edwards, argued that by the bequest of the "£2000 insured on my life," the bonus did not pass. They cited *Norris v. Harrison* (2 Madd. 268); and see the note to *Gilley v. Burley* (22 Beav. 624), and *Lock v. Venables* (27 Beav. 598).

THE MASTER OF THE ROLLS [Sir John Romilly]. It is obvious that the testator used the word "heirs" for children, a thing not very unusual for testators to do. He gives his property, on the death of his widow, to his brothers (if alive) or, if dead, to their heirs, to be divided "in proportion to the number of children each may have then living, share and share alike." That is, the heirs are to take equal shares, and their number is to be in proportion to the children then living. It is obvious that he considered the expression "heirs" equivalent to "children," and that they were convertible terms. The property is divisible into sixths, and four of them will belong to the children of Thomas Edwards, and the remaining two shares to the children of Evan Edwards.

As to the bonus, the testator knew that if he effected an insurance with profits, any bonus would be added to the policy. I think, therefore, that it passes as part of the legacy.

[262] SMITH v. BOLDEN. Nov. 16, 1863.

A trustee of a fund belonging to a deceased person refused to pay it over to his legal personal representative, on the ground that there was a question, under the will of the deceased, whether it was not specifically bequeathed, and requiring the assent of the alleged specific legatees. He was ordered to pay it to the legal personal representative, together with the costs of suit, to which suit it was held that such specific legatees were not necessary parties.

A sum of consols was vested in the Defendant, in trust for Mrs. Hall for life, with remainder to her seven children.

Mrs. Hall died in 1858, and six-sevenths of the fund were thereupon distributed, but the remaining one-seventh share, which belonged to Henry Hall, one of the children, was retained, he being then dead.

He had made a will and had appointed executors, who had not acted, and, thereupon, the Plaintiff obtained letters of administration to his estate. She afterwards applied to the Defendant for Henry's one-seventh share; but, after some delay and long correspondence and negotiations, the Defendant insisted that it was doubtful, upon the terms of Henry Hall's will, whether he had not specifically bequeathed this one-seventh share to the Plaintiff and her two sisters, and he required the release and concurrence of the other residuary legatees to the payment to the Plaintiff.

This bill was filed by the administratrix of Henry Hall, against the trustee alone, to obtain payment of his one-seventh of the fund.

By his answer the Defendant said,—

"I submit whether or not the shares of Henry Hall are or are not properly payable to the Plaintiff, as his legal personal representative or otherwise.

"I submit whether the persons claiming as specific legatees or as representing specific legatees under the [263] will of Henry Hall are not necessary parties to this suit. And I am ready and willing and hereby offer, upon this suit being properly consti-

tuted in respect of parties, to pay the shares of Henry Hall of the sums of stock in the bill referred to into Court in this suit, and I am also willing and hereby offer, upon my costs, as trustee under the said settlement, being provided for, including my costs in this suit, to pay the said shares of Henry Hall into Court under the Trustee Relief Act, and to consent to a stay of all further proceedings in this suit. And I submit that to proceed with this suit, without making parties thereto those who are really interested in or have *bond fide* claims against the said shares of Henry Hall can only lead to useless expense."

Mr. Southgate and Mr. Waller, for the Plaintiff, asked for a decree with costs.

Mr. Haynes, for the Defendant, justified the refusal of the trustee to pay over the fund without the concurrence of the specific legatees, and argued that the residuary legatees were necessary parties to the suit.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is one of those unfortunate cases which occasionally come before me, where trustees for one purpose think it their duty to act as trustees for other persons who are not their *cestuis que trust*. This Court ordered this fund to be paid out of Court to the trustees of the settlement, according to the trusts of which, on the death of the tenant for life, seven persons became entitled to it. The trustee pays six-sevenths to the persons entitled, and he refuses to pay the remaining one-seventh, because he says that when in her hands questions will arise under the will of Henry Hall, with which he has nothing [264] to do. The rights of the legatees, under Hall's will, are quite foreign to his trusteeship. If such a course of proceeding were allowed, the whole trust fund might be frittered away in costs.

I have no option. I must direct the Defendant to pay the one-seventh to the legal personal representative of Henry Hall, and, as the Defendant has been the occasion of the suit, he must pay the costs.

[264] EAMES v. ANSTEE. Nov. 23, 25, 1863.

Construction of a referential trust.

A testatrix directed trustees to make an investment, and out of the dividends to pay annuities of £100 each to his two nieces and his nephew for life, and the capital to their children respectively, and to apply £100 a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one, when he gave them the capital fund producing this annuity. He bequeathed his residue to his two nieces and nephew and the children of Daniel "in equal shares, in like manner as was thereinbefore mentioned with respect to the annual sums of £100 bequeathed to them respectively." Held, that the children of Daniel took one-fourth only of the residue.

The testatrix directed her executors to invest in the funds a sum sufficient to produce the yearly sum of £590; and she directed them, out of the dividends, to pay an annuity of £100 to her niece Jane Hitchman, and a like annuity of £100 to her niece Ann Eames, during their respective lives, and to pay another annuity of £100 to her nephew William Eames for life, and to apply another £100 towards the maintenance of the children of Daniel Eames, deceased, until twenty-one, and then to pay to them, respectively, such share or proportion of the funds from which his or her share of the dividends arose. And as to the fund from which the annuities to her nieces and nephew should be derived, she gave the same, on their decease respectively, unto their children respectively. She gave the remaining £150 to other persons.

[265] She proceeded:—"And as to all the rest and residue of the money to arise and be produced from my estate, I direct that the same shall be invested in the Government funds, in the names of the said John Cook and James Burne, and the dividends and interest thereof paid and applied, from time to time, unto and for the benefit of my said nieces Jane Hitchman and Ann Eames and my said nephew William Eames for their lives and the children of my said nephew Daniel Eames, in equal shares, in like manner as is hereinbefore mentioned with respect to the annual sums of £100

bequeathed to them respectively." "And after the decease of Jane Hitchman, Ann Eames and William Eames, I give the capital sum out of which their respective shares of such last-mentioned dividends may be derived unto and equally amongst their respective children, in like manner as is hereinbefore directed with respect to the principal money from which their said annuities of £100 shall have been derived."

The testatrix died in 1841.

Jane Hitchman had two children; William Eames had two children, and Daniel Eames left four children.

Ann Eames never married, and she died in 1863, and thereupon the £3333, 6s. 8d. consols set apart to answer her annuity of £100 fell into the residue, became distributable, and the question was, in what shares it ought to be divided.

On behalf of Jane Hitchman, William Eames, and their children, it was contended that the children of Daniel took only one-fourth of the residue and of the fund in question, which, it was insisted, had fallen into the residue.

[266] The children of Daniel Eames, on the contrary, contended that the words, "in equal shares," contained in the residuary gift, governed the whole sentence, and that the fund was divisible into sevenths.

The next of kin contended that the fund was undisposed of.

Mr. Jessel, for the Plaintiffs.

Mr. Southgate, Mr. A. Smith, Mr. Baggallay and Mr. Blackmore, for the Defendants.

Tyndale v. Wilkinson (23 Beav. 74), was cited.

Mr. Jessel, in reply. In the case cited, the words of equality preceded the gift to be settled in like manner.

THE MASTER OF THE ROLLS. I have no doubt that the residue includes this capital fund; but I will consider as to the proper division of it.

Nov. 25. THE MASTER OF THE ROLLS [Sir John Romilly]. The questions arising on the construction of this will are, first, what passed by the residuary gift, and, secondly, to whom. The next of kin contend that there is an intestacy as to Ann Eames's share, and the children of Daniel insist that the words "in equal shares" govern the whole residuary gift, and consequently that Jane, Ann and William take three-sevenths between them, and that they, the above children of Daniel, take the remaining four-sevenths.

[267] I am of opinion that in this the testatrix merely intends to repeat the manner in which she had given the three several annuities of £100 a year to Jane, Ann and William for life, and afterwards to their children, and the £100 a year equally amongst the children of Daniel.

The words "for their lives" apply to the three first, and the words "in equal shares" apply to the children of Daniel. The expression, "in like manner as is hereinbefore mentioned," merely refers to and repeat what she had previously said, they extend to the annual sums of £100, and cannot apply to the mode of settlement, because the testatrix goes on and states how the shares of the nephew and nieces are to be settled.

I have already decided that the capital of Ann's annuity falls into and passes by the residuary gift. The consequence is, that the £3333, 6s. 8d. consols must be divided into fourths, one of which will belong to Jane for life, with remainder to her children, another fourth to William for life, with remainder to his children, one-fourth to the children of Daniel, and the remaining one-fourth is undisposed of, and goes to the next of kin.

A similar fourth of the residue is also undisposed of, and goes to the next of kin.

[268] ROBSON v. FLIGHT (No. 1). Dec. 3, 1863.

[For subsequent proceedings, see 34 Beav. 110; 4 De G. J. & S. 608; 46 E. R. 1054.]

A Plaintiff sought to set aside a lease, and to obtain the *mesne* profits. The Defendant, the assignee of the lease, insisted on its validity, and that he was a purchaser for

valuable consideration without notice. Held, that the Defendant was bound to answer as to the amount of rents and profits, the particulars of his under-letting and of his receipts, and what charges he had created.

The case came before the Court on exceptions to the Defendant's answer for insufficiency. The case made by the bill was that the testator devised a house on Ludgate Hill to two trustees, upon trust to pay a moiety of the rent to his son John E. Hall during his life, with remainder to his children, and the other moiety to his daughter Eliza Hall for life, with remainder to her children. And he "directed" that the property "should and might be leased" by his two trustees, "and the survivor of them and the executors or administrators of such survivor, at rack rent," for any term not exceeding twenty-one years.

The testator died in 1826; one of his trustees disclaimed and the other died without having acted. In 1848, there being no trustee, the testator's son, who was his heir at law, granted a lease to Russell for twenty-one years, at a rent of £180; and in 1850 the Defendant Flight purchased this lease for £75.

The infant children of the testator's daughter, who was dead, instituted this suit against Flight, insisting that the lease was invalid under the power. The bill charged that Flight, from 1856 to 1863, when a railway company compulsorily took the property, received the rents, amounting to between £300 and £400 a year. The bill sought to set aside the lease and to have an account of the rents.

The Defendant claimed to be a purchaser for valuable [269] consideration without notice, and he declined to give such part of the discovery required by the interrogatories as is hereinafter set forth in the exceptions.

The Plaintiffs excepted to the answer, because the Defendant had not set forth (in substance) what had been the amount of rents and profits of the premises during each and every quarter since the assignment, and because Defendant had not set forth whether he had not under-let the premises at rents amounting in the aggregate to £419, 12s., and the particulars of the rents and of his receipts, and had not stated the portions of the premises which had from time to time remained unoccupied, and why and during what periods respectively. That he had not set forth whether he had aliened, mortgaged, charged or otherwise dealt with the premises, and the particulars.

Mr. Bagshawe, in support of the exceptions. The Defendant not having pleaded or demurred is bound to answer fully; *Howe v. M'Kernan* (30 Beav. 547); *Swinborne v. Nelson* (16 Beav. 416); *Clegg v. Edmonson* (22 Beav. 125). The discovery will be material at the hearing of the cause.

Mr. Hemming, *contra*. The Defendant claims to be a purchaser for valuable consideration without notice, and he insists on the validity of the lease. The discovery in question can only be useful if the lease should be set aside at the hearing. The Plaintiffs are only entitled to such discovery as will enable them to obtain a decree, and not to a discovery consequential on that relief, which it is oppressive to require, and will be useless if the Plaintiffs should fail on their main point.

[270] In *De la Rue v. Dickinson* (3 Kay & John. 388), in a suit to restrain an alleged infringement of a patent, it was held that the Defendant, by his answer, denying the fact of infringement, was protected from making any discovery immaterial to that question, and which, when that question had been decided, would be given under the decree. It was also held that it was not necessary to set up a defence of this nature by plea. So in *Marsel v. Freney* (2 John. & Hem. 323), the V.-C. Wood observed:—"Even where the question arises on the answer, the Court has refused to compel a Defendant to set out accounts of profits, where the alleged partnership is denied, because a mere account of profits cannot affect the question whether he is a partner or not. The Plaintiff is entitled to all such discovery and to the production of all such documents as are necessary to make out his case at the hearing, and if he should fail in that, any account of the profits of the business would become useless and improper, and it would be unjust to the Defendant to compel him to disclose such particulars to a person who, in the event supposed, would have had no interest in the discovery." And see *Swabey v. Sutton* (1 Hem. & Mill. 514); *Lett v. Parry* (*Ibid.* 517).

The proper course will be to allow these exceptions to stand over to the hearing,

as was done by the Lords Justices in *Clegg v. Edmonson* (22 Beav. 125, and 3 Jurist (N. S.), 300), and in *Grievess v. Nielson* (unreported).

THE MASTER OF THE ROLLS [Sir John Romilly]. I have no doubt that the Defendant must answer, and that these exceptions must be allowed. The im-[271]-portance of this information may be very great to the Plaintiff, who comes to set aside a lease and to recover the profits made by it. It is true that the knowledge of the amount of profits may not assist the Plaintiff in setting aside the lease, but it may be material on the rest of the case. Suppose the Defendant states the amount of the profits made by the lease, and that they should appear to be great, the Plaintiff might, at the hearing, if the lease were set aside, adopt the statement of the Defendant, and take a decree at once for the amount. But suppose he says there have been no profits, the Plaintiff might trust to the statement and abandon the suit.

In all these matters, it is very difficult to determine before the hearing that the information required will be of no use to the Plaintiff; and the rule is strict, that if a Defendant answer, he must answer fully.

I express no opinion on the point raised, whether the Defendant is or not a purchaser for valuable consideration without notice.

NOTE.—At the hearing of the cause on the 3d of December 1864 the Master of the Rolls supported the lease (see 34 L. J. (Chanc.) 101 [34 Beav. 110]), but on appeal the decision was reversed by Lord Westbury, L. C., on the 11th of January 1865. [4 De G. J. & S. 608.]

[272] DUTTON v. CROWDY. Nov. 16, Dec. 5, 1863.

[S. C. 33 L. J. Ch. 241; 9 L. T. 630; 3 N. R. 234; 10 Jur. (N. S.) 28; 12 W. R. 222.]

"Shares" directed to go over, Held to include accrued shares, from the circumstance of there being in the will an intention, plainly shewn, of keeping the estate together, so as to go over ultimately in one aggregate mass.
Cross-remainders not implied in respect of accrued shares, where the original shares are expressly limited over.

The testator, William Hugessen, by his will, dated in 1800, devised Stodmarsh Court and a moiety of Great Hoddesford to certain uses, which expired in 1861, on the death of the first tenant for life without issue. And, subject thereto, he devised this property to his nephew John Spratt for life, with remainder as follows:—

"To the use of all and every the child and children, both sons and daughters, of the body of my nephew John Spratt lawfully to be begotten, equally to be divided between or among them (if more than one) share and share alike, as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such child or children severally and respectively lawfully issuing. And in case any one or more of such children shall happen to die without issue of his, her or their body or bodies lawfully begotten, then as to the share or shares of him, her or them so dying without such issue, to the use of the eldest surviving son, for the time being, of the body of my said nephew John Spratt, lawfully to be begotten, and the heirs of the body of such eldest son lawfully issuing. And in case there shall not be any such son, then to the use of the survivors or survivor and others or other of the children of my said nephew John Spratt, lawfully begotten, equally to be divided between or among them (if more than one) share and share alike, to take as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of such survivors [273] or survivor and others or other of them. And if all such children but one shall happen to die without issue of their bodies lawfully begotten, or if there shall be but one such child, to the use of such surviving or only child and the heirs of his or her body lawfully begotten. And for default of such issue, then to the use of my dear niece Elizabeth Spratt, spinster, and of her heirs and assigns for ever, to and for her and their own use and benefit.

But in case my said niece Elizabeth Spratt shall happen to die in my lifetime or afterwards in the lifetime of her said brothers, and without leaving issue of her body lawfully begotten which shall be then living, then, in default of issue of them my said nephews William Hugessen Spratt and John Spratt lawfully begotten, to the use of the right heirs of me the said William Hugessen for ever, and to and for no other use or uses, intent or purpose whatsoever."

The testator died in 1801.

John Spratt, the second tenant for life, died in 1843, in the lifetime of the first tenant for life, who survived until 1861, when he died without issue, and the limitations in favour of John Spratt's children thereupon took effect in possession.

John Spratt had six children, all born after the death of the testator, viz., William the eldest, John the younger, who was the second, Mary Crowdy (the Defendant), and three others who died under two years of age, in 1807 and 1812. It was conceded that the shares of these three infants vested, on their deaths, in their eldest brother William Spratt.

William, the eldest son, died without issue in 1830. [274] John the younger, the second son, died in 1849, and the Defendant, Elizabeth Dutton, was his only child.

The question in the cause was this: to whom, under the terms of the testator's will, did the three-sixth accrued shares, which William took upon the death of the three infants, go, upon his death in 1830.

Mr. Hobhouse and Mr. Kekewich, for the Plaintiff, the only child of John the younger. Upon the terms of this will, the three-sixth accrued shares, to which William became entitled on the death of the three infants, passed, upon his decease without issue, to his brother John the younger. It is true that ordinarily accrued shares do not pass by the word "share" used *simpliciter*; *Goodwin v. Finlayson* (25 Beav. 65); *Evans v. Evans* (*Ib.* 81); but the frame and intention of the will may extend its operation, and here a clear intention appears to give the original and accrued shares to the eldest son for the time being. Secondly, if the testator gives the whole estate over in mass or in bulk, upon failure of all the objects of the prior class, it must necessarily be kept together in the meanwhile to await that event, and the Court, in such cases, infers that by the word "share" the accrued, as well as the original shares, were intended to go over; *Douglas v. Andrews* (14 Beav. 347); *Hawkins on Wills* (p. 269).

Mr. Erskine, for the Plaintiff's husband. The Defendant Mrs. Dutton claims by virtue of implied cross-remainders; but when cross-remainders between persons are expressly limited by a will to take effect on a given event, the Court will not imply cross-remainders between the same persons on a different event; *Rabbeth v. Squire* [375] (No. 2) (19 Beav. 77, and 4 De Gex & J. 406). Here the daughters are only to take "in case there shall not be any such son."

He referred to *Edwards v. Alliston* (4 Russ. 78), the authority of which case had been shaken by the decision of the Court of Exchequer in *Doe d. Clift v. Birkhead* (4 Exch. Rep. 110).

Mr. Selwyn and Mr. Dickinson, for Mr. and Mrs. Crowdy, argued that there was nothing in the will to extend the operation of the word "share" to accrued shares, except the gift over in mass, and that this was the very circumstance from which cross-remainders were to be implied; *Jarman on Wills* (chap. 42 (2d edit.)); *Vanderplank v. King* (3 Hare, 1). The cross-remainders in tail were therefore to be implied, and that consequently Mr. Crowdy was entitled to five-twelfths of the estate.

Dec. 12. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on the construction of the will is, whether the accrued shares, as well as the original shares, passed to the eldest surviving son of John Spratt.

What occurred was this:—With respect to the shares of the three children who died in their infancy, no question arose; but under the terms of the will they all vested in William Hugessen Spratt. William, therefore, at the time of his death, had vested in him his original one-sixth share in the devised estate, and also three-sixth other shares in it, all expectant on the decease of the tenant for life. The question is, to whom, under the words of the will, do these three-sixth shares go.

[276] There are three possible constructions, first, it may be contended that, under the terms of the will, the gift of the shares to the eldest surviving son for the

time being carried the accrued shares, and that John Spratt the younger took them under the express terms of the devise.

The second possible construction is, that the accrued shares are not given over or disposed of at all in the event of the devisee of them dying without issue, when the ultimate gift over on failure of all the issue of John Spratt took effect, and that, consequently, they remained vested in William Hugessen Spratt, and passed by his will; or if he died intestate, that they passed to John Spratt the younger, his brother and heir at law, until it should be ascertained whether the ultimate gift over took effect.

Thirdly, which is the contention of the Defendant Mrs. Crowdy, that neither of these events happened; but that the accrued shares are subject to a devise of cross-remainders in tail among the children of John Spratt the elder, to be implied from the terms of this devise; and that, accordingly, one-half of these three accrued shares vested in her, Mrs. Crowdy, as tenant in tail, until, if at all, the ultimate gift over took effect.

There are two circumstances which are favorable to the contention of the Defendant Mrs. Crowdy. The first is, the ordinary rule of construction that the word "*share*," unassisted by anything to be found in the context, is to be confined to the original shares, and not extended to accrued shares; and, secondly, that if the devise here had stopped at the gift to the children of John as tenants in common in tail, and then, [277] omitting all other gifts of the shares of the deceased children, had proceeded to devise, that in default of issue of all such children respectively, the estate was to go over to Elizabeth Spratt in fee; in that event, it would, in my opinion, have been a clear case for implying cross-remainders in tail between the children dying before the ultimate gift was to take effect.

But having stated these two circumstances, I have stated all that is favorable to the contention of Mrs. Crowdy, and these circumstances are controlled by the general scope and object of the will, the effect of which is, to require that the *share* which goes over to each son should be treated as including the accrued as well as the original shares. This is, I think, the case, wherever the intention of keeping the estate in one aggregate mass is plainly shewn in the will. This principle was acted on in the case of *Doe d. Clift v. Birkhead* (4 Exch. Rep. 110) and *Worlidge v. Churchill* (3 Bro. C. Cases, 465), and by me also in *Douglas v. Andrews* (14 Beav. 347). It would, I think, be wrong to imply cross-remainders in a devise to affect the accrued shares only, when the testator has expressly stated what is to be done with the original shares.

The case of *Doe d. Clift v. Birkhead* will illustrate my meaning: it was the case of a deed, but that will not affect the question before me. There, lands were limited to several persons as tenants in common in tail, with remainder, as to the shares of those dying without issue, to the survivors in tail. There the word "*shares*" was held to include accrued as well as original [278] shares. But if the Defendant's contention be correct it would follow that, if a devise had been made in the words of the deed in the case of *Doe d. Clift v. Birkhead*, the original share of the tenant in common who died without issue would have gone over by force of the expressed devise, and the accrued share would have gone over to the same persons, not by force of the express devise, but by force of the implied devise of cross-remainders in tail. But it would, I think, have been a singular piece of refinement, to have held that the original shares of a deceased tenant in common who died without issue went over to the survivors by force of the expressions in the will, but that the accrued shares went over in like manner, not by force of the word "*shares*," but by force of an implied devise of cross-remainders to be gathered from other parts of the will; and yet this is, in fact, what I am asked to do here. The original share is given to the eldest surviving son for the time being; and then it is contended that the testator did not intend that the accrued shares were to be included in this word "*share*," but that he intended that they should go over to the others, under an implication of cross-remainders in tail.

Where cross-remainders are implied, it is to carry into effect the obvious scope of the will, to be gathered from the whole taken together; but here it is asked that they should be implied to defeat the object which appears to be expressed on the face of the will. And it must be remembered that the rule which determines that

the word "*shares*" does not include accrued shares was settled after contradictory decisions originally; and this rule of construction, though perfectly well settled now, probably often defeats the real intention of the testator.

[279] The case of *Worlidge v. Churchill* (3 Bro. C. C. 465) is very near the present. There the testator devised his real and personal estate on trust to sell and divide the proceeds among his four children on their attaining twenty-one, but if any of them died under that age, the deceased child's share was to go to the survivors or survivor; but if all died under twenty-one, then he gave it over. As the testator shewed a desire that the estate should be kept entire, the word "*share*" was held to include the accrued as well as the original shares.

The cases of *Eyre v. Marsden* (2 Keen, 564), *Sillick v. Booth* (1 Yo. & C. C. C. 117), and *Leeming v. Sherratt* (2 Hare, 14), before Sir James Wigram, were all instances of this kind.

If I were to adopt the construction of this Defendant, and hold that the word "*share*," as used in this will, did not include the accrued shares, I should be disposed to hold that the heir or devisee of William took it, rather than that an implication of cross-remainders could arise partially, where the testator had stated what he wished to be done with the original shares of the children dying without issue in the manner here expressed.

I think that the whole scope of this will is, to accumulate all the shares which fail by reason of the death, without issue, of any one of the tenants in common in tail upon the eldest surviving son for the time being; and upon the death of the surviving son without issue, to divide the property equally among the [280] daughters. And, I think, this extends to accrued as well as to original shares, and that in case all the children of John Spratt should die without issue, the entire subject of the devise should then, but not until then, go to and be vested in Elizabeth Spratt in fee.

I will therefore make a declaration to the effect that I have stated, declaring that John Spratt the younger, the father of the Plaintiff, on the death of his brother William Hugessen without issue, became entitled to all the shares vested in him at his decease, both original and accrued, as tenant in tail general.

[280] GODFREY v. TUCKER. Nov. 5, 6, 1863.

[S. C. 9 Jur. (N. S.) 1188; 12 W. R. 33.]

A bill filed by a judgment creditor before the expiration of twelve months from the date of the judgment to foreclose a fee-simple estate of the judgment debtor cannot be supported unless he has issued an *elegit*.

A bill was filed by a judgment creditor, which, as such, could not be sustained, but pending the suit he got in a mortgage and claimed the benefit of it by amendment. Held, that the Plaintiff could not support his suit by this supplemental title.

A Defendant who had not demurred or raised the objection by his answer refused a portion of the costs of suit upon the dismissal of the bill.

On the 18th of December 1861 the Plaintiff recovered a judgment in the Queen's Bench against the Defendant Tucker for £89, and a minute of the judgment was duly registered in the Common Pleas.

At the date of this judgment, the Defendant Tucker was seised in fee of a house and premises at Hythe, subject to a mortgage in fee vested in Thomas Sacree.

On the 22d of August 1862, and before the expiration of the twelve months required by the 1 & 2 [281] Vict. c. 110, s. 13, the Plaintiff filed his bill, as a judgment creditor only, to redeem Sacree and to foreclose Tucker. The Plaintiff had not sued out an *elegit*.

In March 1863 the Plaintiff paid off Sacree and obtained a transfer of the mortgage, and he thereupon amended his bill by omitting Sacree, and praying that Tucker might pay the amount due, both on the mortgage and judgment, or be foreclosed.

The cause now came on for hearing.

Mr. Dickinson, and Mr. A. Dixon, for the Plaintiff. Although the statute (1 & 2

Vict. c. 110, s. 13) provides that a charge by virtue of a judgment shall not be enforced until after the expiration of a year, still this does not prevent a judgment creditor proceeding to enforce the lien which he possesses independently of that statute. It will be objected that the Plaintiff has not issued an *elegit*; and *Neate v. Duke of Marlborough* (3 Myl. & Cr. 407) will be cited. But that was the case of a trust estate; and in addition Lord Cottenham admits the right, for he says (p. 416), "that for certain purposes the Court recognizes a title by the judgment"—as for the purposes of redeeming—"inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out the writ," and "gives to the party the right to come in and redeem other incumbrances upon the property." From a passage in Powell on Mortgages (vol. 1, p. 282 (a.) (6th edit.)) it appears that the issuing of the writ is not an essential preliminary to a suit by a judgment creditor. It is there said:—"In like manner many books use this language. A judgment creditor may [282] redeem, having previously sued out a writ of execution. (See 2 Fonbl. Tr. on Eq. 269, and 1 Madd. Ch. 522 (2d edit.)). Now, with respect to a mortgage in fee and a mortgage for years of freehold property, no writ of execution is requisite to entitle a creditor to redeem. It is to the redemption of a leasehold estate only that a writ of *feri facias* is essential. The rule, therefore, as thus propounded, is too general."

Mr. John Pearson and Mr. Horsay, for the Defendant. The Plaintiff had no right "to proceed in equity to obtain the benefit of" his charge under the 1 & 2 Vict. c. 110, "until after the expiration of one year from the time of entering up such judgment." If he proceeds under a right independent of that statute, then the authorities are express, that he must previously sue out an *elegit*; *Neate v. Duke of Marlborough* (3 Myl. & Cr. 407); *Smith v. Hurst* (10 Hare, 30); Madd. Practice 522 (2d edit.); Redesdale (p. 126 (4th edit.)). The reason stated by Lord (p. Cottenham is this:—that the statute 13 Edw. 1, c. 18, gives no charge or lien, but only the option by issuing an *elegit* of obtaining one.

Secondly. The Plaintiff cannot rely on his mortgage title acquired pending the suit; his right to sue must exist at the time of filing his bill, which cannot be sustained by a different title subsequently acquired. In *The Attorney-General v. The Corporation of Avon* (33 L. J. Ch. 172), the Lords Justices held that if there be no title to sue at the time of filing the original bill, a decree cannot be founded upon a subsequently acquired right.

[THE MASTER OF THE ROLLS. There are cases where [283] executors and administrators have sued before the grant of probate or letters of administration; and vendors have filed bills for specific performance at a time at which they had not a title to the estate.]

The first is an exception; the second depends on the prior contract, and not on the title.

Mr. Dickinson, in reply, argued that the objection ought to have been raised by demurrer, or to have been taken by the answer.

Nov. 6. THE MASTER OF THE ROLLS [Sir John Romilly]. On fully considering this case, I am of opinion that the Plaintiff fails. The principle on which this Court proceeds, notwithstanding some ambiguous statements to be found here and there, and especially in the passage cited from Powell on Mortgages, amounts to this; Courts of Equity interfered in two classes of cases, first, where there is an equitable lien on the land, and then it proceeds on the equitable right alone, and without reference to any legal doctrine; and, secondly, where there is a legal charge or lien on the land, and the only object in coming into equity is, to assist the owner of the legal lien and remove some impediment, by reason of which he is unable to get satisfaction at law. In the latter case, the Plaintiff must shew that he has done all he can to perfect his legal title, before this Court will assist him.

This is, however, distinct from the cases where equity protects property pending litigation in other Courts, or administrators it here. That explains the observation of Lord Cottenham in *Neate v. The Duke of Marlborough*, [284] which has been cited, that the Court will recognize a judgment in a suit for redemption, or in a suit to administer an estate. It does so, because a person obtaining the judgment is in a condition to acquire a charge on the estate; and therefore you cannot deal with the estate itself, without regarding the interest of the person, who, by issuing an *elegit*, has a right to

obtain a charge on it. But when a person comes to enforce his legal right in equity, he must shew that he has that right at law, and that a Court of law cannot give him the remedy he requires. For that reason, Lord Campbell's Act gave to a judgment creditor an immediate charge, but no right to enforce it until after the expiration of twelve months.

That statute does not apply here, and the Court is therefore thrown back to the rules which existed previous to the statute; and the case of *Neate v. The Duke of Marlborough*, and all the text-writers, concur in this:—that a judgment creditor, coming to enforce his judgment in this Court, must previously have sued out an *elegit*, which in this case the Plaintiff has not done.

I have next to consider whether this is a suit by a judgment creditor or by a mortgagee. Under the amended bill, the Plaintiff is both judgment creditor and mortgagee; and if he had originally filed his bill as mortgagee to foreclose, and had afterwards got his judgment, he might then have tacked. But this bill was originally one by a judgment creditor, and the Plaintiff seeks by amendment to tack the mortgage, subsequently got in by him, to the judgment. I think he has not thereby improved his original case.

I am, however, of opinion that this objection ought to have been taken at an earlier period; and as it is [285] neither taken by answer nor by demurrer, though I must give the Defendant the benefit of his objection, it must be without costs. The Plaintiff must pay the costs incurred up to the filing the answer; and I must dismiss the bill without any subsequent costs.

Mr. Pearson asked for the costs of the hearing which the Plaintiff would have had to pay on a demurrer.

THE MASTER OF THE ROLLS. I will give you the costs of the day, £10, or the taxed costs, at the option of the Plaintiff.

NOTE.—As to a Plaintiff being limited to his title at the time of his filing his bill, see *Pilkington v. Wignall*, 2 Mad. 240; *Tonkin v. Sir John Lethbridge*, Sir G. Cooper, 43; *Barfield v. Kelly*, 4 Russ. 359; *Pritchard v. Draper*, 1 Russ. & Myl. 198; *Hollingsworth v. Shakeshaft*, 14 Beav. 492; *Griffith v. Ricketts*, 7 Hare, 305; *Byrne v. Byrne*, 2 Dru. & War. 71; *Cashell v. Kelly*, 2 Dru. & War. 181; *Magrath v. Heron*, 3 Irish Eq. Rep. 476; *Doyle v. Callow*, 12 Irish Eq. Rep. 241.

[285] WETENHALL v. DENNIS. Nov. 10, 1863.

[S. C. 9 L. T. 361; 9 Jur. (N. S.) 1216; 12 W. R. 66. See *Henderson v. Dodds*, 1866, L. R. 2 Eq. 533; *In re Spensley's Estate*, 1872, L. R. 15 Eq. 16; *In re Richardson*, 1880, 14 Ch. D. 613; *In re Middleton*, 1882, 19 Ch. D. 556.]

In a bill by a legatee for the administration of an estate, it was probable that the assets would not even be sufficient to pay the costs. Held, that the costs were payable in the following order: first, the costs of the legal personal representative as between solicitor and client; secondly, the costs and expenses of the Plaintiff in selling and getting in the estate, and the costs of the heir in executing deeds, and thirdly, the other costs of all parties as between party and party *pari passu*.

This bill was filed by a legatee for the administration of the estate. The assets were insufficient for payment of his debts, and also probably insufficient to pay the costs of suit.

Mr. G. N. Colt, for the Plaintiff, contended that, as the estate was deficient, the costs of all parties were payable as between solicitor and client, and that the costs of the Plaintiff had priority over the costs of the [286] other parties except the administrator. He cited *Tipping v. Power* (1 Hare, 405).

Mr. Langworthy, for a specialty creditor, and Mr. Everett in the same interest. The rule of the Court is, that parties can only have costs as between solicitor and client out of their own fund; *Seton on Decrees* (p. 165 (3d edit.)); *Weston v. Clowes* (15 Sim. 610); *Thomas v. Jones* (1 Drew. & Sm. 134).

Mr. Bristowe, for the heir at law, asked for his costs, and of executing certain conveyances.

Mr. Colt, in reply, cited *Cross v. Kennington* (11 Beav. 89).

THE MASTER OF THE ROLLS [Sir John Romilly]. That case is not disputed, but the only question is, as to the costs of a legatee Plaintiff where the estate is insufficient to pay the debts. I must follow the authorities cited, though there are cases in which a bill has been filed by a simple contract creditor and the assets have been insufficient to pay the specialty creditors, and yet the Plaintiff has got his costs, as between solicitor and client, out of a fund belonging to the specialty creditors.

I do not think the Plaintiff has priority for his costs, and I am of opinion that the costs must be paid in the following order:—first, the costs of the legal personal representative, as between solicitor and client; secondly, the costs and expenses of the Plaintiff in and about the sales and getting in of the estate, and the costs and ex-[287]penses of the heir in relation to the execution of the deeds connected with the sale; and thirdly, the other costs of all parties, which will be taxed as between party and party, amongst which the residue of the fund will be apportioned.

NOTE.—Reg. Lib. 1863, B. fol. 2343.

[287] INGLE v. PARTRIDGE. Nov. 12, 1863.

A Defendant, knowing the Plaintiff has used due diligence, is liable to pay the costs of his motion to dismiss for want of prosecution.

The bill in this cause was filed, on the 16th of February 1863, against a number of Defendants, two of whom only were required to answer.

On the 27th of October 1863 three sets of Defendants, who had not been required to answer and had not answered, gave notice to dismiss for want of prosecution, under the XXXIII^d Consolidated Order, r. 13. This order enables a Defendant, who is not required to answer, to move to dismiss after three months from his appearance, "unless a motion for a decree or decretal order shall have been set down in the meantime, or the cause shall have been set down to be heard."

This had not been done in the present case.

In answer to the application, it was shewn that the delay in proceeding in the cause had been caused by the other Defendants who had been required to answer having obtained several extensions of time for that purpose, and that the Plaintiffs had never had the opportunity of once amending their bill.

[288] Mr. Baggallay, Mr. Cracknall, Mr. Southgate, Mr. Surrage and Mr. E. K. Karslake, for the Defendants, in support of their several motions.

Mr. Selwyn and Mr. Beavan, for the Plaintiffs, argued that as the proceedings had been delayed by the other Defendants, and as the Plaintiffs had shewn due diligence, no order could be made. That it was not compulsory on the Court to make the order, and that these notices of motions ought never to have been given. They also asked for time to amend the bill.

THE MASTER OF THE ROLLS [Sir John Romilly]. I shall make no order on these motions. The Plaintiffs have shewn not only reasonable diligence, but that they have proceeded actively in getting on with the suit. If the Plaintiffs had given the Defendants, who are now moving to dismiss, notice of what was doing in the cause, I should certainly have given the Plaintiffs the costs of these motions.

But here, the Defendants, without making any inquiry, gave notice of motion to dismiss for want of prosecution, and the Plaintiffs have shewn that the delay is justified. The Court will make no order on this motion, but will give the Plaintiffs a month to amend their bill.

NOTE.—See *Earl Mornington v. Smith*, 9 Beav. 251; *Partington v. Baillie*, 5 Sim. 667; *Kelinge v. Audley*, 4 Ir. Eq. Rep. 630.

[289] FREEMAN v. BUTLER. Nov. 16, 1863.

The Defendant, the trustee and executor, was also a mortgagee on part of the estate. Upon a bill for the administration of the estate, Held that the Defendant was not bound to produce the mortgage and title-deeds, but that he must produce all accounts in his possession relating to the mortgage.

This was an administration suit against the trustee and executor, who was also entitled to a mortgage on part of the estate. The Defendant, in his affidavit of documents, admitted that he had in his possession the mortgage and title-deeds, and certain accounts, some of which related to the mortgage. He objected to produce these.

Mr. Hardy, for the Plaintiff, insisted on their production; arguing that a mortgagee was bound to produce all his accounts and vouchers; *Gibson v. Hewett* (9 Beav. 293).

Mr. W. H. Terrell, for the Defendant. A mortgagee cannot be called on to account, except in a bill to redeem him. *Gibson v. Hewett* was a redemption bill, which distinguishes it from the present, which is a mere administration suit.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Plaintiff is entitled to the production of all the documents, except the mortgage and title-deeds. I dissent from the doctrine urged on behalf of the Defendant, which would amount to this: that when an executor or administrator pays off a mortgage on the estate, out of his own money, he is able to avoid shewing any of the documents relating to it.

[290] WOOD v. THE CHARING CROSS RAILWAY COMPANY. Nov. 13, 16, 1863.

[See *Dowling v. Pontypool, Caerleon and Newport Railway Company*, 1874, L. R. 18 Eq. 747; *Corporation of Parkdale v. West*, 1887, 12 App. Cas. 616.]

Where a railway company, acting *bond fide*, has made a mistake as to the lands they have valued and taken possession of, and the question between the company and the landowner is merely one of value, this Court will not, by injunction, stay the works on the property taken. The Court, in such cases, has regard to the injury which may be done to the public.

This railway company required, for the purposes of the extension line of railway authorized by an Act of 1861, certain property in Redcross Street, Southwark, of which the Plaintiff was lessee, but which was in the occupation of under-tenants.

In February 1862 the company gave the Plaintiff the usual notice to treat; and in April 1862 he claimed £1901 compensation. The company required further part of the property, and gave a second notice to treat on the 8th of September 1862; and the Plaintiff, on the 29th, required them to take the whole property. The company caused the property to be valued, and on the 2d of October 1862 they paid the amount, £488, into Court, and gave the usual bond.

In these notices, there was some confusion as to the property required, and some mistake as to the parcels.

On the 29th of December 1862 the Plaintiff gave notice that he required the compensation to be determined by a jury, and on the 13th the company made an offer of £1050, which the Plaintiff accepted; but again, there was some confusion as to the property comprised therein. The warrant to summon a jury issued on the 17th of January 1863; and on the 21st of January 1863 the company's solicitor wrote to the Plaintiff's solicitor as follows:—

"In looking at the notice served by you on the 29th [291] of December last and the company's notice of the 3d of February 1862, I find it is possible that some misunderstanding may arise between us, as to the property covered by my offer of the 13th instant, as a small piece of Robson's yard appears to have been left out of the company's notice to treat, by accident. I would therefore wish you to understand

that my offer of £1050 was intended to include the whole of the wheel-wright's shop, yard and premises, held by Robson, and also the house and premises, No. 90 Redcross Street (92 on Railway City Terminus plan), now in the occupation of Mr. Odham.

"Perhaps you will be good enough to let me know if these were the premises you understood to be included in the claim forming part of the notice of the 29th day of December 1862, before I take steps to withdraw the warrant to summon a jury."

The only reply and explanation given by the Plaintiff's solicitors was, "We beg to refer you to our former letter to you on this matter." But this, in fact, contained no answer to the inquiry.

The proceeding by jury fell to the ground; and the company, who had previously entered under the right of the under-lessees, commenced, in August 1863, pulling down some of the buildings on the property, and forming their railway thereon.

The Plaintiff filed his bill on the 9th of September 1863, to restrain the company "from continuing on any part of the lands" until after they had come to an agreement with him for the purchase. "2. To restrain the company from proceeding with the work of the railway over the land."

[292] The Plaintiff insisted that the company had no right to enter on the property, and that their entry was in violation of the statute. That as to part of the property, no notice to treat had been given, no agreement to purchase entered into, and no bond given or deposit made as required by the statute. That the company, by pulling down the buildings and forming their railway, were committing irreparable waste and damage on the Plaintiff's property.

Mr. Selwyn and Mr. Joyce, for the Plaintiff.

Sir Hugh Cairns and Mr. Speed, for the company.

Nov. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion, in this case, that sufficient ground is not shewn to induce the Court to grant any injunction against the Defendants. [His Honor stated the facts of the case, observing that he considered the Plaintiff's claim made in April 1862 for £1901 ambiguous; that there was an uncertainty as to what was meant by "Robson's yard," and that the evidence did not clearly shew what was comprised in the surveyor's valuation.]

There was a considerable correspondence between the parties, and several letters passed between them, with a view to buying the property and endeavouring to settle it amicably instead of going before a jury. That failed, at least it did not come to any definite conclusion; but this took place, which appears to me extremely material. On the 21st of January 1863 the Defendants evidently supposed that they had made some mistake as to what was included in the Plaintiff's [293] claim, and they asked for an explanation on that subject. This letter, in the latter part of it, clearly applies for and requests an explanation of how much was included in the claim. [See *ante*, p. 291.] Not only is this observation very strong against the Plaintiff, for where a document is ambiguous, it must be construed most strictly against the person who makes the statement, but, in addition to that, here is a *bonâ fide* application by the Defendants, who say they may have made a mistake as to what was included in the claim. The only answer they get is, "Act on your own peril"—in substance it is that—"We will give you no information on the subject. You must judge for yourselves. There is the claim, make it out as well as you can."

If a company *bonâ fide* make a mistake as to what they have valued and taken possession of, is it competent for the landowner to come here and say, "You have acted in contravention of the provisions and the powers given you by the Act of Parliament, and in consequence of that, this Court must interpose with a strong hand and prevent you from taking any further steps in the matter?" I apprehend that is not the course which this Court would take. If the explanation requested had been fairly given by the Plaintiff on the 21st January 1863, then, if the company had been wrong, they would have had ample time to set the matter right before the bill was filed. But the Plaintiff did nothing of the sort; he simply allows the matter to go on, and, in point of fact, leaves the company to do it at their peril; and even in the month of August 1863, when it is quite clear that they have taken possession of this property and are using it for making their railway, the Plaintiff makes no application whatever to the Court on the subject, but rests until the 9th of September 1863, when he files his bill, but makes no application until the 2d of No-[294]-vember, he being

aware of what is taking place during the whole of that time. I apprehend the rule of the Court in all these matters is this:—The Legislature empowers the railway company to take the property on paying a reasonable sum for it; but they must not take it arbitrarily or without giving a fair and reasonable compensation to the owner of the property, and they are bound to put the matter in such a shape that a jury or arbitrator may be able to form an accurate estimate of its value. If a railway company, disregarding the provisions of the Act, thinks fit to take possession of property, to act with a high hand and set the owner in defiance, this Court interferes and restrains the company from taking any further step in the matter; but it only does so if the owner comes with reasonable diligence, at the proper time, and without doing unnecessary injury to the company. But if a company acting *bonâ fide* take possession of property by mistake, and it is merely a question of value between the company and the owner, then I apprehend the Court does not act in the same way, unless it is shewn there has been culpable negligence on the part of the company.

The object of the 84th section of the Act (8 & 9 Vict. c. 18) is this: it is obvious, on the one hand, that though time is a matter of great importance to the company, and facilities must be given to the company to take possession of the land as soon as possible, still that they are not to be allowed to do so without making or securing payment of the full value to the owner, they are not to set him at defiance: so, on the other hand, the landowner must not take advantage of the peculiar necessity which the company has for speedy occupation, and, by reason of some accidental slip, extort from the company a larger sum than the property is fairly worth.

[296] I see, in this case, no misconduct on the part of the company, and they having had possession from August till the 2d of November, and having completed or nearly completed their works on the spot, I think the Plaintiff has come too late to this Court to turn the company out of possession or to restrain them from taking any further steps in the matter.

In addition to that, I do not consider the granting an injunction which stops the works to be merely a question between the Plaintiff and the company; I think, as Lord Cottenham did in the case of *Rigby v. The Great Western Railway Company* (2 Phil. 44; 15 L. J. (Ch.) 266, and 19 L. J. (Ch.) 470), that the public have an interest in this matter. When, therefore, it appears that by granting this injunction I shall stop the opening of the railway without giving any benefit to the Plaintiff, except, perhaps, the means of enhancing the price to be paid to him, and that I shall be causing an inconvenience to the company and an injury to the public, I think that this is an additional element which ought to induce me to abstain from interfering in this matter.

Upon the whole, my opinion is, that the Plaintiff has failed in making out any case for the interference of the Court, and the motion must, therefore, be refused; but I will make the costs of it costs in the cause.

[296] MASON v. BROADBENT. Nov. 17, 18, 1863.

[S. C. 9 L. T. 565; 12 W. R. 118. See *Edmunds v. Waugh*, 1866, L. R. 1 Eq. 420; *In re Marshfield*, 1887, 34 Ch. D. 724. Discussed, *Dingle v. Coppen* [1899], 1 Ch. 726.]

After the sale of the estate by a trustee for a mortgagee, under a power of sale, it was held, in a suit by the mortgagor to recover the surplus money, that the mortgagee could not, under the 3 & 4 Will. 4, c. 27, retain more than six years' arrears of interest out of the purchase-money.

By a deed dated the 1st of June 1848, and made between Tomlinson of the first part, Broadbent of the second part, Phipson of the third part, and Blair and eleven others of the fourth part, reciting an existing mortgage from Tomlinson to Woodward for £1700, and another mortgage to Phipson for £800, and that Tomlinson was indebted to the parties of the fourth part in the sum of £1150; and reciting that it had been agreed that Tomlinson should execute a mortgage to Broadbent, "as a

trustee for securing the repayment of the sums" of £800 and £1150: it was witnessed that Tomlinson conveyed the property to Broadbent in fee, subject to a proviso for redemption, on payment on the 1st of July 1848 of the two sums of £800 and £1150 and interest. And it was "declared and agreed," that in case default should be made in payment of these two sums, "it should be lawful" for Broadbent to sell the property, "and out of the money which shall arise," Broadbent "shall, in the first place, pay the expenses attending the said sale or sales, and the execution of the trusts of these presents; and in the next place" shall pay the first and second mortgages, and, after payment thereof, pay to the parties of the fourth part the £1150 "and all interest thereon from the date thereof," and "lastly shall deliver the surplus, if any, unto" Tomlinson. There was a covenant by Tomlinson with the parties of the fourth part to pay on demand, and a subsequent declaration that all the moneys received by Broadbent from the sale should be applied, first, in payment of the costs of executing the powers and [297] trusts thereby reposed in him, and next in payment of Phipson's interest, and next in payment of the interest of the £1150, and that the surplus should be "accumulated towards payment of the principal sums intended to be thereby secured."

No interest whatever had ever been paid on the £1150, and in November 1862 the property was sold by Broadbent under the power of sale. After payment of the two mortgages prior to the £1150 there remained in his hands a balance of £1838, 5s. 4d. applicable to the payment of the £1150 and the arrears of interest.

The Plaintiff, who was entitled to the equity of redemption under Tomlinson, sought by this suit to recover the surplus, after payment of six years' interest only on the £1150. He insisted that the recovery of the other arrears had been barred by the statute 3 & 4 Will. 4, c. 27, s. 42. The Defendants claimed the principal sum of £1150, together with arrears from 1848 down to the completion of the purchase in February 1863, amounting in the whole to £1909.

Mr. Selwyn and Mr. Horsey, for the Plaintiff. The Defendant has no right to retain more than six years' arrears of interest, for the 3 & 4 Will. 4, c. 27, s. 42, is express that no arrears of interest on any money charged upon any land shall be recovered but within six years next after the same shall have become due, and the 34th section extinguishes the right as well as the remedy. Secondly, there is no express trust to bring the case within the 25th section, as in *Lewis v. Duncombe* (29 Beav. 175), but a mere power to sell, and the excep-[298]-tion introduced into the 25th section refers to adverse claims between trustee and *cestui que trust*, and not to those between two persons between whom the relation of trustee and *cestui que trust* does not exist. The trust must also be "express" and not constructive, and a mortgagee is not in any sense a trustee for a mortgagor. It is true that by the deed the Defendant is to pay all interest; this means all interest which by law can be recovered, and not that which is barred by the statute. The rights of a mortgagee are the same in a bill to foreclose as in a bill to redeem, and the claims of a mortgagee to interest cannot be greater against the produce of the estate than against the estate itself. The cases of *Young v. Lord Waterpark* (13 Sim. 204, and affirmed 15 L. J. (Ch.) 63); *Cox v. Dolman* (2 De G. M. & G. 592); *Du Vigier v. Lee* (see 2 Hare, 328); *Sinclair v. Jackson* (17 Beav. 405), were referred to.

Mr. Cole and Mr. Dryden, for Broadbent and, by consent, for the parties beneficially interested in the £1150. The statute 3 & 4 Will. 4, c. 27, in no way interferes with the Defendant's right to retain the fourteen years' arrears of interest out of the purchase-money of the estate. The 42d section says that no arrears of interest shall be recovered "by any distress, action or suit but within six years." This applies only to the recovery of the arrears as against the land itself by those specified means, but here the estate had been sold prior to the institution of the suit, and the relief sought is against money in the hands of the Defendant, to which this section of the statute has no application. It is a suit not of the mortgagee to recover the arrears as against the lands of the mortgagor, but a proceeding by the mortgagor to get [299] back moneys received by the mortgagee, and which he has a right to retain and apply in discharge of the existing arrears of interest. There is nothing in the statute which extinguishes the right of the mortgagor to any arrears of interest. What is extinguished by the 34th section is the right of the mortgagee "to the land, rent or

advowson," and it does not touch the arrears mentioned in the subsequent section (s. 42). It is clearly settled that a mortgagor may recover twenty years' arrears of interest under his covenant, by virtue of the 3 & 4 Will. 4, c. 42, s. 3, and therefore at the time of the sale, fourteen years' arrears were legally due to the mortgagees.

But, secondly, there is a distinct trust in this case. Broadbent has no beneficial interest, he is a mere trustee to secure the mortgages and to pay over the surplus to the mortgagor. There is no difference between a power and a trust for sale; but this is clear, that immediately upon the sale, Broadbent became an express trustee both for the mortgagor and the mortgagees. The case, therefore, is excepted from the operation of the 3 & 4 Will. 4, c. 27, by the 25th section, and it comes within the decision of *Lewis v. Duncombe* (29 Beav. 175). Again, the word "trust" is used in the deed, and the trust is to pay the costs attending "the execution of the trusts," and then the arrears from the date of the deed. At the time of the sale these arrears consisted of interest for fourteen years, no part of which had been extinguished or barred by any statute.

Mr. Selwyn, in reply. In *Lewis v. Duncombe*, the first express trust was for Duncombe. The Plaintiff could redeem on payment of six years' arrears, and this is a suit of the same nature.

[300] Nov. 18. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case arises upon the construction of the Statute of Limitations of the 3 & 4 of Will. 4, c. 27, s. 42, as to which it is quite settled, by all the authorities, that unless an express trust be created for the payment of interest, it is barred after the lapse of six years.

I am of opinion that there is no trust created. In fact, it is not pretended that any trust is or could have been created until the money which arose from the sale of the property got into the hands of the mortgagee, who had the power of sale.

I think it has been properly admitted, that with respect to the persons for whom Mr. Broadbent is a trustee, that is, for the eleven persons who advanced the money, that circumstance does not affect the question before me. There must be the relation of trustee and *cetui que trust* created between the mortgagor and the mortgagee in order to prevent the statute from applying, to prevent the operation of the bar created by the 47th section of the statute, or, in other words, to prevent the recovery of interest beyond six years.

In this case, unlike the cases of *Hunter v. Nockolds* (1 Mac. & G. 640), *Lewis v. Duncombe* (29 Beav. 75), and *Cox v. Dolman* (2 De G. M. & G. 592), there is no trust term and no trust estate created for the purpose of paying the interest which existed in those cases and is totally wanting in this. In those cases there was a trust term created to pay the interest, or there was a conveyance of the whole of the [301] property to trustees upon certain trusts, not for their own benefit but for certain trusts, one of which was to pay the interest. In all those cases, therefore, the exemption provided by the statute applies, but there is nothing of the sort here. Here, after the power of sale, it is directed that, out of the money to arise from such sale, Broadbent is to pay the costs and expenses, and out of the remainder he is to pay Phipson £800 with interest, and then to pay to the persons for whom Mr. Broadbent is trustee, a sum of £1150, "and all interest thereon from the date thereof." That means not a trust created by the mortgagor at that time, to the effect that all the interest which might have accrued due from the beginning should be paid to these persons, but only so much interest as was then actually due. Accordingly, if there is no more than six years' interest legally due, that is the limit of the amount which he is to pay.

It would be an anomalous state of things to say that the day before the power of sale was exercised, the sale could have been stopped, and that the mortgagor could have redeemed the property by payment of the principal and six years' interest, but that the day after the sale he is obliged to pay interest from the date of the deed for twelve, thirteen or fourteen years.

I am confirmed in this view because the deed subsequently directs the application of the money in payment of the interest on the mortgages, and the surplus, if any, is to be accumulated towards the payment of the principal. I am of opinion, therefore, that this case comes within the principle laid down by Lord Cottenham in the case

of *Hunter v. Nockolds* (1 Mac. & Gor. 640), and that it is [302] not a case in which more than six years' interest can be recovered.

I cannot give any costs. It is a case well worthy of trying, and as the *cestuis que trust* of Mr. Broadbent were not brought before the Court, he could not, without incurring considerable risk, give it up. It is not a case to give costs to the Defendant. I will make an order for payment of the £475, and let each party pay his own costs.

NOTE.—The case was appealed, but was compromised, by payment of less than one-third of the fund in dispute to the claimant.

[302] GLANVILLE v. GLANVILLE. Nov. 17, 18, 1863.

[S. C. 33 L. J. Ch. 317; 9 L. T. 470; 3 N. R. 58; 9 Jur. (N. S.) 1189; 12 W. R. 93.]

A testator having four nephews and a niece, children of his brother Richard, bequeathed some stock "in trust for his four nephews and niece, children of my brother Richard, namely, Robert, Richard, Francis and Margaret" (omitting Thomas the fourth nephew). Held, that Thomas could not be admitted to participate in the bequest.

The testator, by his will in 1862, bequeathed to two trustees the New £3 per cents. standing in his name on the following trusts:—

"In trust for my four nephews and niece, children of my said brother Richard, namely, Robert Glanville, Richard Glanville, Francis Glanville and Margaret Jane Glanville, to be equally divided [between] them; but if any or either of them, my said nephews and niece, shall die under the age of twenty-one, then as to the share or shares original of such of them so dying, in trust for the others of my said nephews and niece, and if more than one, in equal shares. And I direct my said trustees, during the minority of my said nephews and niece, to [303] apply the interest, dividends and annual produce of his or her share towards his or her respective maintenance or education until the end of the year 1872, when I direct a general division of the property to take place."

The testator died in the same year (1862).

There were five children only of the testator's brother, Richard Glanville, living at the testator's death, namely, the Plaintiff Robert Glanville, Richard Glanville, Francis Glanville, Margaret Jane Glanville and Thomas Glanville, all of whom were now living, and of whom Robert Glanville only had attained the age of twenty-one years. Margaret Jane was born in March 1850, and Thomas in February 1853. The question was, whether the youngest nephew, Thomas, whose name was omitted in the will, was entitled to any share of the New £3 per cents.

Mr. Lloyd, junior, for Robert, who had attained twenty-one, argued that the fund was divisible into fourths, and that the one-fourth of Robert was now payable, notwithstanding the direction to divide at the end of 1872; *Saunders v. Vautier* (4 Beav. 115); *In re Jacob's Will* (29 Beav. 402).

Mr. Athelstane Willcock, for Richard, Francis and Margaret. The nephew Thomas is excluded in this gift. In the cases of *Tomkins v. Tomkins* (cited 19 Ves. 126, note 30), *Garvey v. Hibbert* (19 Ves. 124) and *Scott v. Fenouillet* (1 Cox, 79) the members of the class were not named as they are here; it was therefore necessary to include all, for otherwise the gift would have been void for uncertainty. In [304] *Eddels v. Johnson* (1 Giff. 22) the gift was to four children, naming three, and it was therefore necessary either to admit the fourth or change the word "four" into "three;" but here the number is four, and the number of legatees named is the same. In *Humphreys v. Humphreys* (2 Cox, 184) the gift was to seven children, naming six, and the seventh was admitted; and the gift was to children, in which case the Court is more indulgent than in that of nephews.

Mr. T. B. Williams, for Thomas. The nephew Thomas is entitled to participate in this legacy. The testator knew of his existence, and his name has been accidentally omitted; *Harrison v. Harrison* (1 Russ. & Myl. 72); *Stebbing v. Walkey* (1 Cox,

250, and 2 Bro. C. C. 85); *Morrison v. Martin* (5 Hare, 507); and see *Yeats v. Yeats* (16 Beav. 170, and 172, n.). The words are "four nephews and my niece;" the word "four" applies to the nephews only, and can only be satisfied by including Thomas. Again, the division is postponed until the end of the year 1872, and the next elder child will attain twenty-one in March 1871, so that the division is not to take place until long after she attained her majority. This shews that her younger brother was intended to be included.

Mr. Bevir, for the executor.

THE MASTER OF THE ROLLS. I am afraid that I must treat this gift as excluding Thomas. It is in trust "for my four nephews and niece, children of my brother Richard." There were only four nephews and one niece, and, therefore, if the [305] testator had wished these five to take, he might have stopped here, but he goes on to specify them by name. It is not a very accurate mode of speaking, nor a convenient mode of expressing himself, but it is not ungrammatical. It is a gift to four persons who stand in the same relation to him, namely, the three nephews and the niece. But I am afraid it is not in the power of the Court to extend a gift, where a definite meaning can be given to the words as they stand.

I may possibly derive some light from the direction to apply the interest towards the maintenance during minority, for the youngest but one would attain twenty-one in March 1871, and it would therefore be unnecessary to postpone the division for a year and three quarters after that event. But, on the other hand, why should he direct the division to take place at the end of 1872, when Thomas would still be a minor?

Nov. 18. **THE MASTER OF THE ROLLS** [Sir John Romilly]. I have been very desirous to admit the fourth nephew to participate in this bequest; but I think that I have no power to do so. The word "four" is not confined to the nephews, but it includes the niece. The gift is, "for my four nephews and niece, children of my brother Richard, namely," Robert, Richard, Francis and Margaret. The word "four" is not necessarily confined to the nephews, but may comprise the niece. If the testator had merely said, "in trust for my four nephews and my niece," I should have come to a different conclusion, and it certainly seems strange that he should exclude a child of so tender an age, namely, a boy, who in 1862 was only ten years old.

[306] The testator directs the income to be applied towards their maintenance, "during the minority of my said nephews and niece," "until the end of the year 1872," when the division was to take place. But Thomas would not attain twenty-one until February 1873, and therefore the division would take place during his minority. The inference to be drawn from this clause is therefore unfavorable to Thomas.

I am of opinion, therefore, that he is not included in this gift.

[306] WILLIAMS v. WILLIAMS. *Nov. 10, 18, 1863.*

[S. C. 9 L. T. 566; 3 N. R. 100; 9 Jur. (N. S.) 1267; 12 W. R. 140.]

An heir is entitled to have the validity of a contested will tried upon an issue, or possibly, under the 25 & 26 Vict. c. 42, by a jury before the Court of Chancery. But when the heir has caused the difficulty, as when he has destroyed the will, or where it is traced into his possession and he does not produce it, he has no such right.

Robert Williams died in February 1861, seised in fee of two small farms in Anglesea. He left Ann Williams, his widow, the Defendant William Williams, his eldest son and heir at law, and Robert Williams, a younger son, surviving him.

The widow and younger son filed this bill, alleging that the deceased had made a will, by which he had devised the property to them; but that the will had been destroyed by the Defendant, the heir at law.

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It was proved by the two attesting witnesses that the will had been prepared and executed in the year 1858 or 1859. The grandson of the deceased proved that the will had been given to him by the deceased, and that when he went to reside with the Defendant at Liverpool he had delivered it first to him, and afterwards, at the Defendant's request, to the Defendant's wife. At the funeral, the Defendant being asked if he had brought [307] the will, "said he had not, because he had come from home in a hurry, but would send for it." He had also made inconsistent statements to different witnesses. To one he stated "that his wife had it," and to another he said, "he was afraid his wife had done something to it, as she had said she would put it in the fire," and he afterwards said, "that he had got into a bad temper and put it in the fire."

The Defendant and his wife denied ever having seen the will, and said they believed the deceased had died intestate. The Defendant had given notice to cross-examine the Plaintiff's witnesses, but had failed to advance the funds necessary to bring them up, so that they were not cross-examined.

The bill prayed the delivery of the will, and that it might be established, and in default of its delivery, for a declaration of the Plaintiffs' right to the farms, and for a conveyance to them by the Defendant.

Mr. Selwyn and Mr. Osborne Morgan, for the Plaintiffs, contended that the evidence established the existence of the will and its subsequent destruction, or the concealment of it by the heir at law, and that, therefore, he was not entitled, as of right, to an issue *devisavit vel non*; *Hampden v. Hampden* (3 Bro. P. C. 551); *Boyse v. Rosborough* (3 De G. M. & G. 817); 25 & 26 Vict. c. 42; *Hayne v. Hayne* (1 Dick. 18); *Woodroffe v. Wood* (1 Dick. 32). That the Plaintiffs were entitled to an immediate decree to hold the estate, and that the heir should convey it to them; *Dalston v. Coatsworth* (1 Peere Wms. 731).

Mr. Bristowe, for the Defendant, the heir at law, [308] contended that the Plaintiff's evidence was unsatisfactory, and that the heir at law was entitled to have the question tried before a jury under an issue *devisavit vel non*. He cited *Man v. Rickett* (7 Beav. 93); *Tucker v. Sanger* (1 McClell. 424). He argued that the heir, not having been able to cross-examine the witnesses, by reason of the expense, ought to have an opportunity of doing so.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiff is entitled to a decree. I concur in the observation that the heir has a right to have the question of the validity of a contested will tried by an issue *devisavit vel non*, or possibly now by a jury in this Court; but that is only in the case where the heir has not occasioned the necessity of a trial; for in all those cases in which the Court is of opinion that the heir himself has occasioned the difficulty, he is not entitled to insist on that right. Thus, where it is alleged that A. B. made a will, which cannot be found, the heir is entitled to put the claimant under the alleged will on strict proof of it, and to have a *voir dire* examination of the witnesses. But if the heir has himself destroyed the will, or if he has received the will and does not produce it, then it is different, for the presumption of law is, that where a person keeps back evidence, everything is to be taken most strongly against him. This rule of law is laid down in *Armory v. Delamirie* (1 Strange, 505), that where a person suppresses evidence "it ought to be most strongly presumed against him," and there are other cases, such as *Hampden v. Hampden* (3 Bro. P. C. 550), to the same effect.

[309] The question now is, whether the evidence before me is satisfactory. If it had not been, I should most probably have directed the question to be tried before myself with a jury, when the witnesses would be examined and cross-examined in open Court. If I were to direct an issue, it is clear that the whole of the estate would be wasted before the time for applying for a new trial arrived. Now with regard to the evidence, there is first the testimony of the two attesting witnesses, who prove the preparation and execution of the will and the purport and effect of it. If it rested there, the heir would be entitled to an issue. But Robert Jones, the grandson, says that the will was entrusted to him by the testator, and that he delivered it to the Defendant's wife. Besides this, there is the evidence of what the Defendant said at the funeral. I cannot disbelieve this evidence unless discredited on cross-examination, and as the Defendant has not thought fit to cross-examine these witnesses, I must

treat it as if he had declined to do so. On the other side, there is the simple denial of the Defendant and his wife.

I am of opinion that the will is traced to the custody of the Defendant or to that of his wife. Everything must be taken most strongly against him if he does not produce it. As he has not done so, I must conclude that the will was to the purport and effect stated by the two witnesses, and I must hold that the Defendant is not now entitled to an issue to determine whether there was a will.

I must make a decree to this effect:—The Court being of opinion that the testator made his will to the effect stated in the affidavits of the attesting witnesses, [310] direct the Defendant to deliver up possession of the farms and to execute a conveyance of them to the Plaintiffs. The Defendant must also account for the rents received by him and pay the costs of the suit.

[310] COWGILL v. RHODES. Nov. 23, 25, 1863.

[S. C. 9 L. T. 595; 10 Jur. (N. S.) 86; 12 W. R. 190.]

In a suit by the heir at law, contesting the validity of his ancestor's will, he is not entitled, as of right, to an issue *devisavit vel non*.

Upon a bill by the heir, impeaching a will, the Plaintiff did not cross-examine the Defendant's witnesses nor apply for a trial by jury. The Court refused an issue, and determined the validity of the will upon the evidence before it.

John Cowgill, who was entitled to a share of the estate of his father James Cowgill, died in 1856. He executed a will, dated the 25th March 1853, which was attested by three witnesses, and by which, after directing the payment of his debts, he gave his real and personal estate in trust for his widow and his five children.

The testator died in 1856, but his will had never been proved.

This bill was filed by the heir at law of John Cowgill for the administration of the estate of his grandfather James Cowgill, and to have the validity of the will of his father, which he contested, determined.

The Plaintiff alleged that on the 25th of March 1853, the date of the will, John Cowgill was suffering from *delirium tremens* occasioned by his intemperance; and that he was not, at the time when his signature to the will was procured, competent to understand the will or to make any testamentary disposition of his property. That a day or two before signing such will, John Cowgill had gone from his home to Bradford, where he was found in a state of intoxication, and suffering from *delirium tremens*, and that in this condition, he was [311] taken to the house of Isaac Rhodes, his brother-in-law, and that whilst there, shortly after his arrival, the will was prepared by, or by the direction of, Isaac Rhodes, and the signature of the testator thereto was procured.

The competency of the testator, at the time he executed the will, which was on a Good Friday, was proved by the person who prepared the will, and also by the three attesting witnesses and five others.

On the part of the heir at law a great number of witnesses (about sixteen) deposed to the general drunken habits of the testator, and to his suffering from *delirium tremens*, brought on by his excessive intemperance. Some of them proved that he had been brought home in a cab on the day following the execution of the will, suffering from *delirium tremens* and deranged in his mind, and that he remained unconscious for a fortnight afterwards.

The Plaintiff did not cross-examine the Defendant's witnesses, on account, as he deposed, of his inability to pay the expenses of bringing them up from Yorkshire to London.

Mr. Hobhouse and Mr. Kay, for the Plaintiff, contended, that the heir at law was entitled to an issue *devisavit vel non* to determine the validity of the will, and to an opportunity of cross-examining the Defendant's witnesses.

Mr. Griffith, for other parties.

Mr. Selwyn and Mr. W. Baker, for the Defendants, contended that the heir at

law was not entitled to an issue as of right. That the modern practice of determining legal questions in this Court with a jury, removed the necessity of restoring to a Court of law, and that the evidence in this case clearly proved the competency of the testator at the time he executed his will.

Mr. Hobhouse, in reply.

Nov. 25. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case relates to the validity of the will of John Cowgill. The bill is filed by his heir at law, and he now asks for an issue to ascertain whether the will is good or not, and also for the administration of the estate of James Cowgill, the father of John Cowgill.

It is by no means of course to direct an issue in such cases. I had occasion to consider this point recently in a case of *Williams v. Williams* (ante, p. 306), in which the authorities were cited:—*Dalston v. Coatsworth* (1 Peere Wms. 731); *Hampden v. Hampden* (3 Bro. P. C. 551); *Woodroffe v. Wood* (1 Dick. 32); *Hayne v. Hayne* (ib. 18). In these cases the Court refused to grant an issue at the instance of the heir at law, but in all of them the heir had obtained possession of the will and had destroyed it; and in *Williams v. Williams* I was of opinion that the will had been traced to the hands of the wife of the heir at law. The Court in all such cases acts *in odium spoliatoris*.

There is no spoliation in this case, but I think the Court can exercise a discretion, and that, as a matter of [313] right, the heir at law is not entitled to an issue, particularly where he himself comes into equity. It is also to be observed that by the modern practice the heir may now have the witnesses examined in open Court, and may apply for a jury. Besides which a statute has been passed requiring Courts of Equity to determine legal questions. (25 & 26 Vict. c. 42.) If the heir does not adopt that course, the Court must look at the evidence and see if a sufficient case is made out to entitle him to a further investigation.

Here there is no doubt that the will was made; but the Plaintiff says, that at the time it was executed, the testator was of unsound mind arising from *delirium tremens*. This is a question to be determined on the evidence: one of the first things the Court does in all these cases is, to examine the will itself, to see if there be any indication of insanity upon the face of it. Here the testator gives all his property in trust to pay his debts, and subject thereto he divides the property between his wife and children; no one else takes any interest in it. This shews no mark of insanity. The will was made on the 25th of March, on a Good Friday, and it is regularly attested by three witnesses. [His Honor examined the evidence in favor of the will.] The competency of the testator is proved by the person who drew the will, by the three attesting witnesses and by four others.

In this state of the case, the evidence of the Plaintiff to rebut this testimony must be overpowering. [His Honor examined the Plaintiff's evidence and proceeded:—] The evidence against it amounts to this—that the testator was addicted to general habits of intemperance, and that on the Saturday following the [314] Friday on which he executed his will at Bradford he was brought home to Cullinworth in a cab, ill of *delirium tremens* and not conscious. I am of opinion that this is quite consistent with the sanity of the testator on the previous day, Friday the 25th of March 1853.

The Plaintiff then says that he ought to have an opportunity of cross-examining the witnesses; but he has had it. He then says, "I was too poor to avail myself of it, and I ought to have an issue, when the witnesses will be produced at the expense of the Defendants;" but I cannot listen to this argument.

I must refuse an issue, and make a decree accordingly; and the Plaintiff must pay the costs of so much of the suit as contests the will of the testator John Cowgill.

[314] COOD v. COOD. Nov. 4, 5, Dec. 3, 1863.

[S. C. 33 L. J. Ch. 273; 3 N. R. 275; 9 Jur. (N. S.) 1335.]

A. was the administrator of an estate, to one-third of which each of his brothers, C. and D., was entitled. In 1833 A. wrote to B. and C., offering, in order to prevent the necessity of accounts and the probability of dispute, to pay each £1000 for his

share. B. accepted the offer, and C. wrote to say that whatever B. determined "would meet with his approbation." A. and B. acted on the contract as complete, and C. never repudiated it or asked for any accounts or explanations. Upon the death of B., seventeen years afterwards, C. insisted that there was no contract binding on him, and he claimed one-third of the estate. Held, that C. had acquiesced and was bound by the contract.

A contract between domiciled Englishmen, relating to real estate in a foreign country, is to be determined by the *lex loci*, but a contract between an Englishman domiciled and resident in England and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed and construed by the rules of English law.

In 1825 Mr. George Cood, a merchant resident in South America, died there intestate. His next of kin were his mother and his three brothers, Benson and Thomas, who were resident in England, and Henry, who was in South America.

The intestate had real and personal estate in South [315] America, and on his death, his brother Henry, as his administrator and as the agent of his mother and two brothers, took possession of and managed the estate, but disputes with the testator's surviving partners and others prevented his realizing the assets.

In 1831 the intestate's mother died, having bequeathed her property between her three surviving sons, and Mr. Nicholson was her executor. Soon after this, in February 1832, Thomas wrote to Henry proposing to sell him his one-third share of George's estate for £1000, but the time he limited for completion elapsed before Henry received the proposal, and nothing came of it.

On the 30th of January 1833 Henry wrote from South America to Thomas in England, a letter, which was received in April 1833, in which, after referring to Thomas's offer, he said:—"I should have no objection to purchasing your and my brother's interest, could we agree between us as to terms." This, he said, would prevent the necessity of accounts, &c., and the possibility of disputes.

On the 31st March 1833 Henry wrote a letter to Benson also, which contained this passage:—"I requested him [Thomas] to lay the letter before you, as regards a proposal made by him to me, and which I will, for various reasons, accept, if agreeable also to yourself, and which, after you have well considered, you will make up your mind upon. I wrote to Thomas 30th January last, in answer to his private letter and offer, and I requested him to shew you or give you extract of so much as regards his offer."

Benson, on receiving the last-mentioned letter, gave [316] to Mr. Ross (Henry's agent in England) a memorandum, by which Benson, in consideration of Henry's causing to be paid to him (Benson) the sum of £1100, undertook that he would relinquish all his claims upon the estate of George, and on the 29th of June 1833 Benson wrote to Henry stating that he had so done.

About the same time, on the 13th of July 1833, Thomas wrote to Henry as follows:—"I handed your letters, as directed by you, to Ben, and he will act on them. *Whatever he determines will meet my approval*, so high is my opinion of him in all matters of business."

Afterwards Benson, in a letter to Henry, dated the 31st of August 1833, reiterated his acceptance. He said:—"Referring to my last, you will observe that I have given to Mr. Ross a conditional memorandum of compounding for all my claims, and your releasing me from any liabilities attaching to me, now or hereafter on George Cood's estate, for £1100 and interest from 1st July last." He went on to express his hope that this would facilitate Henry's settlement with George's late partners through Thomas "acquiescing with him in a similar way."

Henry's acceptance of these proposals was contained in two letters written to his brothers Thomas and Benson, dated the 31st of May 1834. In the one written by Henry to Thomas he said: "You only say in yours, as regards my offer, that you have passed my letter to Ben, and whatever he determines on will meet, you say, your approval. He does agree individually, but not jointly, with yourself, and which was, if you will refer to mine of the 18th and 30th January 1833, my positive offer, as without both your approvals and [317] regular deed of sale to me I cannot make out deeds of sale to others."

Henry's second letter of the same date, 31st of May 1834, written to Benson, was as follows:—"I should have wished you would have had a clear understanding with Tom regarding my proposal, and which you have accepted." . . . "Tom, in referring to my proposal, only says, 'I handed your letters to Ben and he will act on them; whatever he determines on will meet my approval, so high is my opinion of him in all matters of business; in future address to him.' Now I presume he agrees with you in conformity to my proposal contained in mine to him of the 30th January 1833, and which I understand him he handed to you."

The subsequent letters of Henry and Benson treated the arrangement as subsisting. On the part of Thomas there appeared no repudiation of the contract until 1850, and he, in the interval, required no account of George's estate, nor any explanation respecting it; but, so far as appeared, Henry was left in undisturbed possession of it.

In 1849 Benson died; and in the next year, 1850, Thomas and the representatives of Benson sent an agent to Valparaiso, who claimed two-thirds of the estate of George, and commenced proceedings in the Courts of law there against Henry to recover these shares.

The Court in Valparaiso determined that the correspondence constituted a contract binding on Benson, but not on Thomas, and made a decree in conformity, decreasing an account of one-third of George's estate in favor of Thomas, but refusing it as regarded Benson's representatives. This decree was appealed from, but [318] was affirmed by the Superior Court in 1858. These proceedings and decrees were, however, very informally proved in this cause, and were objected to and received *de bene esse*.

Henry Cood returned to England in 1859, and in 1862 he instituted this suit against Thomas Cood, praying an injunction to restrain the proceedings of the Defendant in the Chilian Courts, for a declaration that the Defendant was a trustee of George's estate for the Plaintiff, and for the specific performance of the agreement.

The cause now came on for hearing.

Mr. Selwyn and Mr. De Gex, for the Plaintiffs, argued that this Court had full jurisdiction to determine the questions between the parties; *Penn v. Lord Baltimore* (1 Ves. sen. 444); *Norris v. Chambres* (29 Beav. 246). And, secondly, that there existed a final and valid agreement, in the nature of a family arrangement, between Henry and Thomas, or one in which Thomas had acquiesced in, that it had been acted on ever since, and that this Court would enforce it; *Neale v. Neale* (1 Keen, 672); *Persse v. Persse* (7 Cl. & Fin. 279).

Mr. Baggallay and Mr. Fooks, for the Defendant, argued that Thomas had never finally agreed to sell his interest in George's estate. That the proper *forum* for deciding the question was in South America, and that the decision of the Court of Valparaiso, affirmed upon appeal, was conclusive as to the rights of the parties to the present suit and binding on the Plaintiff.

Mr. Selwyn, in reply.

[319] *Dec. 3.* THE MASTER OF THE ROLLS [Sir John Romilly]. The questions which arise in this case are three: First, whether Henry Cood bought the share and interest of his brother Thomas in the estate of George Cood, who died intestate in Chili: secondly, whether this question has been decided by the Court of Chili: thirdly, if it has so, whether this Court, if it came to a contrary conclusion, could disturb the decision of the foreign Court.

I think it most convenient to consider, in the first place, the rights of the various parties as between themselves, without reference to any proceedings which have taken place in the Court of Chili, and I will then afterwards consider how the matter is affected by the decision of that Court. [His Honor here reviewed the facts of the case, and proceeded thus:—] Everything turns upon the meaning and the construction of the letter of the 13th of July 1833, and it is essential to consider the effect of it, as an answer to the letters of Henry. My opinion is, that the letter of Thomas means this:—"whatever Benson does, I will do." It must be taken most strongly against the writer, and if it was so understood by Henry, and if it was so stated to have been understood by him, I should treat it as understood by Benson in the same way, unless there be found some subsequent repudiation of that meaning, made by Benson.

But what does occur is this:—Benson writes to Henry on the 31st August 1833, in which letter, upon the assumption of this being the arrangement between them, he makes out certain accounts and statements of them, and he expresses himself in a tone which assumes that the arrangement is acceded to.

Then, how was this received by Henry? It is received simply as an acceptance of his proposal; and this appears by his two letters of the 31st May 1834, [320] one of which was written to Thomas and the other to Benson.

In answer to these letters, there appears no sign of any repudiation by Thomas. On the 24th October 1834 Henry again writes to Benson a letter, in which he treats the contract as a subsisting one; but admits that, owing to the delay in sending the money, they may treat the matter as still open, but nothing of the sort appears: neither Benson nor Thomas adopted the suggestion. There is no refusal or modification proceeding from them, and no explanation is required. All the letters are upon the same footing, viz., of treating the arrangement as if it were still a subsisting and binding arrangement. On the 30th January 1836 Benson again writes to Henry a letter, in which he treats the arrangement as one that is subsisting, and they all treat the matter as a concluded arrangement. No accounts are asked of George's estate, and no statement relative thereto is required. The principal object of Henry, as stated in his letter, was to avoid the necessity of rendering the accounts of that estate, which he said would be a very voluminous and very troublesome affair, and after this, not a word is said about any accounts. Henry might well after this have disposed of and destroyed all the vouchers which would have been necessary to him in making them out.

So the matter goes on till the year 1849, when Benson dies, and then, in 1850, seventeen years after the transaction is over, and as soon as the principal actor in it is dead, Thomas sends out an attorney to Valparaiso to demand, on behalf of himself and the representatives of Benson, two-thirds of the real property of George, who had died twenty-five years before. Now I pass over all the time which has elapsed since 1850, but I must say, that if Thomas had, in 1850, filed a bill in this Court for an [321] account of the estate of George, I should have considered that he was bound by the circumstances I have detailed, and that he was estopped by the time which he had allowed to elapse. No doubt Henry is liable to account for the £1000, if that has not been paid, and I think that no time will have barred the right to demand it, because the relation between them as regards that sum was that of trustee and *cestui que trust*. Accordingly, if the matter had been brought before me in 1850, and I had had to judge of the matter solely on principles of English equity between the parties, and confined to those rules which are in force in this country, I should simply have confined all future proceedings between the two brothers to an account of what had been paid and what remained due on the footing of Henry's proposal, accepted by Benson, and, in my opinion, acquiesced in by Thomas.

Then this brings me to the consideration of the second question. It appears that proceedings have taken place in the Court in Chili, at the instance of Thomas and the representatives of Benson, which create some additional complication in the matter, and which form the principal grounds of the defence of the Defendants. Thomas and the representatives of Benson claimed in Valparaiso, in 1850, two-thirds of George Cood's estate from Henry. The Court there has determined that the correspondence which I have read constitutes an agreement which bound Benson, but which did not bind Thomas, and have accordingly decreed an account of one-third of the estate of George in favor of Thomas, and refused it in favor of Benson's estate. If I were regarding this matter simply as a question of English law, I should find it difficult to come to the conclusion that one entire contract between three persons could be good in part and bad as to the rest; that is, that it [322] could bind Benson and not bind Thomas. The leading motive of Henry, as he states in the letters I have read and in the other parts of the correspondence, for entering into the contract, was to avoid rendering harassing and voluminous accounts; but if Thomas is not bound by this arrangement, then all these accounts must be gone into, and unless the correspondence discloses a distinct and separate agreement to have been made by Henry with each brother, it is difficult to consider, on the principles of English law, how we could come to the same conclusion as that of the Chili Courts.

But then arises the third question: the law of which country is it that governs the transaction and the actors in it? The right to land in Chili must, no doubt, be determined by the *lex loci*, but a contract entered into between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chili, but not having acquired a foreign domicile, must, I think, be governed and construed by the rules of English law. If so governed, I am of opinion that the letter of Thomas of 1833 must be construed to mean that he acquiesced in and consented to be bound by what Benson did in the matter.

I concur with the Chilian Courts in thinking that Benson did bind himself to Henry. And I am also of opinion that though he was not the agent of Thomas to bind Thomas, yet that when Thomas told Henry that he would be bound by what Benson did, which, if I am right, is the proper construction of his letter, and when Henry so treated it, and acted accordingly, and informed Thomas he had so acted, and when Thomas, knowing all this, took no step to undeceive Henry until after seventeen years had elapsed, and, above all, till after the death of Benson, then, I say, that admitting [323] that there was not such a contract originally as this Court would have specifically enforced at that time and before the arrangement had been acted upon, yet that now after this lapse of time it is not open to Thomas to question the propriety of the course that Henry has taken, and now to ask for these accounts.

I am, therefore, of opinion that the Plaintiffs are entitled, substantially, to the relief they ask. I shall not direct any agreement to be specifically performed, but I shall declare that, having regard to the correspondence between the Plaintiff Henry Cood and the Defendant Thomas Cood and the deceased brother Benson Cood, from the beginning of the year 1833 till the month of June 1834, set forth in the pleadings in this cause, and having regard also to the lapse of time which has occurred since the close of such correspondence until the death of Benson Cood, and having regard also to the fact that, since that time, the Defendant Thomas took no step to repudiate or question the applicability to him of the arrangement existing between the Plaintiff Henry Cood and his deceased brother Benson Cood, this Court is of opinion that the Defendant Thomas Cood is not now entitled to any account of the estate or effects of George Cood received by, or by the order or for the use of, the Plaintiff Henry Cood, or of any part thereof. I shall, thereupon, direct the relief in the terms contained in the second and third paragraphs of the prayer of the bill, omitting the specific performance. But this decree must be without prejudice to any steps which the Defendant Thomas may take to require Henry Cood to account for what, if anything, may be due to him in respect of the £1000 agreed to be paid by Henry in respect of his share of George Cood's estate.

[324] MONTAGU v. THE EARL OF SANDWICH. Dec. 8, 1863.

[S. C. 9 L. T. 632; 10 Jur. (N. S.) 61; 3 N. R. 186; 12 W. R. 236.]

General residue of personal estate held to pass under the words "residue of money," the will commencing with a general bequest of everything "in trust for the following purposes," and the gift of money being preceded by bequests of specific chattels.

The Countess Dowager of Sandwich, being possessed of considerable personal estate, made her will dated in 1861, which (so far as is material) was as follows:—

"I appoint my son John William Earl of Sandwich and the Right Honorable Henry Thomas Corry my executors; to them I leave everything of which I die possessed, in trust for the following purposes. She then bequeathed some pecuniary legacies and a house in Grosvenor Square as it stood, with plate, linen, &c., and after several specific bequests of jewellery and other things, the will continued thus:—"Should any money remain after paying these bequests, I leave £50 to each of my two footmen, William Goddard and James Weaver, should they be in my service at the time of my death. *The residue of money (if any) I leave to my grandson, Oliver Montagu, he will want it most; Hinchk. must inherit my son's love, for Victor will*

provide for him. I leave my cabinet and its contents to my dear grandson Hinchbrook as a souvenir. I leave £20 a year to be given to whoever takes care of my boarhound Juba while he lives."

The testatrix died in 1862.

The Plaintiff, Oliver Montagu, insisted that he was the universal and general residuary legatee of the testatrix, and, as such, entitled to all her personal estate not specifically bequeathed, after payment of her debts, funeral and testamentary expenses, and the pecuniary [325] legacies bequeathed by her will out of her general personal estate. But the Defendant, the sole next of kin, alleged that the Plaintiff was only entitled to the residue of the money of the testatrix.

Mr. Baggallay and Mr. Schomberg, for the Plaintiff, Oliver Montagu, claimed the residuary personal estate. They cited *Rogers v. Thomas* (2 Keen, 8); *Dowson v. Gaskoin* (2 Keen, 14).

Mr. Selwyn and Mr. Salmon, for the Earl of Sandwich, the sole next of kin, argued that, in this case, the word "money" was to be construed strictly in its correct and limited sense, and that it did not include the testatrix's property generally. They cited *Lowe v. Thomas* (5 De G. M. & G. 315); *Chapman v. Reynolds* (28 Beav. 221); *Cowling v. Cowling* (26 Beav. 449); *Gosden v. Dotterill* (1 Myl. & K. 56).

Mr. Southgate and Mr. Earle, for legatees.

THE MASTER OF THE ROLLS [Sir John Romilly]. The rule of construction is that the word "money" does not extend beyond what is literally "money," unless the context requires it; and that the burden of proof lies on those who contend the contrary to shew that its signification is to be extended. But I think there are circumstances in this case which shew that "money" includes the whole of the property of the testatrix, and the cases cited confirm that view. In the first place, the testatrix professes to "leave everything of which she dies possessed in trust for the following purposes." That is an express desire, on her part, to dispose of the whole of her property for the purposes afterwards mentioned, and if she has not disposed of the whole [326] afterwards, it was clearly by inadvertence. The strong and conclusive thing is this, which is well put by Lord Justice Turner (5 De G. M. & G. 317):—"If a person gives the whole of the residue of his money to A. B., and he afterwards gives specific chattels, it is clear that they are not to be treated as money, and therefore the word "money" is not to be treated as the whole of the residuary estate. But if a testator bequeaths specific chattels first, and the residue of his money afterwards, it is the converse. If Lady Sandwich had begun by leaving £1000 to Lord Sandwich, and had then said, "all the rest of my money I leave to the Plaintiff," and had then gone on to give her diamond wreath and her jewellery, it would be a strong proof that she did not mean these articles to be treated as money; but so far from that, she bequeaths the legacies and diamonds and various things to other persons, and afterwards she says, "should any money remain after paying these bequests" (i.e., the specific legacies) "the residue of money (if any) I leave to my grandson Oliver Montagu." I do not find that she afterwards makes any specific bequest.

[Mr. Selwyn. There is the cabinet.]

Even the gift of the cabinet, at that place in the will, cannot control the effect of her treating all the previous specific gifts as money.

I am of opinion that I cannot, after the testatrix has treated these chattels as money, and after she has given legacies to the two footmen, control the general effect of the will, which expresses a desire of disposing of everything she had, and read the will so as to create an intestacy of the residue. I am of opinion that the Plaintiff is the residuary legatee, and that he takes the North-Western Railway stock.

[327] FOX v. SCARD. Dec. 21, 1863.

A surgeon at W., upon taking an assistant, required him to give his bond, in a penalty, not to practice at W. Afterwards he discharged the assistant, who thereupon commenced practice at W. The surgeon then filed a bill to restrain him, to which the Defendant demurred. The Court overruled the demurrer, holding that, notwithstanding the pecuniary penalty, the Plaintiff was entitled to a remedy in equity.

This case came on upon general demurrer to the Plaintiff's bill, which stated as follows:—

In June 1862 the Plaintiff, a surgeon at Weymouth, agreed to take the Defendant, a surgeon, as his assistant at a salary. The bill stated that the Defendant, at the same time, agreed not to carry on the business of surgeon at Weymouth, or within twelve miles thereof, without the Plaintiff's consent, during the Plaintiff's life, or within ten years after his decease, and to execute a bond for securing the due performance of the agreement. This was not in writing.

The Defendant at the same time executed a bond to the Plaintiff, in the penal sum of £1000, conditioned not to practice at Weymouth, &c., as above stated.

The Plaintiff in July 1863 discharged the Defendant from his service, and the Defendant having continued to practice on his own account at Weymouth, the Plaintiff instituted this suit, praying an injunction to restrain the Defendant from practicing at Weymouth, &c.

The bill offered to waive the penalties of the bond.

To this bill the Defendant demurred for want of equity.

Mr. John Mee Mathew, in support of the demurrer, argued that this was a case for an action at law on the [328] bond, and not for a suit in equity, and that the parties had, by their contract, agreed that the remedy upon the breach of the bond should be by pecuniary damages only.

Mr. Southgate and Mr. Marten, for the Plaintiff, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot accede to the Defendant's view of this case, for I take the principle to be this:—Where a person enters into an agreement not to do a particular act and gives his bond to another to secure it, the latter has a right at law and equity, and can obtain relief in either, but not in both Courts. If he proceeds at law on the bond and recovers damages, and afterwards comes into equity, and states that fact in his bill, a demurrer will lie because he has chosen the jurisdiction and the remedy he will have. Accordingly the practice has been, to adopt the rule very strictly in equity. (*Sainter v. Fergusson*, 1 Mac. & Gor. 286.)

It sometimes happens that this legal right is in doubt, and, in such cases, the Court used formerly to direct an action to try the right. This is now prevented by Mr. Rolt's Act, which compels the Court to determine the legal right. But the practice under the old system is a good illustration. When the Court gave liberty to the Plaintiff to try his right in an action, if he succeeded and only took nominal damages, he obtained his equitable relief; but if he sought and obtained substantial damages, the Court, when he came back, dismissed his bill, saying, "you have already had your remedy at law." But the Plaintiff has a right to say, "I will not have [329] money or take compensation in damages, but I will have the strict performance of that which is secured to me by the bond," which in this case is in the nature of a covenant by the Defendant that he will not practice at Weymouth.

The bill contains a paragraph waiving the penalties of the bond, but, without that, if, after an injunction had been granted against the Defendant, the Plaintiff should bring an action for damages, the Defendant might come here and have the injunction dissolved.

The Defendant has, for valuable consideration, entered into an engagement not to practice at Weymouth, which he is bound to perform, and if the facts alleged be

true, the Plaintiff is entitled to relief in this Court. The demurrer must, therefore, be overruled.

NOTE.—See *Coles v. Sims*, 1 Kay, 56; *French v. Macale*, 2 Drew. & W. 269; *Galsworthy v. Strutt*, 17 L. J. (Exch.) 226; *Shackle v. Baker*, 14 Ves. 468; *Woodward v. Gyles*, 2 Vern. 119, and *Howard v. Woodward*, V.-C. Wood, 8 Nov. 1864.

[330] CHAPLIN v. YOUNG (No. 1). Dec. 9, 10, 1863; Jan. 11, 1864.

[S. C. 11 L. T. 10; 3 N. R. 449.]

As to the duties and obligations of inspectors and managers under a creditors' deed. Independently of any question of fraud or misconduct, the liability of inspectors and managers under a creditors' deed is confined to accounting for all moneys received by them, or by their order or for their use.

If they have the exclusive management and control of the whole establishment, and if all the subordinate managers, workmen and servants are appointed by them and are removable at their pleasure, in that case money paid to their cashier or to any person in the establishment, in the ordinary course of business, would be money paid for their use, for which they would be accountable.

But if, by the arrangement, the trader be continued in the management of his business and cannot be removed by the inspectors, then the inspectors would only be liable for the moneys actually paid to them or to their agent. The trader could not be considered their agent, and they would not be liable for moneys received and misapplied by them.

A mortgagee in possession of a business is accountable not only for what he has received, but for what he might or ought to have received.

Upon taking the accounts directed by the decree, a question arose as to the principle on which two gentlemen, named Low and Clayton, who were inspectors under a creditors' deed, ought to be charged. The question arose under the following circumstances:—

Mr. Murdo Young was the originator and editor of the *Sun* newspaper, which, in its inception, was a very flourishing and lucrative concern. Prior to February 1848 Mr. M. Young became largely indebted to Mr. Harmer (since deceased), and to secure this debt Mr. Young mortgaged the concern (subject to a prior mortgage) to Mr. Harmer. In February 1848 Mr. Harmer entered into possession of the concern in his character of mortgagee. He caused his name to be duly entered as the publisher, and he engaged Mr. Young to conduct and edit the newspaper under him. Besides these two mortgage debts, Mr. Young was indebted to other unsecured creditors to an amount exceeding £16,000.

In this state of things, a meeting of his creditors was held in May 1848, when the terms of the future management of the concern was agreed upon, and it was arranged that Messrs. Low and Clayton should be appointed inspectors to conduct and manage the concern.

A deed was accordingly prepared and executed to carry this arrangement into effect. It was dated the 31st of July 1848, and was made between the first mortgagees of the first part, Mr. Harmer (the mortgagee in possession) of the second part, Mr. Young of the third part, Mr. Low and Mr. Clayton (who were described as inspectors for the purposes thereafter mentioned) of the fourth part, and the scheduled creditors of the fifth part. It recited that £1976 was due to the first mortgagees; it recited the mortgage to Mr. Harmer, under which he had, on the 6th of January 1848, taken possession of the property comprised in his mortgage; it then recited an agreement between Harmer and Young of the 21st of February 1848, by which Young was to be the printer, publisher and editor of the paper at the yearly salary of £520 or £10 per week, and that he was so to continue for one year at least, but that he "was not to have any control over, or in any manner interfere with, the receipts or expenditure in respect of the newspaper;" it recited that Young had so acted since the 11th of

February 1848, and that Harmer had received the net profits of the newspaper, and that £6397 was due on his mortgage, and £1090 on the balance of receipts and payments. The deed then recited that Mr. Young was indebted to the scheduled creditors, the meeting of the creditors, and that "it had been agreed between the parties thereto, that until the mortgagees should have been paid the said newspaper should be continued to be carried on by Harmer" "with the same conditions as to the printing, publishing and editing thereof by Young and as to salary" as were named in the agreement of the 21st of February last, and that the moneys [332] to be received by him should be applied in manner thereafter mentioned, and that from and after full payment of the mortgages, and until the amount due to the scheduled creditors should have been repaid Young "should be permitted to manage and conduct, and to edit, print and publish the said newspaper under the like conditions as aforesaid, *and under the inspection of Low and Clayton*, under and subject to the stipulations thereafter contained, and that after such payment the newspaper should become and be the property of Young."

The operative part then proceeded to provide for three distinct cases: first, until the first and second mortgagees had been paid off, until which event Mr. Harmer was to remain in possession and carry on the concern as he had been up to that time; secondly, after the first mortgagees and Mr. Harmer had been paid off (which had never happened), then the inspectors Messrs. Low and Clayton were to be put into possession and to manage the concern for the benefit of the creditors; and, thirdly (which was the case which had occurred), in case Harmer thought fit to relinquish possession before he had been paid off, and to allow the inspectors to take possession, and to manage the concern as if he had been paid off. In the first event, Mr. Harmer was to reimburse himself a sum of £1090 and interest thereon, and to retain £1400 per annum out of the profits, which was to be divided in certain proportions between him and the first mortgagees.

The indenture then witnessed that the parties of the scheduled creditors did "give and grant unto Young full, free and absolute liberty and licence," after full payment of the two mortgages, "to carry on, conduct and manage all and every his affairs and concerns," [333] subject to the approbation and control of Low and Clayton, and thenceforth until the whole of the scheduled debts had been fully paid and satisfied. The deed then contained a covenant by the parties of the scheduled creditors not to sue or molest Young, and a covenant by Young with Low and Clayton to make and deliver to them, within a month, an exact account of his debts and property; and further that, after the two mortgages had been paid off, Young "would, during all the period aforesaid, manage and transact the affairs and business of and relating to the newspaper for the benefit of" his scheduled creditors, and would "observe, perform, fulfil and execute, from time to time, all the advice, instructions, orders and directions of the inspectors," and which they "were thereby authorized and empowered, from time to time, to make and give for that purpose, touching the conducting of the newspaper and the trade of Young." Young further covenanted that he would not dispose of any part of his property, that he would keep proper books of account and permit the inspectors to examine them, and that, at the beginning of every week, he would deliver a statement of the receipts and payments of the previous weeks, and, if necessary, verify it by a statutory declaration. The deed then proceeded to provide that, after payment of the two mortgages, the inspectors, and also Young with their approval, might "appoint persons to assist Young in the management of the newspaper," &c., and "to discharge and dismiss any person or persons, *other than* Young, employed or to be employed on or respecting the newspaper, and as well for the inspectors as Young to order, direct and assent to all and every or any such Acts, matters and things whatsoever relative to the matters or things aforesaid, as the inspectors, in their discretion, or the said Mr. Young, with their consent and approval, should at any time and from time to time [334] think fit and expedient; provided, nevertheless, that this present provision *should not in any manner extend to authorize the dismissal of the Defendant Mr. Young*, nor to abridge his power or authority as printer, publisher and editor of the newspaper, over all persons employed under him." After this, Young covenanted to pay all moneys which he should receive or get in as or for the produce of the newspaper, or which should be or become

payable in respect thereof, into the inspectors' bankers, or permit them to receive the same, "In order that such moneys might be applied, as occasion might require, in and towards payment of such stock as should be purchased for carrying on the said trade or business, for the benefit thereof, and all other incidental expenses attending the said business or other purposes therein mentioned." The deed then provided—first, that the inspectors should, out of the moneys, pay the expenses of the deed; secondly, the expenses of carrying on the concern; and thirdly, to pay Mr. Young £10 per week, and then pay the schedule creditors rateably.

Harmer covenanted with the inspectors that he would yearly pay them all the net gains and profits which he should receive beyond the above £1090 and the annual sum of £1400, or that he would suffer the inspectors to manage and conduct the said newspaper for and on behalf of him, in which case Harmer was not to be answerable for the acts of the inspectors, and that the inspectors should, out of the profits, in the first place, pay over to the first mortgagees and Harmer £1400 a year, to be divided as therein mentioned. It then provided that Harmer might carry on and conduct the newspaper as mortgagee in possession, or, at or for any time, permit the same to be carried on by the inspectors. The deed contained a proviso for reducing Young's [335] salary proportionably if the newspaper should not produce sufficient profit to pay the sum of £1400 a year.

After the execution of this deed the concern was carried on until October 1848, by Harmer, when he retired from the management and possession of the concern, and it was then continued by Young under the inspectorship of Low and Clayton.

Harmer died in 1853. This suit was instituted in March 1862, by his executor, against Young, Low, Clayton and others, for an account of what Low and Clayton had received, "or which, without their wilful neglect or default, might have been received by them, and of all payments properly made, and for an account of the receipts by Young, and that Low and Clayton might make good what should be found due upon taking these accounts." It prayed also an injunction and receiver against Young and the sale of the copyright and goodwill of the paper.

A decree was made by the Lord Chancellor in July 1862, by which an account was directed to be taken of all moneys received by Low and Clayton, "or by any person by their or either of their order, or for their or either of their use, for or in respect of the *Sun* newspaper, under the provisions of the indenture of the 31st of July 1848, and of the application of such moneys, if any, under the provisions of the said indenture."

In taking these accounts, it appeared that Young had, during his management, received in the whole £164,746, 5s. 2d., and that he had paid into the account of the inspectors at their bankers the sum of £158,206, and the Plaintiff sought to charge the inspectors with the difference (£6540), on the ground that it had been [336] received by Young as their agent, "by their order or for their use." The matter was adjourned into Court.

THE ATTORNEY-GENERAL (Sir R. Palmer) and Mr. G. L. Russell, for the Plaintiff, and Mr. Selwyn and Mr. Cecil Russell, for the general creditors.

Sir Hugh Cairns, Mr. Baggallay and Mr. W. Morris, for Clayton and the executors of Low.

Jan. 11, 1864. THE MASTER OF THE ROLLS [Sir John Romilly]. This was a summons adjourned from Chambers to determine on what principle Messrs. Low and Clayton are to be charged in account with the Plaintiff.

The suit was instituted in order to obtain from the Defendants, Messrs. Low and Clayton, an account of the moneys produced by carrying on the *Sun* newspaper subsequent to the 31st of July 1848. On the 5th of July 1862 a decree was made for taking the accounts, and the question is, whether Messrs. Low and Clayton are to be charged with all sums received by Mr. Murdo Young subsequently to the 31st July 1848. The determination of that question, in my opinion, depends on the construction of this deed of the 31st of July 1848.

Before examining the contents of the deed itself, it is material to consider what, independently of the clauses and covenants contained in it, are the duties and obligations imposed upon persons who are appointed inspectors and managers and conductors of a concern to be carried on for the benefit of creditors. Independently of any

question of fraud or misconduct, it is, I think, [337] clear that their liability is confined to accounting for all moneys received by them, or by their order or for their use. To what limits this would extend would, I apprehend, depend on the circumstances of the case. If they were to have the exclusive management and control of the whole establishment, if all the subordinate managers, workmen and servants were appointed by them, and were removable at their pleasure, then, I think, that money paid to their cashier, or to any person in the establishment, in the ordinary course of the business, would be money paid for their use, for which they would be accountable.

If, on the other hand, the original debtor, whose business it had been at the time when the inspectors were appointed, was, by arrangement between the creditors, the inspectors and himself, to be continued to manage the business, and if he could not be removed by the inspectors without some new arrangement, then, I think, the inspectors would only be liable for the moneys actually paid to them or to some agent of theirs (assuming always that there was no misconduct on their part):—that the original debtor, who so continued to act in the management of the business, would not be their agent, and that they would not be liable for moneys received and misapplied by him. In all cases it must, I think, depend on the contract by which the inspectors were appointed.

In the case of a mortgagee of the business, if he enter into possession, he becomes the owner of the business, and he stands exactly, as regards his powers, in the place of the mortgagor, and, accordingly, he is accountable to the owner of the equity of redemption for everything which he either has received or might have [338] received, or ought to have received, while he continued in such possession.

If the inspectors undertake to carry on the business as owners, then they are accountable in like manner, but if they are merely to overlook the arrangement and to see that the former owner carries on the business properly, if they have no power to dismiss him, or the persons under him, then, in the absence of culpable negligence, he is not their agent, and their duties are confined to seeing how he conducts the business, to inspecting the accounts regularly, to requiring the moneys received to be paid to them or to their order, and in seeing that the moneys so paid to them are properly applied.

In this case it may be stated that £158,206 was paid into the bank to the account of Messrs. Low and Clayton. With this sum, therefore, they are properly charged, or they must discharge themselves of it, by shewing the proper application of it and of every part of it. In addition to this, it appears that, during the time that they were the inspectors, £6540 was paid to Mr. Young, but was not paid over to the inspectors, Messrs. Low and Clayton, and the question is, whether they are liable for this amount, and whether the payment of this sum to Mr. Young was a "payment" to their "order or for their use," in other words, whether, under the deed of the 31st of July 1848, Mr. Young was their agent for the receipt of this money.

Having made these preliminary observations, I proceed to examine the provisions of the deed itself. [His Honor stated the effect of it. See *ante*, p. 331.]

I think the effect and construction of this deed by no [339] means ambiguous. I am of opinion, in the first place, that under it and so long as it remained in force, no person could remove Mr. Young from the management or conduct of the newspaper. The recital to that effect, which I have read, and which immediately precedes the operative part, shews that as long as the mortgagees were unpaid, the creditors were not intended to have that power. This is followed by a distinct covenant, to the effect that he is to be allowed to carry on all and every his affairs and concerns, subject to the approbation and control of Low and Clayton, and this is followed by a distinct proviso, that they should not be at liberty to remove him.

It is true that this covenant and this proviso are not repeated over again, upon the occasion of the inspectors being put into possession before the mortgagees are paid off; but such repetition was, in my opinion, unnecessary. All the provisions and covenants, both on the part of Young and on the part of the inspectors and the scheduled creditors, apply, in my opinion, equally to this case as to the possession of the inspectors after the mortgagees were paid off. If they did not, this incongruity would arise:—The covenant by Young to keep the accounts, the covenant to shew

them to the inspectors weekly, the covenant to pay the money into the bank to their account, and so on to the end of the covenants, would none of them apply, for they are not, nor is any one of them, repeated over again in the deed as applicable to this third state of things. But if they are to be implied, as having relation to this third state of things, which, in my opinion, they must be, according to the true construction of the deed, then upon what principle of construction could the Court apply all these covenants to the case of the inspectors being in possession by the relinquishment of Harmer, and stop [340] short of the proviso, which says, they are not to exclude or dismiss Young? If the previous clauses and covenants, which apply to the possession of the inspectors after payment off of the mortgagees, do not apply to their possession by the relinquishment of Harmer, it would not be possible for the inspectors to manage the business, or, in any respect, to perform the duties which they undertook to perform. And if all the clauses and covenants do so apply, no construction could be more arbitrary or less unwarranted by authority, than to take one clause and hold that this clause alone did not apply to the third state of things. Nay, more, I think that the whole scope of this deed shews that Harmer himself could not have dismissed Young from the management, and that this is shewn to have been the view of the parties to the deed themselves, by the introduction of the proviso at the end of it, which I have read, to the effect that Harmer should not be bound to employ Young as editor, in the event of the profits not amounting to £1400 per annum.

I think, however, no fair analogy can be drawn between the position of Harmer and that of the inspectors. Harmer was mortgagee in possession before the deed was executed, and he must have acted in that character, in which case, of course, the defaults of his servants fall on him. But he could not, by merely transferring possession to Low and Clayton, put them in the same position as he was in, or thereby invest them with the character of mortgagees in possession; unless, indeed, by express contract they have agreed to be so bound. Accordingly, the deed provides in what character and with what powers and obligations they were to be in possession, and it regulates the mode and extent of their possession; and, in my opinion, these provisions apply equally to them, whether they are put into possession by Harmer under this clause in the deed, or whether under the authority given to them after the prior mortgagees are paid off under the prior clause. If I am right in this view of the case, it puts an end, in my opinion, to the question before me. No Court of Equity could hold that, in the absence of express contract, a man was liable for the acts of another, as his agent, whom he had not appointed, and whom he had no power to remove.

I do not doubt that a man might, for a sufficient consideration, bind himself by covenant to appoint another person to be his agent, to receive for him moneys payable to him only in his character of a trustee, and at the same time agree with his *cestuis que trust* that his agent should not be removed, whatever might be his misconduct, and also that, notwithstanding this, he, the trustee, would account for and be liable to make good to his *cestuis que trust* all the moneys received and misapplied by his agent. But so strange and singular a provision must be clearly expressed, and the Court would not lightly create the relation of principal and agent between two persons in such a state of circumstances, which would lead to so monstrous a result. But in this case, in my opinion, the relation or character of principal and agent between the inspectors and Young is excluded by the provisions of this deed, even independently of the proviso which prevents them from removing him.

The gentleman who framed this bill, in my opinion, took the correct view of this case, and felt that the only way in which the inspectors could be charged with such sums would be, not by making Young their agent for the receipt of all moneys paid in the course of business, but by obtaining a decree for taking an account against [342] the inspectors with wilful default. And, accordingly, the bill, by the prayer, sought to have the account taken against them, upon the principle of their being in possession of the business on exactly the same footing as Harmer was in possession of it prior to the execution of the deed of July 1848; and, accordingly, it prayed that an account might be taken against them of all moneys which, but for their wilful default, they might have received. But this part of the relief sought by the prayer was, in my opinion, very properly excluded by the terms of the decree, and virtually

the exclusion of this portion of the prayer from the decree has decided the question before me upon this summons against the Plaintiff. If Messrs. Low and Clayton were not to be treated as mortgagees in possession, they could only be charged with Young's receipts, on the principle that the deed had made him their agent for this purpose. To effect this object, express words in the deed were necessary; mere silence would not make him their agent. Not only are there no such words, but the words which are to be found in the deed exclude the possibility of his being so treated.

I am, therefore, of opinion that Messrs. Low and Clayton are not to be charged with the £6540 received by Young, and not paid over by him to them.

But though I hold that the deed did not constitute Young the agent of the inspectors, it does not, therefore, follow that they may not have constituted him their agent by acts of their own, to account to them in matters relating to their trust, and it is necessary that I should explain the distinction, because I observe, from various parts of the case, and, indeed, even from some parts of the argument before me, that the parties themselves seem to have supposed that, if Young was the agent of [343] the inspectors in any one transaction relating to this matter, he must have been their agent for all, which is, in my opinion, a great mistake. The distinction I refer to, and which I desire to point out, occurs in the various circumstances of this case. As soon as the money was paid into the bank to the joint account of Low and Clayton, they were bound to see to the right application of it, and, accordingly, when they gave £100 of that money to Young, to be applied by him for the benefit of the concern, they constituted Young their agent so far as that £100 extended, and no further. If Young misapplied that money, the inspectors are liable to make it good, exactly in the same manner as they would have been if they had employed any stranger for a similar purpose, and given him the money to make the necessary payments; for the money so entrusted to him, and so misapplied by him, they are liable. But this only applies to the money paid to them or to their order, and this £6540 was not so payable, and was not money payable to the inspectors personally, or for which they, or, through them, their agent, could alone give a good discharge. On the contrary, the whole scope of the deed and the direct provisions shew that the payments were to be made to and received by Young, who was to account for these sums to the inspectors. If, wholly independent of the deed, a sum of money had been paid to the inspectors, and the man who had to pay it had applied to them and asked them to whom it was to be paid, and they had answered that it might be paid to Young, or to any other person, then Young, or that other person mentioned by them, would have been the agent of the inspectors. But that is wholly on the ground that they were the proper persons to receive it, and that they alone could give a proper discharge for the money. But this was not so as regards the £6540, Young, I repeat, was [344] the proper person to receive it, and give receipts for the money so paid.

The accounts and letters seem to have been given in evidence with this view:—For the purpose of making out that the inspectors ought to have received the money themselves; but, in my opinion, they fail in shewing that any money ought properly to have been paid by the customers of the concern to the inspectors, in the first instance; and, secondly, if it had been so, the evidence fails to shew the inspectors gave any authority to Young to receive the money, without which authority he could not have got it.

Accordingly, as neither under the deed, nor as agent apart from the deed, was Young the agent of the inspectors to receive any money, this sum of £6540 must be disallowed as a charge against the inspectors. But, on the other hand, the inspectors are bound to discharge themselves of the £158,206 paid to their account in the bank; they must account for the whole of that amount. And as to all sums which they have paid to Young, or to any other person, they have made him and them their agents for the purpose specified, and if he or they have misapplied the moneys entrusted to them, or any part thereof, the inspectors are liable to make good such amount.

NOTE.—There was an appeal, but the matter was compromised.

[345] FOXWELL v. GREATOREX. FOXWELL v. TURNER. Jan. 13, 14, 1864.

[See *Cook v. Hathway*, 1869, L. R. 8 Eq. 618.]

A vendor resisted a bill for specific performance. He became bankrupt, and his assignee afterwards continued the resistance, but failed at the hearing. Held, that the assignee must pay the Plaintiff's costs of suit incurred subsequent to the bankruptcy.

This suit was instituted by a purchaser against the vendor, for the specific performance of a contract for the sale of a freehold messuage, &c., in Hinchley. The Defendant Greatorex (the vendor) resisted the claim, and during the progress of the suit he became bankrupt. After this the suit was continued against Turner, his assignee, who continued to resist the performance of the contract. The case now came on for hearing, when the Court held that the Plaintiff was entitled to a decree, and the only question was as to the costs.

Mr. Selwyn and Mr. Blackmore, for the Plaintiff.

Mr. Prendergast, for the assignee.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the assignee wrong from the beginning in resisting the performance of this contract. He ought to have made proper inquiries as to the merits of the case, and acted accordingly. I cannot make him pay the costs previous to the bankruptcy, but he must pay those incurred by the Plaintiff subsequently. I must make the common decree for specific performance.

[346] *Re FARINGTON*. Jan. 25, 1864.

A client obtained an order of course to tax, after action brought, but before notice of it, and the order did not provide for the costs of the action: Held, that this was not irregular, and a motion to discharge it was refused with costs.

The Taxing Masters do not act under the 40th Consolidated Order, r. 9, in relation to the unnecessary length of the pleadings, &c., unless directed by the order of reference.

A client owed his solicitor a bill of costs. The solicitor issued a writ to recover the amount, but before he had served it the client obtained the common order to tax as before action brought, and under which the costs of the action were not provided for. (NOTE.—See the distinction between these orders, Seton on Decrees, 828, 481 (3d edit.).)

Mr. Marten moved to discharge the order for irregularity.

Mr. Swanston, *contrà*.

THE MASTER OF THE ROLLS [Sir John Romilly]. This was a motion to discharge an order for taxation for irregularity, under very peculiar circumstances. The common order to tax was obtained by the client on the 10th of December, and it appears that the solicitor had sued out a writ for the amount of his bill of costs on the 7th of December. I am of opinion, on the evidence, that the client knew nothing of the writ when he obtained the order on the 10th of December. It is, therefore, impossible to hold that this proceeding was irregular.

A client owes a bill of costs to his solicitor, and obtains a common order to tax it. How can that be [347] irregular because an action has been commenced against him by the solicitor, of which he knows nothing? A solicitor might issue a writ against his client and keep it in his pocket for a twelvemonth, renewing it from time to time. How can his client know of the existence of the action, unless he is served with the writ? Here the client served the order for taxation, and was served with the writ on the following day. I am of opinion that the Respondent was guilty of no irregularity, and that the motion of Mr. Farington must fail.

There is this also to be said that the action was useless, the solicitor knew that

an order was about to be obtained, the result of which would be equivalent to a judgment on which he could enforce payment of his bill when taxed. Both parties appear very hostile, but it is impossible for me to discharge this order for irregularity. The result is that the motion must be refused, and with costs; but the solicitor ought to be allowed the costs of the writ, and I shall direct the Taxing Master to allow them accordingly.

There is also this to be said:—Some of the affidavits are very diffuse, and I understand the Taxing Masters do not act upon the terms of the General Order (40 Consol. Ord. s. 9), unless they are directed to “look into such pleading, petition or affidavit, &c.,” in the terms of the General Order—I shall therefore give the necessary direction, in the terms of the General Order.

[348] EDWARDES v. JONES. Feb. 11, 12, 1864.

A devise to two persons, in terms importing a joint-tenancy, is not changed into a tenancy in common by a subsequent gift over of the “estate” of one of them upon a certain contingency.

A testator devised his real estate to his wife and his son Daniel, and he then proceeded thus: “if my son Daniel shall happen to die without issue living, my will is that all his estate is to be divided between all my children in equal shares;” and “if my wife will intermarry she is to enjoy none of my property:” Held, first, that the wife and Daniel took as joint-tenants. Secondly, the wife having died in the life of the testator and Daniel having survived the testator, and died a bachelor, that the whole estate was divisible between the testator’s children, and that Daniel’s representatives took his share of it.

The testator’s will, dated in April 1835, contained the following residuary devise:—“Also I nominate and appoint my wife Sarah and my son Daniel to be joint executors of this my last will and testament; unto them I give the rest, residue of all my real and personal estate, of what kind and nature soever they be; but if my son Daniel shall happen to die without issue living, my will is that all his estate, both real and personal, is to be divided between all my children in equal shares. If my wife Sarah will intermarry she is to enjoy none of my property.”

The testator survived his wife, and died in August 1835, leaving his son Daniel and four daughters, his only children, surviving.

Daniel died a bachelor in 1851, having devised his real and personal estate to his sister Mary Ann.

The bill sought a declaration of the rights of the parties in the real estate of the testator, and for a partition.

Mr. Selwyn and Mr. Everett, for the Plaintiff, and

Mr. Rudge, Mr. Baggallay, Mr. Chitty, Mr. Woodhouse, Mr. Hobhouse, Mr. Walker, for the Defendants.

[349] On the one side it was argued that the word “living” referred to the immediately preceding antecedent, viz., the death of Daniel; *Hodgson v. Smithson* (21 Beav. 354); and not to the death of the testator. That therefore there was a devise to the wife and Daniel as joint-tenants in fee, with an executory devise to the testator’s children, and not an estate tail in Daniel; *Porter v. Braddley* (3 Durn. & East, 143). That the whole estate survived to Daniel, and on his death passed to the testator’s daughters.

On the other side it was argued that this was a tenancy in common. That the independent and separate interest of Daniel which was given over, and the clause of forfeiture as to the widow, were inconsistent with the unity required for a joint-tenancy. (2 Cruise, Dig. tit. xvii. c. 2.)

Mr. Everett, in reply, cited *Barker v. Giles* (2 Peere Wms. 280).

Feb. 12. THE MASTER OF THE ROLLS [Sir John Romilly]. On examining this will carefully, I am of opinion that this is a joint-tenancy, and that this is the only proper mode of construing it. The testator gives the residue of all his real and personal estate to his wife and his son Daniel. If you stop there, it is a mere joint-

tenancy. But it was suggested in argument that if a testator makes a devise to two, in words which import a joint-tenancy, but afterwards goes on to say that their interests are separate and distinct, this would make it a tenancy in common. I do not, however, [350] think that the subsequent words here used amount to this. The testator goes on to say, "but if my son Daniel shall happen to die without issue living, my will is, that all his estate, both real and personal, is to be divided between all my children in equal shares." If I were to read the words "all his estate" as "all his share," that would make a severance, but I do not think I can so read it. The words "all his estate" mean "all his interest," and I know of no reason or rule of law which prevents an estate being given to two persons in joint-tenancy in fee, with a direction that if one should survive the other, all his estate should go over on the happening of a particular event. And if that be the real meaning of this passage, as I think it is, I see no reason why his interest should not go over. If this be a joint-tenancy, then on the death of the son in the life of his mother he would have no estate or interest to go over, but if he survived her, he would have the entirety of the estate in fee, and if he died without issue living, it would go over in the manner specified.

It was pointed out that the wife might be the survivor, and that then she would have the whole property in fee-simple; but the testator might have intended that she should have the disposal of it amongst her children, or amongst such persons as she might think fit. The same objection would apply to her share if they were tenants in common, and the testator might reasonably have supposed that the son would outlive his mother.

The other thing relied on was the direction that if his wife should marry she should enjoy none of his property. Without expressing any opinion as to the validity of this direction, it does not go beyond this, [351] that if she survived him and married again she should forfeit her interest.

I am of opinion that the son, on the death of the testator, took an estate in fee-simple in the whole, subject to be divested on his dying "without issue living." I am also of opinion that this dying refers to the death of Daniel, whenever it might happen, and is not confined to his death in the lifetime of the testator, in which case there would be intestacy in certain events.

With respect to the persons who take, I see nothing which confines the gift to the children who survived Daniel. The gift is to "all my children in equal shares." The estate must, therefore, be divided into fifths, of which Daniel was entitled to one-fifth, and might dispose of it, and the other four-fifths went between his four sisters.

[351] BIRD v. MAYBURY. Feb. 12, 1864.

A testator devised his real and personal estate to trustees in trust to sell and invest and to pay the interest to his wife, to be applied in support of herself and her children until they should respectively attain twenty-one, and upon their severally attaining twenty-one to divide the capital between his wife and children. Held, that a child who died under twenty-one had attained a vested interest.

The testator devised and bequeathed his real and personal estate to trustees upon trust to sell. His will proceeded as follows:—"And I do hereby declare and direct my said trustees to stand and be possessed of the moneys to arise from the sale of the said real and personal property, upon trust, after payment of all costs, charges and expenses attending the same sale or sales, to invest the same upon real or Government securities, [352] and to pay the interest or dividends arising therefrom unto my said wife, to be applied by her towards the support and maintenance of herself and my said children until my said children shall, respectively, attain the age of twenty-one years, and upon their severally attaining that age, I direct the moneys so invested as aforesaid to be divided between my said wife and children, share and share alike."

The testator died in 1846, leaving his widow and three children, viz., Charles, John and George.

George died in 1854, an infant.

The question was whether George, who died under twenty-one, had attained a vested interest.

Mr. Cole and Mr. Howard, for the Plaintiffs, cited *Leake v. Robinson* (1 Mer. 363).

Mr. Southgate and Mr. Elderton, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is clearly vested.

[353] BARKER v. YOUNG. Dec. 11, 1863; Jan. 12, 1864.

[S. C. 33 L. J. Ch. 279; 3 N. R. 350; 10 Jur. (N. S.) 163; 12 W. R. 659.]

Held, on the construction of a will, that the word "and" could not be read "or."

A testator gave his residue to his nephew for life, and after his decease, provided he should leave a child surviving, then to such persons as he should by will appoint; but if his nephew should die without leaving any child him surviving, "and" should not "make any appointment as aforesaid," then to A., B. and C. Held, first, that "and" could not be read "or;" secondly, that the power to appoint only arose provided the nephew left a child surviving him; consequently, that an appointment by the will of the nephew, who died childless, was inoperative, and that A., B. and C. were entitled.

The testator Francis Const died in 1839. By his will he appointed his nephew Henry Beaumont Coles, William Dunn and Henry Young his executors. He devised and bequeathed to them all the residue of his real and personal estate, in trust, after payment of a number of legacies, to permit and suffer his nephew Henry Beaumont Coles to receive the rents and profits during his life. The testator then proceeded in the following words:—

"And from and after the decease of my said nephew, providing he shall leave any child or children him surviving, or who shall be born in due time after his decease lawfully begotten, then I declare and direct that my said executors shall stand and be possessed of my said residuary estate, upon trust for such persons and for such ends and purposes as my said nephew shall, by his last will or testament, direct or appoint, give, devise or bequeath the same; but if my said nephew shall die without leaving any child or children him surviving, or who shall be born in due time after his decease lawfully begotten, and the said Henry Beaumont Coles my nephew shall not, previous to his decease, make any such appointment, gift or bequest as aforesaid, then I declare that my said executors shall stand and be possessed of all my said residuary estate, and of all rents, dividends, interest and profits of or arising out of the same, upon trust for and to be divided between the [354] following persons (that is to say), Richard Barker, Esq., of Fitzroy Square, hereinbefore named, the said Henry Young, my executor, and James Ryland, herein also before mentioned, and to and for their heirs, executors and administrators, and I hereby give and bequeath the same accordingly."

Henry Beaumont Coles died in 1862 without ever having had a child. By his will he purported to appoint the residuary estate of the testator Francis Const to his executors, upon certain trusts, which are immaterial.

The bill was filed by the representatives of Richard Barker, and the Defendants were Henry Young, the executors of Henry Beaumont Coles, the representatives of Ryland and Richard William Jennings. The bill prayed a declaration that the will of Henry Beaumont Coles was an invalid appointment of the residuary real and personal estate of Francis Const, and was inoperative, so far as it purported to be a devise and bequest of such residuary real and personal estate, and a declaration that, by virtue of the will of Francis Const, his residuary real and personal estate became, upon the death of Henry Beaumont Coles, divisible between Richard Barker, Henry Young and James Ryland.

THE ATTORNEY-GENERAL (Sir R. Palmer) and Mr. Bird, for the Plaintiffs. By the terms of this will, the ultimate gift to Barker, Young and Ryland was to take effect on the happening of either of two events, viz., if the nephew should "die with-

out leaving any child or children him surviving," or if he should make no appointment. This is exactly the case in which the Court is in the habit of reading the word "and" as "or;" Jarman on Wills (vol. 1, p. 422 (2d edit.)); [355] *Maberly v. Strode* (3 Ves. 450), where there was a gift over on A.'s dying unmarried *and* without issue, the word "and" was read "or," and A. having married, but having died without issue, it was held that the gift over took effect. But it is not necessary to change the words in the present case; there is a double hypothesis, namely, "if" he shall die without leaving any child, "and if" he shall not make an appointment, the word "if" governing both parts of the sentence. The result is that, one of the events having happened, namely, the nephew having died without leaving any child, the gift over takes effect.

But secondly, if the word "and" be copulative, it is equally plain that the gift over has taken effect. The will contains one single power of appointment, and not two, and this power is only to arise "provided" the nephew "shall leave any child or children him surviving." The power mentioned in the second branch is identical with that in the first; this is evident from the words "such appointment," &c., "as aforesaid." This conditional power never arose and could never be executed. Both events have, therefore, happened; the nephew died both without children and without making any such appointment as was contemplated by the power.

Lastly, no general power can be implied; *Addison v. Busk* (14 Beav. 459, and 2 De G. M. & G. 810).

[THE MASTER OF THE ROLLS. According to your construction, if the nephew left children and made no appointment they would be disinherited.]

There is no case of disinheritance, for the children are [356] not objects of the testator's bounty; nothing is given to them; the power is general, and the reference to the children is only in relation to the event on which the power is to arise.

Sir Hugh Cairns, Mr. Baggallay and Mr. H. F. Shebbeare, for Mr. Young. Although the residuary legatees would be entitled by changing "and" into "or," still it is not necessary to resort to that doctrine here, nor is it necessary to change any word in the will. This is not like the cases of gifts over upon a person dying unmarried and without issue, when there is but one verb governing the whole. Here there are two verbs, and two events, viz., shall die without children, and shall not make an appointment. The gift over is in either event, that is, if the nephew shall die without leaving any child, "and also in case" he shall not make an appointment.

It will be argued that the nephew had a second power if he died leaving no children, but the words "such" and "as aforesaid" prohibit such a construction. They shew that the testator refers to the previous power, which was only to arise "providing" he left a child; these words throw you back to the previous part of the will. The case is like *Dillon v. Harris* (4 Bligh, 321), where the gift over was "in case both of my said sons shall so die unmarried *and* without leaving lawful issue." It was held that "and" could not be changed into "or," but that the word "so" referred back to the marriage previously referred to, which was to be with consent, and that the gift over took effect upon death, without leaving lawful issue, after a marriage without the requisite consent.

Here both events have occurred, viz., a death without [357] children, and the absence of an appointment under the conditional power.

Mr. W. M. James, Mr. Prendergast and Mr. Rendall, for the representatives of Ryland.

Mr. Selwyn, for Francis C. Barker.

Sir Fitroy Kelly, Mr. Hobhouse and Mr. Druce, for the executors of Henry Beaumont Coles. The gift over has never taken effect. It is impossible, since the cases of *Grey v. Pearson* (6 H. of L. Cas. 61), followed by *Secombe v. Edwards* (28 Beav. 440), to change the words of the will and to convert "and" into "or." Both of the events on which the gift over was to take effect have not happened. It is plain, from the context of the will, that the testator intended his nephew to have a general power of appointing in all events, and the words "such appointment, &c., as aforesaid" have reference to the mode and form of appointment previously mentioned, which appointment was to be by "will and testament" only. It is impossible that

the power which is referred to in the second clause (a clause which directs the devolution of the property in the event of the nephew dying leaving no children), can be fettered by the inconsistent proviso, that it is only to arise if he shall die leaving children. The power must be general, and the gift over must have been intended to take effect only in the absence of a *de facto* execution of it. For if the nephew, having children, made his will appointing this property to A. B., surely the appointment could not become inoperative by the circumstance of the nephew surviving his children. This construction is supported by the words "previous to his death."

[358] To read this will in the manner proposed by the Plaintiffs would be to render the second clause a mere repetition and superfluous. The second branch gives, by implication, a power to the nephew to dispose of the property, for it was only to go over if he should make none; *Ex parte Rogers* (2 Madd. 449); *Andree v. Ward* (1 Russ. 260); *Greene v. Ward* (*Ib.* 262); *Bibin v. Walker* (Ambl. 661); *Jordan v. Fortescue* (10 Beav. 259).

Mr. Earle, in the same interest.

THE ATTORNEY-GENERAL, in reply.

Jan. 12, 1864. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a question arising on the construction of the residuary bequest and devise contained in the will of Francis Const. The words of the will are these. [See *ante*, p. 353.]

The question is, whether the devisees mentioned in the will of the uncle, or the devisees mentioned in the will of the nephew, take the residuary estate of the uncle since the decease of the nephew in November 1862.

The Plaintiffs are the executors of Richard Barker, one of the residuary devisees and legatees mentioned in the will of the uncle. They are supported by the Defendant, the legal personal representatives of another of [359] the remaining devisees and legatees, viz., James Ryland, who has also died since the death of the uncle, and by the Defendant Henry Young, another Defendant, who is the last and surviving residuary legatee of the will of the uncle.

The Defendants who contest the views of the above-mentioned persons are Henry Earle and John James, who are the legal personal representatives of the nephew.

The first contention of the Plaintiffs is, that the word "and" is to be read "or," and that the sentence should be read thus:—"But if my said nephew shall die without leaving any child or children him surviving, or who shall be born in due time after his decease lawfully begotten, or the said Henry Beaumont Coles my nephew shall not, previous to his decease, make any such appointment as aforesaid, then," &c. In which case, as one branch of the alternative has taken place, viz., the death of the nephew without leaving a child, the gift over would take effect. For this construction are cited *Maberly v. Stode* (3 Ves. 450) and the usual class of cases in which the substitution of "or" for "and" is maintained.

I cannot, however, accede to this view of the construction of this will. I had to consider the matter in a similar case of *Secombe v. Edwards* (28 Beav. 440), where I held that, in words resembling the present, such a substitution could not be permitted, and I retain that opinion on the present occasion.

Sir Hugh Cairns argued that the substitution of "or" for "and" was not necessary, but that if "and" were read "*and also in case*" my nephew shall make any [360] such appointment, the same result would occur. But, in truth, this is only another mode of putting the same point. The words "*and also in case*," so read, are equivalent to the word "or," and make the construction of the sentence disjunctive instead of conjunctive. I am of opinion that the words of the will must be read conjunctively, and that unless both events have occurred the gift over cannot take effect.

The question is, have both events occurred? The death of the nephew without leaving a child has unquestionably occurred. Has he died without making the appointment spoken of in the uncle's will? If he could make the appointment, he undoubtedly has done so. The real question, therefore, is whether, in the events which have occurred, the power contained in the will ever arose. The words are these, I will read them once more, they are very short:—"And from and after the decease of my said nephew, providing he shall leave any child or children him surviving, or who shall be born in due time after his decease lawfully begotten, then I declare and direct that my said executors shall stand and be possessed of my said

residuary estate upon trust for such persons and for such ends and purposes as my said nephew shall, by his last will and testament, direct or appoint, give, devise or bequeath the same."

I think that under these words the power did not arise unless the nephew left a child surviving him.

It is argued that the construction of the will must be the same, whether the nephew had not any child, or had a child who did not survive him, and that if the nephew had made his will during his life, while he had children still alive, it would have been a good [361] execution of the power, and if so, then that the circumstance of the predecease of the child would not destroy the execution of the power which was previously valid. In other words, it is contended that the appointment spoken of in the uncle's will is an appointment *de facto*, not an appointment which became effectual by reason of their children having survived their father. But, in my opinion, the error in this reasoning is, that a power of appointment, which can be exercised only by will, does not take effect *de facto* until the death of the testator. The instrument purporting to execute the power is, in fact, no execution of the power until it is a will, and it is no will until the donee of the power dies.

Accordingly, the real question here is, not whether an appointment was made, or rather whether an instrument purporting and intended to execute the power was executed, but whether the power itself arose which could be exercised by the nephew. I think that the power did not arise until the death of the nephew leaving a child, and that his death leaving a child was the event which called the power into existence. It is true that the power was to be executed by anticipation, as indeed all powers to be executed by the will of the donee must necessarily be. But it was a conditional power, that is to say, it was a power to arise and to take effect, only "provided the nephew left a child him surviving." I cannot strike these words out of the will, nor can I convert a conditional into an unconditional power. The condition here imposed by the original testator was, the survivorship of a child at the death of the nephew; this condition was not fulfilled, and the consequence is, that, in my opinion, the nephew had no power vested in him at his decease which could be exercised by will, that therefore the gift over in [362] the will of the uncle takes effect, and that the Plaintiffs are entitled to a declaration accordingly.

I think it highly probable, as was suggested in the argument, that this difficulty has arisen from the leaving out of a line or two in making a fair copy of the will from the original draft, where the same word ends two sentences, an error which we find so common in old manuscripts. But that cannot affect my decision. I must read the will as it stands, and this excludes the devisees of the nephew.

I am, however, of opinion that this difficulty has been created by the will of the original testator, and that the costs of all parties must be paid out of his residuary estate.

NOTE.—Affirmed by the House of Lords, March 1865.

[362] JONES v. BINNS. Jan. 12, 13, 1864.

[S. C. 10 Jur. (N. S.) 119. See *Metropolitan Bank v. Offord*, 1870, L. R. 10 Eq. 400.]

The Defendants mortgaged some leasehold property to the Plaintiffs, who filed their bill to realize their security. Three days afterwards, the Defendants were made bankrupts on their own declaration of insolvency, and they then pleaded their bankruptcy in Bar, without averring that their assignee had elected to take the lease. The plea was allowed without costs, with liberty to amend the bill.

The Defendants had, in 1861, mortgaged some leasehold property to the Plaintiffs, and on the 17th of November 1863 the Plaintiffs instituted this suit to realize their security.

On the 20th of November 1863, upon a declaration made by the Defendants that

they were unable to meet their engagements with their creditors, the Defendants were declared and adjudged bankrupts.

[363] The Defendants afterwards, on the 22d of December 1863, put in a plea, whereby they stated the bankruptcy, and the appointment of Mr. Edwards as official assignee, and the subsequent appointment, on the 15th of December 1863, of Mr. Williamson as creditors' assignee. The Defendants then pleaded these matters "in bar to the whole of the discovery and relief sought and prayed by the Plaintiffs' bill."

The plea did not aver any election on the part of the assignees.

Mr. Tripp, in support of the plea. When a Defendant becomes bankrupt subsequently to the filing of the bill, his bankruptcy may be pleaded in bar to the whole bill, and such a plea was allowed in *Lane v. Smith* (14 Beav. 49). It will be argued that leaseholds do not vest in assignees until they have done some act shewing their acceptance, and *Copeland v. Stephens* (1 Barn. & Ald. 593) will be cited to shew that the leaseholds remained in the bankrupt until acceptance by the assignees. But that case was decided under the old law, by which a mere statutable power to convey was given to the Commissioners, in whom nothing was vested and from whom nothing passed. But now, under the 145th section of the 12 & 13 Vict. c. 106, it has been held that a bankrupt's interest in leasehold property remains in the assignees until they elect not to take it, and that *Copeland v. Stevens* (*Ibid.*) has no application where, by virtue of the Bankrupt Act, the bankrupt's estate vests in his assignees; *Cartwright v. Glover* (2 Giff. 620). Such is the case now, for under the 12 & 13 Vict. c. 106, s. 142, all the bankrupt's estate vested in the official assignee, and the 25 & 26 Vict. c. 134, [364] s. 117, which enacts, that upon the appointment of the creditors' assignee, "all the estate both real and personal of the bankrupt shall be devested out of the official assignee and vested in the creditors' assignee." The Defendants, therefore, have not a *scintilla* of interest.

Mr. Baggallay and Mr. W. Forster, *contra*. The Defendants cannot escape giving the discovery and release themselves from this suit by this voluntary bankruptcy. They cannot be discharged from the record until it is known what definite course the assignees will take under the 12 & 13 Vict. c. 106, s. 145, in respect to this leasehold property. If this plea be allowed, the assignee may afterwards disclaim, and then it will be necessary to bring back the bankrupts and again make them parties to this suit.

The plea is bad in form; it ought to have contained an averment that the assignee had elected to take the lease, the words of the 145th section being, if the assignees "shall elect to take," and not "shall elect to retain." They cited *Manning v. Flight* (3 Barn. & Adol. 211) to shew that the lease was not at an end by the disclaimer of the assignees.

Mr. Tripp, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am disposed to think that the Defendants became bankrupt in order to defeat this suit, for, three days after the filing of the bill, the Defendants made a voluntary declaration of the insolvency and they then plead their bankruptcy.

[365] I will look at the Acts of Parliament, but I am inclined to think that the proper order will be, to allow the plea with liberty to amend, making the costs of the plea costs in the cause. I will look into the Acts to see whether the leasehold interest vests in assignees until they elect not to take the property.

Jan. 13. THE MASTER OF THE ROLLS allowed the plea without costs, and gave liberty to amend the bill.

[365] HARDY v. CALEY. Jan. 13, 16, 1864.

Though the solicitor or agent of a trustee is not generally a proper party to suit to recover the trust funds, yet the case is different where he has received the trust moneys, and has intermeddled with the performance of the trust.

Mr. Caley, who was the trustee of the will of the testator, employed Mr. John Spencer Galloway as his solicitor in the matters of the trust. In 1861 he authorized

him to receive £400, part of the trust money invested on mortgage, which he directed him to pay into the bank of the Hull Banking Company to the trust account. On the 1st of April 1861, John Spencer Galloway received the £400, and on the same day he paid it into his private bankers, Messrs. Thomas and Robert Raikes & Co. of Hull, in his own name, to the credit of "*Dick's trust*," the name by which the trust was familiarly known. Between the 1st of April and the 1st of June, he drew out seven sums, amounting in the whole to £168, 11s. 8d. The bank failed in June 1861, and £36, 17s. only was received for dividends on the £231, 8s. 4d. and interest in their hands at the bankruptcy.

Mr. Galloway paid £120 to Mr. Caley, which was [366] divided between the *cestui que trust*, and he paid £35 to a Defendant, another *cestui que trust*, and retained £15 for his costs. These three sums amounted to about £170.

This suit was instituted by the *cestui que trust* against Mr. Caley, Mr. Galloway and others to recover the trust funds, and seeking to make Mr. Galloway liable for the £400 and other sums.

Mr. Galloway by his answer submitted that he had been improperly and unnecessarily made a Defendant to the suit.

Mr. Baggallay and Mr. Boys, for the Plaintiffs.

Mr. Southgate, Mr. Batten, Mr. Selwyn, Mr. Broderick and Mr. Bruce, for the Defendants.

It was contended, on behalf of Mr. Galloway, that having acted merely as agent and solicitor of the trustee, he ought not to have been made a party to the suit. As to this *Attorney-General v. The Earl of Chesterfield* (18 Beav. 596); *Maw v. Pearson* (28 Beav. 196); *Marshall v. Sladden* (7 Hare, 428), were cited.

Jan. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. There is great confusion in this matter; but still I think that the Plaintiffs are entitled to a general inquiry of what the trust funds consisted, and how they have been disposed of.

[367] It is said that I cannot direct an account against Mr. Galloway, because he is only the solicitor of the trustee, and that I have held in *Maw v. Pearson* (28 Beav. 196) that the *cestui que trust* must get it through their trustee. I have always so held, but I think the principle does not apply here. Mr. Galloway has acted otherwise than as solicitor, he has taken upon himself the performance of the trust. In April 1861 he received £400 trust moneys, which he ought to have divided between the *cestui que trust*; instead of that he paid it into his private bankers, and not into the Hull bank as he had been ordered. He then became a trustee of that money from the persons entitled. He draws seven cheques upon it to answer his own purposes to the amount of about £170, and £232 is lost by the bankruptcy of his bankers in June 1861. After that, he repays the *cestui que trust* the £170 which he had drawn out; but why did he not pay the whole to them at once? It was his duty to do so, and he had undertaken to do so. Instead of this, he takes the money for his own purposes, and thereby became liable to make it good to them to whom it belongs.

If the money cannot be obtained from the trustee he must pay it.

[368] THE WESTERN BENEFIT BUILDING SOCIETY. Jan. 19, 1864.

An affidavit in support of a petition to wind up sworn before the presentation of the petition is ineffectual, and it must be re-sworn before an order can be made on the petition.

The 4th of the General Orders of 11th November 1862 (32 L. J. (Chanc.) 4), made under the Companies Act, 1862, directs that the affidavit verifying the petition for winding up any company "shall be sworn *after* and filed within four days after the petition is presented." In this case, an order had been made on the 16th of January, to wind up this company, but it was found that the affidavit in support of the petition had, inadvertently, been filed *before* instead of *after* the filing of the petition.

Mr. Roxburgh now brought the matter to the notice of the Court, and stated that the error had arisen from the old practice, which was, to annex the affidavit to the

petition, and which therefore required it to be sworn before the filing of the petition; 12 & 13 Vict. c. 108, s. 3.

THE MASTER OF THE ROLLS [Sir John Romilly]. This affidavit amounts to nothing; it must be resworn and the order dated subsequently.

[369] QUENTERY v. QUENTERY. Jan. 14, 20, 1864.

A testator devised his freeholds in trust to pay two-fifths of the rents to A. for life, with remainder to his children, and to pay three-tenths to B. for life, with remainder to his children, and to pay the remaining three-tenths to C. for life, with remainder to her children. By a codicil he left A. an equal share only of the property with B. and C., instead of the increased share: Held, that the property was divisible into thirds, one of which belonged to each of the legatees for life, with remainder to his children.

The testator, by his will dated in 1855, devised his freeholds to his wife for life, and after her decease to pay two-fifths of the rents to his nephew Charles C. Quentery for his life, with remainder to his children, and to pay one-half of the remaining three-fifths of the rents to William S. Quentery for life, with remainder to his children, and to pay the other one-half of the three-fifths of the rents to his niece Elizabeth Godefroy for life, with remainder to her children.

The testator made a codicil, which was not dated, but was in fact executed on the 14th of November 1859, and was as follows:—"Codicil to my last will and testament, dated the 3d day of August 1855. I appoint my nephew William S. Quentery one of my executors, in the room of Charles C. Quentery therein named. I leave to my nephew Charles C. Quentery an equal share only of the property and moneys therein named with his brother William S. Quentery and his sister Elizabeth Godefroy, instead of the increased share therein named."

Questions had arisen upon the construction of this codicil, as to whether the reduction thereby directed to be made in the share of Charles C. Quentery was confined to his interest in the trust estates devised by the will, or whether it extended to the interests of his children. A further question had arisen, whether the share of Charles C. Quentery was, by virtue of the codicil, vested in Charles C. Quentery absolutely, or was subject to the [370] limitations in favor of his children contained in the will, and whether the share, which by the codicil was divested from Charles C. Quentery, was, by the codicil given to William S. Quentery and Elizabeth Godefroy and their respective children, according to the limitations in the will with respect to their original shares, or whether the same share was undisposed of and devolved upon William S. Quentery as heir-at-law of the testator, or to whom else the same now belonged.

This was a special case to determine these questions.

Mr. Selwyn and Mr. Browne, for the Plaintiff William S. Quentery, argued that the effect of the codicil was, to reduce the share of Charles and his children to an equality with his brother and sister, that is, to give three-tenths instead of four-tenths, leaving the difference or one-tenth undisposed of and to descend on the testator's heir at law.

Mr. Eddis and Mr. Woodhouse, for the Plaintiff's children, argued that they took one-third in remainder.

Mr. Hobhouse and Mr. Schomberg, for Charles C. Quentery, argued that the property was, on the whole, given to the three devisees in equal thirds, with remainder to their respective children.

Mr. Babington, for the children of Charles C. Quentery, argued that the codicil did not affect their interest, but they were entitled to two-fifths in remainder; *Boulcott v. Boulcott* (2 Drew. 25); *Stocks v. Hammond* (M. R., 11 June, 1863); *All v. Gregory* (8 De G. M. & G. 221); *Philipps v. Allen* (7 Sim. 446); [371] *Sanford v. Sanford* (1 De Gex & Sm. 67); *Hutchison v. Skelton* (2 Macq. H. of L. Cas. 492), were cited.

Mr. Selwyn, in reply.

Jan. 20. THE MASTER OF THE ROLLS [Sir John Romilly]. I have felt considerable difficulty in this case, and I find that the cases cited afford me no assistance.

The question is, whether the property is divisible into thirds, one of which is to be held for each of the three legatees for life, and afterwards for their children, or whether the effect of the codicil is to cut down the share of Charles from four-tenths to three-tenths, leaving the other one-tenth undisposed of, or whether the codicil only affects the life-estate of Charles without interfering with the remainder to his children.

The plain meaning of the words is, and I think the intention of the testator was, to divide the property into three-thirds and to give it in the same way as he had previously given the other unequal shares. I think there is sufficient on the will to enable me to come to that conclusion.

I must accordingly declare that the whole is divisible into thirds, of which one-third each is given to the two nephews and the niece for their lives, with remainder to their respective children.

[372] *JOPP v. WOOD* (No. 2). *Jan. 22, 23, 1864.*

[For previous proceedings, see 28 Beav. 53; 2 De G. J. & S. 323. For subsequent proceedings, see 34 Beav. 88; 4 De G. J. & S. 616; 46 E. R. 1057.]

Leave given to a person, who was not a party to the cause, to intervene and present a petition of rehearing of an order in which he was materially interested and which had been made upon petition in the cause.

John Smith was born in Scotland in 1786; he went to India in 1805, and married there in 1816. He survived his wife and died there in 1830.

By a bond, executed on his marriage, a sum of £10,000 was settled on trust for himself and wife for their lives, with remainder to the children of the marriage.

There were six children of the marriage, two of whom, Eleanor and Mungo, died infants in India.

This suit was instituted to have the rights of the children to the £10,000 declared. At the hearing, the Court held that the shares of the children vested at their births (see 28 Beav. 53), and the shares of the two deceased children were carried over to the separate accounts of their legal personal representatives. In December 1862 these funds were ordered to be paid to Elizabeth Smith, the administratrix of Eleanor and Mungo, but a stop had been placed on the fund by the officer of the Crown, who claimed legacy duty on it, on the ground that the domicile of the infants at their deaths, being that of their father, was Scotch. A petition was therefore presented by the administratrix, which was served on the Attorney-General only, stating the principal circumstances relating to the father's domicile, and praying a declaration that the domicile of Eleanor and Mungo Smith at the time of their deaths was Anglo-Indian.

[373] The petition was argued by the administratrix on the one side and on behalf of the Crown on the other, and on the 5th of May 1863 the Master of the Rolls held that the father had never lost his domicile of origin, that the domicile of the children was therefore Scotch, and that legacy duty was payable.

Mr. Fergusson, who was the executor of John Smith, and had proved his will in India, but was no party to this suit, and had no notice of the proceeding on the petition, now moved, in the cause, that he might be at liberty to present a petition for rehearing the petition and for varying the order.

He alleged he had paid out of his own moneys a legacy of £3000, given by the testator, and he stated additional circumstances relating to the domicile of John Smith, tending to shew that such domicile, and consequently that of his deceased children, was Anglo-Indian, so that the shares of the children would form part of their father's estate, and not belong to the other children.

Mr. Hobhouse and Mr. Jackson, in support of the motion. The domicile of the deceased children has been determined in the absence of the party principally

interested, and without all the necessary evidence. The applicant has a sufficient interest to entitle him to a rehearing, and this is the proper form for obtaining it; *Berry v. Attorney-General* (2 Mac. & Gor. 16); *Gwynne v. Edwards* (9 Beav. 22); *Paterson v. Scott* (Seton on Decrees, 1154 (3d edit.)).

Mr. Selwyn and Mr. B. L. Chapman, *contrà*, argued that the applicant had no *locus standi*, he being a [374] stranger to the cause in which the matters had been finally determined.

Mr. Hanson, for the Attorney-General.

Jan. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. I have considered this case and I am satisfied that it ought to be argued again. I must allow Mr. Fergusson to argue it again, and for that purpose I will give him leave to present a petition of rehearing, he undertaking to be answerable for any costs the Court may award.

NOTE.—On the rehearing (2d December 1864) the Master of the Rolls held the domicile to be Scotch, and his decision was affirmed by the Lords Justices, 28th February 1865. See *post*.

[374] CHAMBERS v. CRICHEY. Jan. 25, 1864.

Upon the dissolution of a partnership between the Plaintiffs and the Defendant, the Defendant assigned to the Plaintiffs all his interest in a patent which formed part of the assets. Held, that the Defendant could not afterwards set up the invalidity of the patent as against the Plaintiffs.

For several years previous to 1857, and down to the end of 1860, the Plaintiffs Chambers and Wright and the Defendant Crichtley carried on the business of stove and grate manufacturers. Part of their assets consisted of a patent for making "bivalve stoves," granted to the Plaintiff Wright in 1857. This was a stove having two valves at the back, through which the smoke passed up the chimney.

The partnership was dissolved by decree in 1861, [375] and in pursuance of the decree on further consideration, the Defendant in 1862 assigned to the Plaintiffs all his "share, right, title and interest" in the partnership assets, "including all patents, inventions, discoveries and designs, and all right and benefit thereof."

The Plaintiffs instituted this suit in December 1863, alleging that the Defendant had sold stoves made upon the principle described in the patent under the name of "Crichtley's improved patent bivalve." The bill prayed an injunction and account.

Mr. Hobhouse and Mr. I. J. Hamilton Humphreys, for the Plaintiffs, now moved for an injunction.

Mr. Selwyn and Mr. Druce, for the Defendant, argued that there was no novelty in Wright's patent, and that the Defendant was not estopped from disputing its validity, because he had not warranted it, and had merely assigned to the Plaintiffs such right in it as he had. Secondly, that the Defendant's stoves were constructed on an entirely different principle from that of the Plaintiffs', and that the manufacture and sale of them constituted no infringement on the Plaintiffs' patent rights.

THE MASTER OF THE ROLLS [Sir John Romilly]. Having looked carefully at this matter and examined the models and the stoves themselves, my opinion is that the Defendant has accurately described his stove as being an improvement upon the Plaintiffs' patent stove, and it appears to me to be an improvement upon the Plaintiffs' patent.

I do not intend to express my opinion as to the validity of Wright's patent. I will assume, for the purpose of my judgment, that it is worth nothing at all. [376] But this is certain, that the Defendant sold and assigned that patent to the Plaintiffs as a valid one, and having done so, he cannot derogate from his own grant. It does not lie in his mouth to say that the patent is not good. I am satisfied that the Defendant has taken advantage of that patent and has made an improvement upon it; but I am of opinion that he is not at liberty to do so. I must, therefore, grant

an injunction to restrain the Defendant from selling stoves made on the principle of Wright's patent.

NOTE.—See *Crossley v. Dizon*, 10 H. of L. Cas. 293, and the cases therein cited.

[376] VICKERY v. EVANS. Dec. 22, 1863.

[S. C. 33 L. J. Ch. 261 ; 9 L. T. 822 ; 10 Jur. (N. S.) 30 ; 3 N. R. 286 ; 12 W. R. 237.]

A testatrix directed her executors (who were also her residuary legatees) to invest such a sum in the stocks or on freehold security as would produce £150 a year, and she bequeathed the £150 to A. for life, and, after his death, she gave the security on which the investment should have been made to B. The executors invested £3530 at four and a half per cent. on a mortgage for five years of freeholds, which were let for a long term on ground rents producing £176 per annum. The value of the freeholds was about £4344, but the property on which the rents was secured was of much greater value. Held, that the investment was not improper. But held, that if the payment to the Plaintiff should be delayed, by the inability of the trustees to call in the mortgage for five years, the Plaintiff was entitled to have the mortgage sold and the deficiency paid by the executors.

The testatrix gave her real and personal estate to the Defendants John Evans and William Drury, upon trust thereout to invest such a sum of money in or upon the public stocks or the funds or securities of the United Kingdom, or upon the security of freehold or copyhold hereditaments in England, in the names of my trustees, as when so invested will produce, by and from the dividends or interest to arise from such investment, the annual sum of £150, "and I authorize my trustees to alter, vary and transfer such investment for or into other stocks, funds or securities of the like nature, as often as they may think proper, and do and shall stand [377] possessed thereof and of the proceeds thereof, upon trust to pay the said annual proceeds of £150, as and when the same shall become receivable, into the hands of my brother Francis William Johnston Vickery for and during the term of his natural life." She then declared the annuity should cease if he should anticipate it, and proceeded as follows :—"And from and after the decease of Francis William Johnston Vickery, then I do hereby declare and direct that my trustees shall stand possessed of the stocks, funds and securities in or upon which the investment hereinbefore directed to be made for the purpose of producing the said annual sum of £150 shall have been made, upon trust for my nephew Francis Vickery."

The testatrix gave the residue of her real and personal estate to John Evans and William Drury, whom she appointed executors.

The testatrix died in December 1861, and her will was proved by the executors.

After the death of the testatrix, her executors, in order to meet the £150 a year, invested £3530 upon a mortgage of ten freehold messuages and buildings in Colville Square and Colville Terrace, West Notting Hill, in the county of Middlesex, and by an indenture dated the 22d day of October 1862, and made between Mr. Tippet of the one part and John Evans and William Drury of the other part, these freehold messuages were conveyed to John Evans and William Drury, their heirs and assigns, subject to the indentures of lease therein mentioned, by way of mortgage for securing the sum of £3530 with interest thereon at the rate of £5 per cent. per annum, reducible to the rate of £4, 5s. per cent. per annum on punctual payment, and subject to a provision to the effect, that if the mortgagor should pay such in-[378]-terest at £4, 5s. per cent. and duly perform the covenants and agreements therein contained, then the mortgagees should not call in the principal sum before the 22d day of October 1867, and that the mortgagor should not be at liberty to pay off the same before that day.

The executors, by a deed-poll dated the 21st of January 1863, declared that they would stand possessed of the mortgage debt of £3530, and of all other the stocks,

funds and securities in or upon which the £3530 might at any time thereafter be laid out or invested, upon the trusts contained in the will for securing the £150 to Francis William Johnston Vickery, and after his decease for the benefit of the Plaintiff.

The property mortgaged was let for ninety-nine years from 1861 on ground rents, amounting in the whole to £176. This was made up of eight ground rents of £18 each, and two of £16 each. The Defendant's answer stated that the annual value of each of these ten houses was £100 a year.

The Plaintiff, by this bill, insisted that the mortgage was not a proper investment to satisfy the trust in his favor; that the messuages and buildings on which the £3530 and interest had been secured did not yield a sufficient rental adequately or permanently to secure the £150 a year, and were wholly inadequate to secure the principal sum of £3530. He alleged that if the mortgage were paid off and invested in consols, at the present or average price thereof, such investment would be wholly insufficient, in respect either of capital or income, to answer the trusts of the will in favor of the Plaintiff.

The Plaintiff also insisted that the discretion was [379] vested in the trustees, and was intended by the testatrix to be exercised by them for the benefit of their *cestuis que trust* and not for their own benefit. He alleged that the executors had refused to exercise a proper discretion in respect of the investment, but had selected a scanty security, carrying a high rate of interest, for the purposes of the Plaintiff's trust bequest, in order to increase the amount of their own residue, at the expense of the Plaintiff. The Plaintiff by his bill also insisted that he was entitled to have a sum of £5000 £3 per cent. consolidated Bank annuities set apart to answer the trust bequest in his favor.

The bill prayed, first, that the real and personal estate of the said testatrix might be administered. Secondly, that it might be declared that the mortgage security was not a proper investment to answer the trusts by the will declared in favor of the Plaintiff and his father, of and concerning the annual sum of £150 and the investments to produce the same, and that the trust bequest might be properly secured, and that a proper sum of consolidated Bank annuities might be purchased to answer the same, under the direction of the Court.

There were four valuations given in evidence, which estimated the value of the property as follows:—£4000, £4050, £4576 and £4752, producing an average of about £4344.

Mr. Selwyn and Mr. Druce, for the Plaintiff. First, upon the construction of the will, this was not a proper investment. The trustees were not justified in exercising their discretion for their own benefit, to the prejudice of the rights of their *cestuis que trust*. It was the interest of the trustees to reduce, as much as possible, the capital producing the £150 a year, for the purpose of increasing [380] their own residue, and, by investing at the highest rate of interest possible, to diminish the capital necessary to produce the annuity. According to their contention, if they could have obtained a security at £10 per cent. they would have been justified in taking it, although the effect would have been to give the Plaintiff a capital of no more than £1500. Secondly, the rule of the Court is, that trustees are not justified in lending more than two-thirds of the value on freehold lands; *Stickney v. Sewell* (1 Myl. & Cr. 8); or more than one-half on house property; *Norris v. Wright* (14 Beav. 307); *Stretton v. Ashmall* (3 Drew. 12); *Lewin on Trusts* (p. 242 (4th edit.)). Here is an investment of £3530 on house property of the value of about £4000, producing a rental of no more than £176 a year, and six of the houses are still unlet. Even taking the Defendant's own valuation, the advance was far beyond what the rules of the Court justified.

Again, payment of the mortgage money cannot be demanded for five years, and the Plaintiff might thus for several years be kept out of his money; this was an improvident and improper stipulation on the part of the trustees.

Mr. Elderton, for the annuitant.

[THE MASTER OF THE ROLLS. I do not consider this as being an investment on house property worth £176 a year, but on the whole value of the houses and property. The only question is this:—Are the trustees entitled, by lending at a high rate of interest, to reduce the amount of the capital to which the [381] Plaintiff is entitled

after the death of the annuitant? If they could get £5 or £6 per cent., could they properly invest the money on that security?]

Mr. Southgate and Mr. Whitehorne, for the executors. We contend that the trustees would be entitled to make such an investment, provided they acted *bonâ fide*.

There is no such fixed immutable rule as that contended for. *Stickney v. Sewell* merely lays it down as a "rule of ordinary prudence;" and the Vice-Chancellor in *Stretton v. Ashmall* speaks of it, "not as a fixed rule liable to no variation, but as a rule of ordinary discretion, not to lend more than two-thirds of the actual apparent value." But here the point does not arise; the security is ample, for the annual value of the property on which the fund is secured is at least £1000 a year. The reason of the supposed rule is, that the value may be diminished by the amount of tenants' repairs, the chance of agricultural distress and such matters, and therefore a large margin is required; but here property of the annual value of £1000 is a security for the fund, for if the rent reserved be not regularly paid and the covenants duly performed, the lessor and the mortgagees claiming under him will re-enter and recover the property. The Court has often referred to this circumstance, in cases where executors have required an indemnity out of the assets against leasehold covenants. The executors having a discretion are only liable in consols in case of their non-exercise of the discretion; *Aspland v. Waite* (20 Beav. 475). They also referred to *Jones v. Lewis* (3 De G. & Sm. 471), but reversed; see Lewin on Trusts (p. 242, n. (e) (4th edit.)).

Mr. Selwyn, in reply.

[382] THE MASTER OF THE ROLLS. I am of opinion that this is a valid investment, and that the freehold ground rents of £176 are a sufficient security for £3530. I concur in the observation that the freehold rents are not alone the security, but the houses erected on the land add the value of those buildings to the security for the due payment of that sum. If, therefore, this sum be considered as advanced on house property, you must take the value of all the houses, because practically that is the security, for beyond question the landlord would take possession if the ground rent were not paid. Therefore you have as a security for the payment of the interest not only the amount of the reserved rents, but that which secures the ground rents, which is the value of the houses built on the property.

On the other question, I have had some hesitation, for there is no authority or decision on the point. The singularity of the case is this:—the bequest is of so much money as will produce £150 upon an investment either "upon the public stocks or the funds or securities of the United Kingdom, or upon the security of freehold or copyhold hereditaments." The £150 is to be paid to one for life, and after his death "the stocks, funds and securities" upon which the investment for producing the £150 shall have been made is given to the Plaintiff.

It is admitted, and it cannot be disputed, that the trustees cannot, by fraud or collusion, so exercise their discretion as unduly to reduce the amount payable to the Plaintiff, and it is also quite clear that the Plaintiff cannot insist that the fund shall be invested at the smallest possible rate of interest, so as to increase the amount ultimately payable to him. Generally £4 per [383] cent. is the usual rate of interest given by the Court when there is no fraud; but I do not know of any rule which would fetter the discretion of the trustees, and prevent a *bonâ fide* investment of the fund on ample security, if they can find a person who will give more than £4 per cent., or, as in this instance, if they find a person who will give £4, 5s. per cent. I am clear that this is not an improper contract on their part, and that the security is ample for the preservation of the fund for the Plaintiff. That being so, I do not know why they are not entitled to the option which the testatrix has given them, provided they invest on perfectly good security. I am of opinion that they have invested on good freehold ground rents. If the trustees had invested at a time when, from accidental circumstances, as the falling of funds, or the state of trade, the rate of interest was very high, I see nothing to deprive them of the benefit of it, though they are residuary legatees, provided their object was not to increase their own interest at the expense of the Plaintiff. The trustees are entitled to a declaration in favor of the investment.

This point was also referred to:—That the money was lent on a condition that it should not be called in for five years, and as the mortgage deed is dated October

1862, the Plaintiff might be kept out of his money if the tenant for life were to die before the five years. I think the Plaintiff would, in that event, be entitled either to have a transfer of the mortgage or to have the mortgage sold and the deficiency made up by the trustees, because he is entitled to payment at once.

I am of opinion, therefore, that this is not an improper security, although the trustees may be liable to the Plaintiff to make good the deficiency in the event of the sale of the mortgage within five years, and consequently that the Plaintiff is not entitled to say that they must make another investment. I do not think it proper to dismiss the bill, but I will declare this to be a proper investment with liberty to apply.

[384] WALLACE v. THE ATTORNEY-GENERAL. Feb. 1, 11, 1864.

[S. C. 33 L. J. Ch. 314; 10 Jur. (N. S.) 249; 3 N. R. 555; 12 W. R. 506. See *Coventry v. London, Brighton and South Coast Railway Company*, 1867, L. R. 5 Eq. 109; *Callanane v. Campbell*, 1871, L. R. 11 Eq. 381. For subsequent proceedings, see 35 Beav. 21.]

Construction of a charitable gift to the hospitals of London.

"London," in its popular sense, is a word of fluctuating extent.

A testator domiciled in Paris bequeathed his residue "to the hospitals of Paris and London" (aux hospices de Paris et de Londres). The Court, considering the testator had used the word London in the ordinary and popular sense in which persons are said to reside in London, rejected all the local boundaries suggested, and held that an accurate definition of the extent of the limits of the metropolis of London was not capable of being made, and it determined on deciding the rights of each claimant separately. The Court also considered that houses which stood in a street, with houses continuous to the Cities of London and Westminster and the borough of Southwark, were within the limit, and also that the Consumption Hospital at Brompton came within the terms of the bequest.

The Right Honorable Henry Seymour Conway, commonly called Lord Henry Seymour, was born in France in the year 1805. He always resided in France; he died there on the 16th day of August 1859, and his domicile, at the time of his decease, was French.

Lord Henry Seymour made twenty-one testamentary writings, eighteen of which only were valid according to the law of France. The twenty-one documents were all written by himself in the French language and had been duly registered, as required by law, in France, and had also been proved in England.

By one of these instruments, dated the 19th of June 1856, he expressed himself (according to the notarial translation) as follows:—

"I give and bequeath all the personal estate and objects of which I have not above disposed of to the hospitals of Paris and London, which for that purpose I appoint my residuary legatees."*

[385] There were some other expressions in the testamentary instruments on which reliance was placed in the argument. Thus the testator had given a sum necessary to produce an income of 10,000 francs a year, subject to the life interest therein of Miss Ellen Menchin, "a l'Hospice des Lunatics de Londres," and he had, on several occasions, referred to his solicitor, Mr. Capron, of Saville Row, Westminster, as "Mr. Capron, mon notaire à Londres."

This suit was instituted by the English executor for the administration of the estate.

By the decree made 25th July 1863 it was ordered, amongst other things, that the following inquiries should be made:—

"8. And in case the testator, at the respective times aforesaid, resided and was

* "Aux hospices de Paris et de Londres, que j'institue à cet effet mes légataires universels."

domiciled in France, an inquiry what was the effect, according to the law of France, of the residuary bequest, by the said testator, to the Paris and London hospitals (aux hospices de Paris et de Londres), and what institution or institutions or person or persons was or were, according to the law of France, meant by the word "hospices," and what institution or institutions, person or persons was or were entitled, in France and in England, to the residuary bequest contained in the will and testamentary papers, or some or one of them.

"9. An inquiry what institution was meant by The London Lunatic Hospital ('Hospice des Lunatics de Londres') mentioned in the testamentary paper No. 2."

Under this reference 141 claims had been carried in, and the Master of the Rolls directed the limits of London to be argued before him in open Court by three or [386] four of the institutions claiming to be entitled to share in the gift of the residuary estate of the testator to the "Hospices des Londres," so that the expense of proceeding upon and considering claims which might be eventually disallowed by reason of the institution not being within London, though entitled as hospices, might be saved. The Chief Clerk selected the four following institutions to argue the point for the institutions in their several districts, viz.:—St. Bartholomew's Hospital for the City of London only; St. George's Hospital for the Cities and Liberties of London and Westminster; London or University College Hospital for the Metropolitan Boroughs; and the Brompton Consumption Hospital for the Registrar-General's district.

The Plaintiff's solicitors furnished the following various limits of London as defined at different times and for different purposes, viz.:—1. The London postal district, which is a circuit of twelve miles from the Post Office. 2. The metropolitan police district, a circuit of fifteen miles from Scotland Yard, and the whole of any parish any part of which is within the circle. 3. The London cab radius, being four miles from Charing Cross. 4. The metropolitan Parliamentary boroughs. 5. The Cities of London and Westminster and their liberties. 6. The (old) bills of mortality, now superseded by the Registrar-General's district. 7. The metropolitan district under the Poor Law Amendment Act. 8. The London district comprised in the weekly return of the Registrar-General. 9. The district covered by the population of London returned under the Government census. 10. The district comprised within the Metropolis Local Management Act, which is the same as the last three with the exception of the addition of Penge.

The case now came before the Court for argument.

[387] Mr. Selwyn and Mr. F. J. Wood, for University College Hospital.

Mr. Southgate and Mr. R. Hawkins, for St. George's Hospital.

Mr. De Gex and Mr. W. W. Streeten, for the Brompton Consumption Hospital.

Mr. Baggallay and Mr. Macnaghten, for St. Thomas Hospital.

Mr. Hobhouse and Mr. H. R. V. Johnson, for St. Bartholomew's Hospital.

Mr. Ware, for other claimants.

Mr. Baggallay and Mr. Schomberg, for the Plaintiff.

Mr. Wickens, for the Attorney-General.

The following authorities were referred to:—*Beckford v. Crutwell* (5 Car. & P. 242, and 1 Moo. & R. 187); *Ditcham v. Chivis* (1 Mo. & P. 735, and 4 Bing. 706); *Mallan v. May* (13 Mee. & W. 511); *Elliott v. The South Devon Railway Company* (2 Exch. Rep. 725, S. C.); *Burbidge v. Jakes* (1 Bos. & P. 225); *Le Roy v. Lewen* (1 Sid. 405); Sir William Petty (Essay on Political Arithmetic); 15 & 16 Vict. c. 84 (the Metropolis Water Act, 1852); 16 & 17 Vict. c. 33 (Metropolitan Hackney Carriages); 18 & 19 Vict. c. 122 (the Metropolitan Building Act, 1855); 23 & 24 Vict. c. 125 (the Metropolis Gas Act, 1860).

[388] Feb. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. The question that I have to determine upon this summons is the extent topographically of the word "London" employed by the testator in his will. The will is written in French, and by it he gives all the residue of his estate to the hospitals of Paris and of London. The words in the original will are "aux hospices de Paris et de Londres." I have not, on this summons, to deal with or consider the extent or effect of the word "hospices." All that I have to consider is, what is included in the words "hospices de Londres," which are properly translated "hospitals of London," as used by the testator in his will.

Four claimants have been selected to argue for different classes of hospitals. One is confined to the City of London, strictly and technically so called; another extends to the limits of the old bills of mortality, which were discontinued in the year 1847; a third claim extends to the limits of what are usually called the metropolitan boroughs, and the fourth extends to the limits included in the Registrar-General's return.

There are, I think, insuperable objections to the adoption of any one of these proposed limits. As regards the City of London proper, it is argued with great force that the limit of the City of London proper affords a safe and intelligible limit, easy to be carried into effect and admitting of no ambiguity, and that if the Court proceeds beyond this, it is impossible to draw a line and say that London begins or ends on any particular spot.

Several cases have been cited to shew that this has been the governing principle in several decisions. In [389] one of these (*Le Roy v. Leven*, 1 Siderfin, 405) a man was convicted of perjury for having sworn that a particular person was in London, when in truth he was in Southwark. In another (*Mallan v. May*, 13 Mee. & W. 511) a man, who covenanted not to carry on business as a dentist in London, was held not to have broken his covenant by carrying on that business in Great Russell Street, Bloomsbury. But whatever may be thought of these decisions, the former of which, I think, would scarcely be followed in the present day, it is clear that the testator, in this case, did not use the word "London" in any technical or restricted sense in this will, for he speaks of Mr. Capron, his solicitor, as residing "à Londres," and the evidence shews that neither Mr. Capron's residence nor his office is situated within the limits of the City of London. It is obvious that the testator uses the word "London" in the ordinary and popular sense in which persons are said "to reside in London," and in which sense, the City, the borough of Southwark and the City of Westminster, and many of the adjoining places, are considered as forming part of the great metropolis of London.

I have no hesitation, therefore, in coming to the conclusion that the words of the will do not confine the gift to hospitals within the boundaries of the City of London properly so called.

When I have arrived at this conclusion, I feel, to its fullest extent, the difficulties which induced the Court, in the cases I have referred to, to confine the terms to the narrowest limits; and I admit that no one of the other limits proposed by the three other classes, and which I have stated, can be allowed to be the proper [390] extent and limit of the meaning of the word "London" as used by the testator.

The bills of mortality present insuperable difficulties as a limit. They were fixed in the time of Car. II., and they were discontinued at the close of the year 1847. They include only entire parishes and not parts of parishes. They exclude the whole of Marylebone and the whole of St. Pancras, whilst, in ordinary parlance, these parishes have long since formed, and do now form, part of the great metropolis of London. It would be, in my opinion, preposterous and purely arbitrary, to draw a line through such a street as Gower Street, and to determine that one house in it was in London and the adjoining house, separated merely by a party-wall, was not in London. Yet such would be the result of taking the limit of the old bills of mortality as a test for the limits of London.

The proposal to adopt the boundaries of the so-called metropolitan boroughs would be just as arbitrary and as objectionable. By it, large agricultural districts in the neighbourhood of London would be included in such limits, while the closely built and thickly inhabited parts of Brompton and Kensington, immediately adjoining the City of Westminster, would be excluded.

Still less could I adopt the limits included in the Registrar-General's return, which includes Plumstead, Eltham and Woolwich in Kent, Greenwich, Sydenham, Putney, Streatham and many other similar places. Not even, in the widest scope of the popular sense of the term London, could persons residing at Plumstead or Woolwich be said to be residing in London.

I have had various other boundaries suggested to me, [391] but they are all equally unsatisfactory. The boundaries of the Cities of London and Westminster would be too limited; the limits of the metropolitan post office delivery would be too

large; and, in truth, I have come to the conclusion that an accurate definition of the extent of the limits of the metropolis of London, properly so called, is not capable of being made, and, accordingly, in none of the cases cited to me, has it been attempted, except where the strict and technical limit of the City of London proper has been adopted, which technical meaning has, as I have already stated my opinion to be, been excluded by the testator himself.

I am, therefore, driven to adopt a course which, in truth, has been adopted by the learned Judges who, in the case of *Ditcham v. Chivis* (4 Bing. 706), and in *Beckford v. Cruikwell* (5 Car. & P. 242; and 1 Moo. & Rob. 187), both of which were cited to me, decided that the word "London" was *nomen collectivum*, and that it was not to be confined to the limits of the city. I must, therefore, deal with each case separately, and say whether, in this or in that particular case, it be or be not within the limits of "London," as that word is used by the testator and as it is popularly understood.

I concur in the argument of counsel that the word "London," in its popular sense, is a word of fluctuating extent, that it had a different meaning two hundred years ago from what it had one hundred years ago, and that one hundred years ago it was less extensive than it was at the commencement of this century, and that the limits of London, since 1800, have been extending gradually up to the present time. In my opinion, this is the mode in which I must deal with the bequest in [392] question:—by considering what hospitals may properly be said to be included in the words "London hospitals," in 1859, when the testator died.

In order to afford a guide to the parties concerned in this matter, and without laying down any definition, I will explain, as well as I am able, the general grounds on which I shall proceed to hold an institution to be within the objects of the testator's bounty. Sir William Petty,⁽¹⁾ writing in the reign of James II., in a passage to which I was referred, defines London to be "the housing within the walls of the old city, with the liberties thereof, Westminster and the borough of Southwark, and so much of the built ground in Middlesex and Surrey, whose houses are contiguous unto and within call of those aforementioned." Not adopting the exact expression of that very observant and intelligent writer, I may say, however, I consider that this is the principle upon which it is to be decided, and that those houses lie within London, which stand in a street continuous to the Cities of London and Westminster and the borough of Southwark, that is, with contiguous houses. More accurately than this, as a general statement, I cannot define it; but, as an instance of my meaning, I am of opinion that the Brompton Consumption Hospital is included within the limits of London, and that it is one of the hospitals of London within the meaning of this bequest.

I think also that I see indications in the testator's will that he included in his bequest hospitals of which the inhabitants of London had the benefit, and that it [393] has reference not merely to the local description, but to the patients as well. For instance, he gives the reversion of a sum of money, which is bequeathed to Ellen Minchin for life, to the hospital previously mentioned in his former will; on turning to which it appears that it is left to the Hospital of the Lunatics of London. This is undoubtedly very slight; but however this may be, my opinion is that I cannot lay down a general rigid line to include some and exclude others, and that I must deal with each case separately, and to avoid multiplicity of application, I afford a guide, as far as I am able, by stating that the bequest includes certain hospitals which I point out, and it, of course, includes all those which are still nearer London, or more obviously within that meaning, and I do this on the principle that I have pointed out.

It is with this view that I have selected the hospital at Brompton as being one which is entitled to a share in this bequest. If any doubt arise as to any other institution, I must deal with it separately in Chambers; but of course no hospital

(1) "What is meant by London? By the City of London, we mean the housing within the walls of the old city, with the liberties thereof, Westminster, the borough of Southwark, and so much of the built ground in Middlesex and Surrey, whose houses are contiguous unto or within call of those aforementioned."

which was not in existence at the date of the testator's decease can have any share in the bequest.

NOTE.—Since the argument, Mr. Macnaghten has kindly furnished me with the following authority as to the definition of Rome, which is very similar to that of the Master of the Rolls. “De verborum significatione, 2.—*Urbis appellatio muris, Rome autem contentibus ædificiis finitur, quod latius patet.*”—Digest, Lib. L. Tit. XVI.

[394] PEARMAN v. PEARMAN. Feb. 1, 11, 1864.

[See *Locke v. Lamb*, 1867, L. R. 4 Eq. 378.]

In residuary gifts the decisions shew a strong inclination of the Court, in all cases where it is possible, to make the gift vested.

A bequest “to pay and divide” to children, “as and when” they attain a certain age, is ambiguous, and these words are not to be treated as equivalent to a gift to such of the children as should attain that age.

Gift “to pay and divide” residue amongst children “as and when” they attained twenty-one, with a maintenance clause not co-extensive with minority, held vested.

A testator bequeathed his residue to his children, in terms which gave them a vested interest, subject to be divested in favour of their children on their death under twenty-one. He then provided that, if it should happen that he should leave no such children or child living to attain twenty-one, “or such, if any, dying without leaving lawful issue,” then over. Held, that “the dying” referred to was dying under twenty-one, and that the testator's children, on attaining twenty-one, acquired an indefeasible interest.

The testator bequeathed as follows:—“And as to all the rest and residue of his personal estate and effects upon the trusts following (that is to say), upon trust that they, his trustees and the survivor of them, use and employ such part thereof, as also such part of his live and dead stock as should be found necessary for the purpose, to enable them and the survivor of them, and the executors and administrators of such survivor, to manage and carry on his farming business upon the farm he then occupied upon a lease under Sir John Eardley Eardley Wilmot, Baronet, in Berkeswell, for the remainder of the term of twenty-one years therein granted, *in order to enable them to bring up, clothe, educate and maintain all his children* living at his decease, or with which his said wife might be then *eniente* with. And he thereby directed his trustees and the survivor of them *to pay and divide* the whole of the said residue of his said personal estate and effects unto all his said children, in equal shares, *as and when* he, she or they should respectively attain the age of twenty-one years, as the before-mentioned term of twenty-one years would then have expired. But in case any or either of his said children should happen to die under age, leaving issue of his, her or their body or bodies lawfully begotten, then he thereby directed his trustees and the [395] survivor of them to pay, assign and transfer the part or share of such deceased child or children unto such his, her or their issue, share and share alike (if more than one) when and so soon as they should severally and respectively attain their several and respective ages of twenty-one years, and to pay and apply the interest, dividends and produce thereof, in the meantime, for and towards their respective maintenance and education.”

“Provided always, and if it should happen that he should have no such children or child living to attain the said age of twenty-one years, *or such*, if any, dying without leaving any lawful issue, then” upon trusts for certain other persons.

The testator died in 1859; he had one child Frances, with whom his wife was *eniente* at his death; she was now about five years old. The testator at his death was in the occupation of the farm alluded to, under a lease dated in 1857 for twenty-one years. The question arose upon the claim of the infant to maintenance, whether the bequest to her was vested or contingent.

It was argued, on the one hand, that the gift to the children was vested; for not-

withstanding the words "pay and divide" amongst the children "as and when" they attained twenty-one, still the gift was residuary, and there was a direction for maintenance.

On the other side, it was argued that the words of gift consisted merely in the direction to pay at twenty-one, and that this made the gift contingent. It was also pointed out that there was a gap in the maintenance clause, which lasted only during the lease, and did not extend to the whole minority.

[396] Mr. Faber, for the Plaintiff, the widow.

Mr. Jebb and Mr. Freeling, for the Defendants.

Leeming v. Sherratt (2 Hare, 14); *Davies v. Fisher* (5 Beav. 201); *Thomas v. Wilberforce* (31 Beav. 299); *Boreham v. Bignall* (8 Hare, 131); *Southern v. Wollaston* (16 Beav. 166), were cited.

Feb. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on which I reserved my judgment is, whether the infant child of the testator Luke Pearman takes a vested interest in the residue of the estate of the testator, and I am of opinion that the bequest is vested. In the first place, it is to be observed that the subject of the gift is residue, in which case the decisions shew a strong inclination in the Court, in all cases where it is possible, to make the gift vested, in order to avoid intestacy.

In the second place, the trust is to pay and divide the whole of the residue unto all his children, in equal shares, as and when they respectively attain twenty-one years. The cases shew that the words "*as and when*," which are ambiguous, are not to be treated, as indeed grammatically they could not be treated, as equivalent to a gift to such of the children as should attain the age of twenty-one years, in which case the attainment of the age of twenty-one years would be made a condition precedent to the acquisition of the right to the legacy.

[397] In addition to this, the gift over in case there shall be no child who shall attain that age furnishes, as Mr. Jarman observes, plausible argument that the subsequent words explain that the interest of the legatee was to be divested on that event, not that the vesting of the interest was to be postponed until the prescribed age.

In the third place, there is contained in the will, in my opinion, a clear direction that any part of the residue may be applied, if necessary, "in order to enable" the trustees "to bring up, clothe, educate and maintain all his children." I cannot attribute so capricious an intention to the testator, as to hold that the maintenance of the infants was only to be provided for during the continuance of the lease, which, as he himself remarks, must expire during their infancy; and still less can I interpolate words in the will, for the purpose of confining the maintenance fund to the profits made by the carrying on of the farm.

I am therefore of opinion that the residue, or such part of it as might be necessary, was, together with the necessary part of the live and dead stock, given for these two purposes, viz., the carrying on of the farm, and the maintenance of the children. If one child died under twenty-one leaving children, the share became vested in the grandchildren. If the child died under twenty-one leaving no issue, then the share of that child was divested, and passed according to the proviso.

Upon this proviso it was argued that the effect of it was, to give the share of the child to the other persons in the event of the child dying at any time without issue; but such is not, in my opinion, the effect of it. If it were to be so read, it would be directly at variance [398] and inconsistent with the gift to the children, "*as and when*" they attain twenty-one, and both could not co-exist together; but in truth such is not the meaning, although the clause is very ill expressed, as indeed the whole will is, which is most inaccurately and inartificially drawn, though apparently the work of some professional man. The words are these, "Provided always, &c. [see *ante*, p. 395]. The question turns on the meaning of the words "*or such*," and I am of opinion that these words refer to the whole of the previous sentence, viz., "no child living to attain the age of twenty-one years," in other words, a child not living to attain the age of twenty-one years, and that which is meant by the proviso is the event of his having no child at all, or, having one or more, that they should all die under twenty-one without issue. Unless this be the meaning, not only is it, as I have already described, inconsistent with the previous bequest, but the whole of the first part of the proviso as to the attainment of twenty-one years, is wholly unnecessary

and surplusage, and it should run thus:—"that if it should happen that he had no child, or, having any, that they should die without issue, then the gift over was to take effect."

It is well observed by Sir James Wigram, in *Leeming v. Sherratt* (2 Hare, 14), that the question must depend on the whole scope and effect of the will taken together, and it is on this principle that the cases of *Eccles v. Birkett* (4 De G. & Sm. 105), *Davies v. Fisher* (5 Beav. 201) and *Harrison v. Grimwood* (12 Beav. 192), and indeed all the principal cases on this subject, have been decided. Acting on this principle, and looking at the whole scope and purpose of the will, I am of opinion that the residue is vested in the infant Defendant [399] Frances S. B. Pearman, subject to be divested in case she should die under twenty-one without issue, and that on attaining twenty-one, her interest which is vested will become absolute and indefeasible.

[399] BROWN v. BROWN. Feb. 13, 1864.

[S. C. 10 Jur. (N. S.) 461; 10 L. T. 83.]

A real estate was devised to two trustees to sell and divide the produce between A., B. and C. The trustees being dead, A. entered into possession and received the rents for three and a half years, accounting to B. and C. for their shares. A. then died, and at his death the estate remained unsold: Held, that there had been no reconversion, but that the estate, in equity, retained its character of personalty.

By the decree, an inquiry was directed as to what property belonging to the intestate James Brown at the time of his death was comprised in and devised by the will of James Dowson the elder, and whether such property, or any and what part thereof, was, at the time of the intestate's death, of the nature, in equity, of real or personal estate.

It appeared that James Dowson the elder, by his will dated in 1830, devised a messuage, &c., called "The Lamb" to his daughter Ann Brown for her life, and after her decease to her husband for life, and, subject to these life interests, he devised the same premises to his sons James and George upon trust to sell; and he gave and bequeathed the money to arise by such sale, or such part thereof as should not have been applied in payment of his debts, funeral and probate expenses, unto the three children of his daughter Ann, namely, Sarah Brown, Ann Brown and James Brown, equally.

The testator died in 1832.

Ann Brown survived her husband and died in March 1859. Previous to her death both the trustees named in the will had died.

The three children of Ann Brown survived her, at [400]-tained twenty-one years of age and became entitled as tenants in common to the Lamb Inn or the produce of the sale of it.

Upon Ann Brown's death, her son James Brown entered into the receipt of the rents of the Lamb, giving receipts in his own name, and accounting to his sisters for their two-thirds. No sale had been made of the premises, and the legal estate was still vested in the heir of the surviving trustee.

James Brown died in September 1862, three years and a half after the death of Ann Brown, the tenant for life.

There was no further evidence to shew any intention to reconvert the property, but, in the affidavit of Henry Goody, it was sworn that the reason why James Brown received the rent was, because he could not find any one to act in the matter, the trustees being dead. The Chief Clerk being of opinion that there was no indication of an intention to elect to take the land in lieu of the proceeds of a sale, the case was adjourned into Court.

Mr. G. L. Russell, for the two sisters, cited *Dixon v. Gayfere*, No. 2 (17 Beav. 433).

Mr. Karalake, for the widow, cited *Kirkman v. Miles* (13 Ves. 338).

Mr. Eddis, for the heir, cited *Davies v. Ashford* (15 Sim. 42).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that there has been no reconversion. [401] Here the estate was devised to two trustees for sale, who were both dead, and the three tenants in common of the produce agree that the brother shall receive the rents and divide them between them. The brother received the rents as the agent of his sisters, the other tenants in common, who have done no other act to reconvert the estate. They have not applied for a conveyance from the heir of the trustees, nor have they done any other act, except that they have received the rents of the property during three and a half years.

I am of opinion that this does not amount to a reconversion, and that it requires something more than this to shew an intention, on their part, to treat the property as real estate. I must therefore hold that it is still personal estate.

[401] SANDFORD v. BALLARD (No. 2). Feb. 15, 1864.

A receiver of the whole property granted at the hearing as between tenants in common, there being evidence that the Defendant, one of them, had excluded the rest.

The Plaintiffs and Defendants were tenants in common of some gavelkind property, the Plaintiffs being entitled to two-thirds of one-half, and the Defendant Hannah Ballard to one-third of one-half. The Defendant Hannah Ballard had taken possession of the whole. The bill prayed a receiver, and for the application of the rents, according to the rights of the parties.

On a former occasion (30 Beav. 109) the Plaintiffs had moved for a receiver of the whole property, but the application had been refused as regarded the shares of the Defendant, and a receiver had been appointed of one-half [402] only. Difficulties had since occurred in consequence of the tenant colluding with the Defendant.

The cause now came on for hearing, when

Mr. Jessel, for the Plaintiffs, asked for a receiver of the whole. He argued that the case now rested on a different ground, for, first, this was not an interlocutory application, but an application at the hearing; and, secondly, that there was now proof of the Defendant having excluded the Plaintiffs, for by her answer she admitted that she had received the whole of the rent, and that she had refused to pay any portion to the Plaintiffs. "Exclusion is where one tenant in common receives the whole rent and excludes his companion from the share due to him;" *Tyson v. Fairclough* (2 Sim. & St. 143). He also asked for an order on the Defendant to pay the admitted balance due to the Plaintiffs.

Mr. Lewin, in the same interest, supported the Plaintiffs.

Hannah Ballard did not appear.

THE MASTER OF THE ROLLS [Sir John Romilly] said that he was of opinion that the conduct of the Defendant amounted to an exclusion, and that the Plaintiffs were entitled to a receiver over the whole property, and to an order for payment of the balance admitted to be due from her to the Plaintiffs.

[403] PEGLER v. WHITE. Feb. 15, 16, 1864.

[S. C. 33 L. J. Ch. 569; 10 L. T. 84; 3 N. R. 557; 10 Jur. (N. S.) 330;
12 W. R. 455.]

A Court of Equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground-rent is payable, and the purchaser must be involved in immediate litigation.

By an indenture, dated the 15th of August 1843, Richard Palmer Roupell demised some premises in Lambeth to Mr. Osment for a term of seventy-two years, subject to

a rent of £10, and to covenants and conditions, with a proviso for re-entry upon non-payment of the rent or non-performance of the covenants.

The lease having become vested in the Plaintiffs, the Defendant Mr. White agreed to purchase it for £450, and the title was to commence with the lease. The Defendant objected to the title, and the Plaintiffs instituted this suit for the specific performance of the contract.

The nature of the principal objection was as follows:—Richard Palmer Roupell the lessor died in September 1856, and after his death Sarah Roupell his widow, who claimed to be entitled to the reversion of the premises, as devisee under an alleged will of Richard Palmer Roupell, executed a voluntary deed purporting to convey the reversion to William Roupell. William Roupell was afterwards, on the 22d of September 1862, convicted, on his own confession, of having forged the will of Richard Palmer Roupell, and he was now undergoing his sentence. The validity of the will had also since been contested in two actions in respect of other parts of the Roupell estates; one of these actions ended in a compromise, and in the other the jury were discharged without giving a verdict. There are also other actions still pending and threatened.

The Defendant under the conditions required that the [404] last receipt for the ground rent should be produced, and asked to whom the ground rent was now payable, and how the vendors shewed that they were paying it to the proper person? In reply, the vendors said, "The ground landlord, the late Richard Palmer Roupell, left his property to his son, who has since become bankrupt, and the ground rent is now received by Messrs. Chinnoek & Galsworthy, the parties appointed by the Court of Bankruptcy. To this the Plaintiffs replied, that "It is so much a matter of notoriety that the validity of Mr. Roupell's will is in question, that the purchaser may be affected with notice, and that the vendors must satisfy the purchaser that the ground rent is properly paid, and that no claim can be substantiated against the property if Mr. Roupell's heir at law or devisee of another will be established."

On the 20th of April 1863 the Plaintiffs' solicitors replied, "We have seen Messrs. Chinnoek & Galsworthy, and they inform us that they collect the rents of the property in the Wandsworth Road on behalf of the first mortgagees of William Roupell, Richard Palmer Roupell the lessor having by his will bequeathed the property to his wife, who by a deed of gift gave the property to her son William Roupell the mortgagor. We have already produced the last receipt for the ground-rent signed by Messrs. Chinnoek & Galsworthy, who have collected the rents for five years and upwards. Have the goodness to reply by bearer if the above information will in any way alter your determination, as we have to follow our clients' instructions?"

The Defendant having refused to complete his purchase, this suit was instituted for the specific performance of the contract.

[405] The Defendant insisted that the Plaintiffs had not made out a good and sufficient title. By his answer he said as follows:—"I am advised and submit that the said lease under which the Plaintiffs hold the premises is voidable by the reversioner, under the proviso for re-entry in the indenture of lease contained, for non-payment of the rent thereby reserved, and for breach of the covenants therein contained. I am further advised and submit that the person or persons lawfully entitled to the reversion may distrain upon the premises in the hands of a purchaser for arrears of rent due for the premises, and that the Plaintiffs, as vendors of a leasehold interest, are bound to produce reasonable evidence that the lease is a valid and subsisting lease, and not void or voidable, and that the rent thereby reserved has been duly paid, and the covenants and conditions therein contained have been duly observed up to the time of the sale; and I say that the Plaintiffs have not produced or offered to produce such evidence."

Mr. Baggallay and Mr. Waller, for the Plaintiffs. The objection of the Defendant, if it were to prevail, would involve the necessity of proving the devolution of the lessor's title subsequent to the lease, in addition to shewing that of the lessees. The Plaintiffs, according to the conditions of sale, have produced the receipts for the rent for five and a half years. These are from the mortgagees in possession, whose possession has never been interfered with. The vendor of an undisputed lease is not bound to prove the title of the person to whom he has been paying his ground-rent; and

the retention of six years' ground rent in Court will be a sufficient indemnity against all claims which may be made by the heir at law of Richard Palmer Roupell.

Secondly. The Defendant cannot raise this objection; [406] he resides in the neighbourhood, and had full notice of the state of the title when he bought the property.

Mr. Hobbhouse and Mr. Francis Nichols, for the Defendant. The Plaintiffs were bound not only to produce the receipts for the ground rent, but to shew that they were given by persons rightfully entitled to receive it. But it appears that even the Plaintiffs did not themselves know to whom they were paying the rent. It is also essential that the Defendant should know to whom he is to pay his rent for the future, otherwise he may be involved in constant litigation, and be obliged to file interpleader bills annually. This objection is one of title, and not of conveyance, for the persons who by joining in the conveyance would make a valid title are not under the control of the Plaintiffs; *Esdale v. Stephenson* (6 Madd. 366); *Craddock v. Piper* (14 Sim. 312). On the whole, this is not such a title as the Court will compel the Defendant to take.

Mr. Baggallay, in reply.

Feb. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon examining the evidence and considering the transaction, I am of opinion that the objection cannot be got over, unless the Plaintiffs can, by some arrangement with the persons entitled to the reversion, put the Defendant in a state of security. It must not, however, be understood that where a purchaser buys a lease the vendor is bound to shew and to deduce the title of the reversioner, for the purpose of shewing exactly who is the person entitled to receive the ground-rent.

But the circumstances here are very peculiar. In this case a lease was granted in the year 1843 for seventy-[407]two years by Richard Palmer Roupell, who died in September 1856. Under his will, which was duly proved, Mr. William Roupell entered into possession of all his property and received the rents, and among them the £10 a year ground rent for this property. Questions then arose as to whether this will was not a forgery, and on the 22d of September 1862 William Roupell was convicted of having forged it, and that upon his own confession. If the matter rested there, it would follow, as a matter of course, that the heir at law, or the devisees under any real will of the testator, would be entitled to the reversion, and there would be no question as to who was the person entitled to receive the rent, and therefore no objection could be taken by the purchaser, that he, having supposed that one set of persons were entitled to the reversion when he bought the property, now finds, when the conveyance is to be made to him, that another set of persons are entitled to it. But the matter does not rest here, it is shewn that there has been a vast amount of complicated litigation between the mortgagees under William Roupell on the one side, and the heir at law or devisees of Richard Palmer Roupell on the other. (See *Ellice v. Roupell*, 32 Beav. 299, 308 and 318.) With respect to one part of the property there was a compromise, and with respect to another portion of the property there has been a trial of great length, and with a great amount of evidence, in which the jury could not come to a conclusion, and were dismissed without giving any verdict. In point of fact the matter still remains in abeyance, and it is still a matter of doubt whether the mortgagees under William Roupell, or the heir at law of Richard Palmer Roupell, are the persons entitled to this reversion.

If I compel the Defendant to take this property, the result may be this:—There may be a claim against him [408] for six years' arrears of ground rent, on the ground of its having been paid to the wrong person. That might easily be got over by a sufficient indemnity given by the vendor. But this difficulty strikes me very forcibly: when the Defendant has to pay the next ground rent which becomes due, to whom is he to pay it? Is he to pay it to the mortgagees or to the heir-at-law? This Court will not compel a person to take a title where it has distinct evidence before it, not only that there are two claimants to the reversion, but that it is impossible for this Court to say which of the two may be in the right, and that it would involve the necessity of the purchaser of the property filing a bill of interpleader for the purpose of being secured in the enjoyment of it. I am of opinion that this Court cannot force on anybody a title which it is evident will involve the taker in immediate litigation.

The result is that, unless some arrangement can be made, I cannot compel the Defendant to take this title ; but I do not mean thereby to say that if the ground-rent had been paid regularly to one set of persons and there has been no contest about it, I should call on the vendor to establish the title to the reversion, and shew who was the person entitled to receive it. There must be some reasonable doubt upon the subject ; but, upon this part of the case, it appears not only that there is reasonable doubt, but that there is a certainty of litigation if I were to compel the Defendant to take the title. If he knew this when he bought the property, I should say that he had determined to run the risk and must take the consequences, and it was for this purpose that I examined the evidence ; but I do not think the evidence establishes that he had notice ; it shews a good deal that ought to have set him on inquiry, but he certainly had not distinct notice of it.

[409] I will allow this case to stand over, in the same manner as if the matter were in Chambers upon a reference as to title, and see whether the vendors can cure the defect by getting both the claimants to assent to the sale, so that this Defendant may not be vexed in regard to the rent ; by agreement it might be paid into Court, or to some third person, to abide the event of the litigation. Unless the defect be cured before Easter term, the bill will stand dismissed without costs.

[409] BIRKS v. MICKLETHWAIT. Feb. 18, 1864.

[S. C. 33 L. J. Ch. 510 ; 10 L. T. 85 ; 10 Jur. (N. S.) 302 ; 12 W. R. 505 ; reversed on appeal, 34 L. J. Ch. 362 ; 13 L. T. 31.]

A large balance was found due jointly from a trustee and the representatives of a deceased trustee, but costs were given to both when such balance had been paid. It being admitted that no part of it could be recovered from the estate of the deceased trustee : Held, that the surviving trustee, on payment by him of the share of the deceased trustee, was entitled to a lien for it on the costs awarded to the representatives. The Court ordered such costs to be carried over to a separate account, with liberty to apply.

Thomas Micklethwait and William Micklethwait (deceased) were the executors of the testator, whose estate was being administered in this suit. By the certificate, it was found that £2042 was due from Thomas Micklethwait and William Micklethwait (deceased). The Defendants, Mr. and Mrs. Winstanley, were the executor and executrix of William Micklethwait.

When the cause came on for further consideration, Thomas Micklethwait was ordered to pay the balance into Court, and he was to be at liberty to prove against the estate of William Micklethwait. The Court also determined, that upon payment of the balance both Thomas Micklethwait and the representatives of William Micklethwait should have their costs as between solicitor and client.

The minutes as drawn by the registrar directed that [410] upon Thomas Micklethwait paying the balance his costs were to be taxed and paid him. Costs were given in a similar way to Mr. and Mrs. Winstanley, in the event of the estate of William Micklethwait paying his share of the balance found due to the testator's estate.

Mr. Jessel, for Mr. and Mrs. Winstanley, moved to vary the minutes as drawn by the registrar, by making their costs payable to them, at all events upon Thomas Micklethwait paying the whole balance found due. He admitted that, from the state of the assets of William and the amount of specialty creditors, nothing could be recovered in respect of the balance found due in this suit. He argued that the Plaintiff had nothing to do with the matter, and that when his claim had once been satisfied the costs of both trustees ought to be paid.

Mr. Hobhouse and Mr. Freeling, for the Plaintiff. No defaulting trustee is ever allowed his costs of suit until he has paid the balance found due from him ; unless, therefore, the representatives of William pay what is due from their testator's estate, they have no claim for costs.

Mr. Faber, for Thomas Micklethwait, asked that the costs of Mr. and Mrs. Winstanley might be carried over to a separate account.

THE MASTER OF THE ROLLS. I cannot think that the representative of a defaulting trustee can be allowed to put the costs of suit into his pocket until he has paid what is due from him. If another person pays his share of the balance, why is he not to stand in his shoes, in regard to anything coming to him in the suit?

[411] Mr. Jessel, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. The principle on which this Court proceeds is very clear, though sometimes in working it out it becomes very complicated. It is not now necessary to consider whether two sets of costs ought to have been allowed to the trustees, no complaint being made in respect to that matter, and I therefore assume that it was proper.

The Court never gives costs to a defaulting trustee; it usually says, "When you have paid in the balance found due from you, then you shall have your costs." When two trustees are jointly and severally liable to make good a trust fund, the Plaintiff may recover the whole from either of them, and the one who pays the whole is entitled to contribution as against the other; and if there is any fund in Court in the suit which is payable to the latter, it is the daily practice to apply to the Court to impound the fund, in order to make good what is due from him. Thus it frequently happens that a fund in Court is set apart to pay a legacy bequeathed to one of two defaulting trustees, and who has paid no part of the balance found due from him. In such a case, the other trustee who has paid the whole balance is entitled to ask the Court to impound the fund, in order to make good the share of the debt which the person who was both trustee and legatee ought to have paid. The same principle is applicable whether the fund payable to such person consists of part of a residue, or of a legacy or of costs. It is said that the costs ought to be paid to the representatives of William whenever the Plaintiff has got all that is due to him. But this is a fallacy; the trustee who pays the whole of a balance which is due from both is [412] entitled to the benefit of all the Plaintiff's rights as against the other trustee. The Plaintiff, when the balance has been fully paid, can get no benefit from the costs of the representatives of William, but his right against them is transferred to the person who has paid for both, and who, upon payment, is entitled to stand in the place of the Plaintiff.

I am of opinion that the minutes ought to be varied, and stand to this effect:—In case Thomas shall pay the balance found due from him and the estate of William jointly, and if Winstanley and wife shall not pay to Thomas their share of such balance, then let the costs of Mr. and Mrs. Winstanley, when taxed, be carried to a separate account, intituled "The Costs of Mr. and Mrs. Winstanley," with liberty to apply.

[412] *Re YETTS.* Feb. 18, 1864.

[S. C. 3 N. R. 598. Distinguished, *In re Ward* [1896], 2 Ch. 31.]

A solicitor delivered four bills, the last of which and the cash account shewed, upon the whole, a large balance due to the solicitor. The solicitor brought an action to recover the balance, whereupon the client obtained an order of course to tax the last bill and to stay the action in the meantime. The order was held irregular, and was discharged with costs.

Mr. Woodgate had employed Mr. Yetts as his solicitor, who had, prior to the 3d of January 1863, delivered to him three bills of costs, and he delivered a fourth, amounting to £304, on the 24th of July 1863. The fourth bill contained a cash account, which debited Mr. Woodgate with the unpaid balance of the former bills, and credited him with cash payments, and shewed a balance of £623 due to Mr. Yetts. Mr. Yetts brought an action at law to recover the £623, and on the 10th of February 1864 Mr. Woodgate obtained an order of course in the usual form (Seton on Decrees, 425 (2d edit.)) for taxing the fourth bill alone, which directed, "that

all further pro-[413]ceedings at law against Mr. Woodgate in respect of the said bill be stated pending such reference."

Mr. Batten, on behalf of Mr. Yetta, now applied to discharge the order. He argued that an order to tax one of several bills was irregular.

Mr. Wickens, *contra*. The client complains only of the last bill, and it is only necessary to tax that bill, in order to ascertain the balance really due and for which the action has been brought.

THE MASTER OF THE ROLLS [Sir John Romilly]. The effect of this order as it stands is this:—The Master may find the total amount of £302 due on the last bill, and the action for the £623 will be stayed, though the whole may be due to the solicitor. The injunction contained in the order stays the whole action.

This is one of those cases in which the client ought to have come for a special order, and if the difficulty had been explained to the secretary he would not have granted the order.

It must be discharged with costs.

[414] CHAPLIN v. YOUNG (No. 2). Feb. 19, 1864.

One of the inspectors, under a creditors' deed, of a newspaper to be carried on under it by the debtor himself, furnished the paper. Held, that being in the position of a trustee, he could only charge the cost price.

Mr. Young, the proprietor of the *Sun* newspaper, being in difficulties, executed an inspectorship deed dated the 31st day of July 1848, under which he was to carry on the paper under the inspectorship of James Low and Joseph Clayton. He was to pay the produce into a bank to the account of the inspectors. (See *ante*, p. 334.)

The decree directed an account to be taken of the receipts of Low and Clayton.

In taking the accounts in Chambers a question arose, which the parties agreed in stating in the following terms:—"The discharge in this suit of Low deceased and Clayton contains an item, No. 4, therein of £48, 5s., and other items of various amounts, for paper supplied for the printing of the *Sun* newspaper by the firm of Pewtress, Low & Pewtress, paper manufacturers, in which Low was a partner at the times the said paper was supplied; the amount of each of the said items includes a profit on the said paper. The Plaintiff and creditors of Young, parties to the indenture of the 31st of July 1848, contend that only so much of the several items can be allowed in the said discharge as was the cost of the said paper to the Defendant Low and his partners. The Defendant Clayton and the executors of Low contend that the firm of Pewtress, Low & Pewtress were entitled to charge for the paper at their ordinary selling price, notwithstanding that the Defendant Low was a partner in such firm."

[415] In December 1861 Low had ceased to be a partner in the firm, and he had since died.

Mr. Baggallay and Mr. W. Morris, for Clayton and the executors of Low. We admit the general rule that a trustee cannot derive any profit for his personal service in the execution of his trust; but inspectors stand in a very different situation from that of trustees, and the distinction is pointed out in the former judgment of the Court (*ante*, p. 337). Their duty was to overlook, but not to regulate, the management of the business in the character of trustees. It would be extending the doctrine, to hold that it applied to inspectors, and it would be most impolitic in a commercial point of view; for, in ordinary cases, the largest creditors are usually appointed inspectors, and it would tend to exclude the most desirable persons from that office, if they were under an obligation either to furnish goods at cost price, or to discontinue supplying the necessary articles for continuing the business, which is always the principal object of such arrangements.

But this rule applies only to the personal services of a trustee, as in the case of an auctioneer or solicitor; *Mathison v. Clarke* (3 Drew. 4), where Vice-Chancellor Kindersley says, "It is a well-established rule in equity that a trustee cannot, as

against his *cestui que trust*, make any profit out of the execution of the trusts in respect of the application of his *personal trouble*."

Here the profit on the paper was not derived from any personal services of Mr. Low, but from the capital embarked in the business and the labour of servants and agents, and the ordinary risks of trade. In one year there might be a profit and in another a loss; and it would not be equitable that the creditors should have [416] the benefit of the one without participating in the other.

This was the mere continuance of the ordinary course of the business prior to the deed, and was contemplated by the arrangement; and if the charges are fair and reasonable they ought to be allowed.

Mr. Selwyn, Mr. G. L. Russell and Mr. Cecil Russell were stopped by the Court.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that I cannot allow the profit upon the paper; and all that can be allowed to Mr. Low or his firm is the actual cost of making the paper. The arguments used before me would equally apply to a solicitor who was one of a firm of solicitors, and to an auctioneer who was one of a firm of auctioneers. In both those cases the trustee might, in the performance of his trust, derive a profit from his business; but if they employed any other person, then it would be different. The Court is very strict in all cases of trustees. I remember in a case I had before me of Mr. Hudson and the York and Midland Railway Company, in which Mr. Hudson, while he was chairman of the company, bought a large quantity of iron, and then afterwards he proposed to sell that iron at a profit to the company, the price having risen; but I held that, as he was the agent for the company, he could not make a profit by his purchase. I refer to this case merely for the purpose of shewing that a trustee cannot make any profit whatever in the performance of his trust. If there had been a special contract contained in the trust deed, or made subsequently to it, that would have altered the case.

[417] I listened attentively to the argument that Mr. Harmer had assented to it; but that does not bind the other creditors. As the matter stands, I am of opinion that Mr. Low and his executors cannot be allowed anything but the actual cost of the paper.

NOTE.—See *Collins v. Carey*, 2 Beav. 128; *Christophers v. White*, 10 Beav. 523, and *Stanes v. Parker*, 9 Beav. 388, note (a).

[417] LYSAGHT v. WESTMACOTT. Feb. 19, 1864.

In a suit against A., an incumbrancer, and B., a sub-incumbrancer, to redeem the securities: Held, that the proper form of decree was, that upon the amount due from the Plaintiff to A. being paid into Court, both A. and B. should reconvey the estate and deliver the deeds to the Plaintiff, and that the Plaintiff was not bound to wait until the accounts had been taken and the equities settled as between A. and B.

The Plaintiff had granted a number of annuities to Mr. Westmacott, who, in 1847, had deposited the deeds with the late Lord Lisle as a security for the repayment of a sum of £7000.

This suit was instituted by Mr Lysaght against the executors of Mr. Westmacott and the executors of Lord Lisle, for setting aside the securities, on payment of the money actually advanced with interest.

The Plaintiff had succeeded in the suit, and the securities had been ordered to be set aside on payment by the Plaintiff of the principal, interest and costs.

In drawing up the decree, it was proposed that, upon payment into Court of what might be found due from the Plaintiff to Westmacott on taking the account, the representatives, both of Westmacott and of Lord Lisle, should reconvey the estate and deliver up the title-deeds and securities to the Plaintiff.

The representatives of Lord Lisle, however, objected [418] to convey the estate and deliver up the title-deeds until actual payment had been made to them of the

amount found due to them from Westmacott. The question as to the proper form of the decree was now brought before the Court.

Mr. Selwyn and Mr. Lea, for the executors of Lord Lisle, referred to the form in Seton on Decrees (p. 475 (3d edit.)), and insisted that the accounts ought to be taken, not only as between the Plaintiff and the representatives of Westmacott, but as between Westmacott and Lord Lisle, and that on payment, according to the result and not until then, a reconveyance and delivery of the deeds ought to be directed.

Mr. Baggallay and Mr. C. C. Barber, for the Plaintiff.

Mr. Cole and Mr. E. Macnaghten, for the executors of Westmacott.

THE MASTER OF THE ROLLS [Sir John Romilly]. There may be a number of questions in contest between the mortgagee and sub-mortgagee, but the mortgagor cannot be kept out of his estate until they have been settled. In cases like the present, the Court orders the money into Court, and then allows the mortgagee and sub-mortgagee to contest their right to it; but the mortgagor is allowed to go free.

As soon as the amount due to the representatives of Westmacott has been ascertained and paid into Court, the Plaintiff is entitled to have a reconveyance and the title-deeds delivered up. If the sub-mortgagee has [419] advanced more than is coming to Westmacott, then all that can be said is, that he has advanced his money upon an insufficient security.

[419] BAKER v. MONK. Feb. 10, 22, 1864.

[S. C. 10 L. T. 86; affirmed on appeal, 4 De G. J. & S. 388; 46 E. R. 968; 10 L. T. 630; 12 W. R. 779. Followed *Fry v. Lane*, 1888, 40 Ch. D. 322.]

Held, that a purchaser from an old, infirm and ignorant woman, having no professional advice, was bound to prove that he gave the full value for the property, and failing in such proof, the transaction was set aside, with costs.

This was a suit instituted by an old unmarried woman, Frances Baker, to set aside a conveyance of the 14th of December 1861, on the ground that "the Defendant took advantage of the Plaintiff's unprotected position, age and weakness of mind to induce her to execute the deed, and that, at the time of the execution thereof, by the Plaintiff, she had no professional advice or assistance or indeed any independent advice or assistance whatever, and that, before the Plaintiff executed the deed, no agreement, either verbal or in writing, was ever made or entered into by her to sell the messuage and premises to the Defendant, and no draft of the said deed was ever sent to the Plaintiff for her perusal prior to her execution thereof, and that the Plaintiff was ignorant of the value of the said property, and that the Defendant never told her of the value thereof."

Mr. Jessel and Mr. Herbert Smith, for the Plaintiff, cited *Clark v. Malpas* (31 Beav. 80); *Harrison v. Guest* (6 De G. M. & G. 424; 8 H. of L. Cas. 481); *Clarkson v. Hanway* (2 Peere Wms. 203); *Wood v. Abrey* (3 Mad. 417).

Mr. Selwyn and Mr. Hardy, for the Defendant.

[420] Feb. 22. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit to set aside the conveyance from the Plaintiff to the Defendant of two small messuages, on the ground that advantage was taken of the situation of the Plaintiff, which rendered her incapable of estimating the value of her property, and that, being without advice or due information on the subject, she was induced by the Defendant to sell the property to him for an inadequate value.

The Plaintiff attended a Dissenting chapel at Faversham. She consulted Mr. Rook the minister as to her position and expressed a desire to sell her two cottages which occasioned her trouble; he advised her not to accept an offer made to her to sell it for an annuity of 5s. per week, to be paid to her weekly.

He mentioned the subject to the Defendant, with a view, apparently, of obtaining a good price for the Plaintiff. The Defendant thereupon called upon the Plaintiff and proposed to buy the two cottages from her for 8s. 6d. a week. She stipulated for a larger sum and agreed to take 9s. a week. The date is not accurately fixed, but it was at the end of November or the beginning of December 1861. The

Defendant then wrote to his solicitor Mr. Johnson, who saw the Plaintiff and afterwards prepared the deed, explained it fully to her, and she executed it on the 14th December 1861.

The deed was to this effect :—

By an indenture dated the 14th of December 1861, and made between the Plaintiff of the one part and the Defendant Frederick William Monk of the other part, after reciting the devise of the property to the Plaintiff in fee, and reciting that the Defendant had contracted [421] with the Plaintiff for the absolute purchase of the hereditaments, in consideration of the Defendant securing to her the Plaintiff a clear annuity of £23, 8s., payable by weekly instalments of 9s., during her life, in the manner thereafter mentioned, and of the covenant of the Defendant thereafter contained to permit the Plaintiff to occupy rent free the cottage secondly thereafter described during the natural life of Edward Hammond, the Plaintiff's father-in-law, the Plaintiff thereby conveyed unto the Defendant and his heirs the two cottages with their appurtenances, to the use and intent that the Plaintiff should receive and take yearly, during the term of her natural life, the clear annuity of £23, 8s., to be issuing and payable out of the hereditaments thereinbefore described, by fifty-two equal payments of 9s. each on the Monday in every week, the first payment thereof to be made on the 16th day of December then next, with power of entry and distress, and subject thereto, to the use of the Defendant, his heirs and assigns for ever. And the Defendant covenanted with the Plaintiff to pay the annuity, and that he would permit and suffer the Plaintiff, for and during the natural life of Edward Hammond, to use and occupy, rent free, one of the said cottages therein described.

Edward Hammond was at that time ninety-three years of age, and he died within a month after the execution of the deed.

No solicitor was consulted or employed on the part of the Plaintiff; she was sixty-seven years of age, infirm and illiterate; but she was able to write, for her signature to the deed is written very plainly in her own handwriting.

The Defendant gave notice to the Plaintiff to appear [422] to be cross-examined in Court, and she attended accordingly; but his counsel, in the exercise of their discretion, abstained from putting her into the witness-box. I have no doubt they acted prudently, for from her appearance in Court it did not seem likely that her production would have assisted the case of the Defendant.

In this state of circumstances, this being an old and infirm woman, with no other assistance or advice, except such as she might derive from the bedridden old man, her father-in-law, who was of the age of ninety-three, who was living in the same cottage, I am of opinion that, upon the principle on which this Court acts, and considering the protection it throws round persons who are so situated, as to be more or less helpless without proper advice and information, such a purchase can only be sustained on proving that the full value was given for the property bought.

Upon the evidence, I think that the Plaintiff had no accurate knowledge, if indeed she had any at all, of the value of the property. She seems to have consulted Mr. Rook as to the propriety of taking 5s. per week for it; and though she bargained for the extra sixpence, as she probably would have done for any price offered to be paid for it, the conclusion I have arrived at from the evidence of Mr. Rook, of the Defendant and of Mr. Johnson is, that she might have easily been induced to sell it for any weekly sum exceeding 5s. per week which they should put upon it.

I think, therefore, on the principle of the cases cited to me, especially *Clark v. Malpas* (31 Beav. 80, and affirmed by the Lords Justices), affirmed by the Lord Justices, and not, I think, impugned or affected by the decision of the House of Lords in *Harrison v. [423] Guest* (6 De G. M. & G. 424; 8 H. of L. Cas. 481), which rests on a different foundation, that the burthen lies on the Defendant to prove that he gave the full value for the property bought. This he has accordingly undertaken to do, and the evidence he brings forward is the following: the Defendant says it is worth £180, Mr. Dawson from £190 to £200, Mr. Shrubssole from £190 to £200, Mr. Minter £200, and Mr. Naylor £200.

Mr. Tucker says that the value of an annuity of 9s. per week on the life of a woman aged sixty-seven is £225 or thereabouts. Mr. Jones states that the value of the annuity is £245 or thereabouts. They both state that the value of occupying

rent free a cottage worth £4 per annum, during the joint lives of a woman of sixty-seven and a man of ninety-three, is £9, that is, two and a quarter years "or thereabouts."

This is the evidence of the Defendant; it is very vague, by reason of the introduction of the word "thereabouts" throughout; and though I have referred to both the Government tables and other tables of annuities, I can nowhere find that the estimation of the value arrived at by those gentlemen is sustained. In all cases the value of such an annuity on such a life is placed much lower, and below even what the Defendants estimate to be the value of the property. Nor do these gentlemen state on what principle or at what rate of interest they calculate the annuity.

On the other hand, the Plaintiff, though she has given no evidence as to the value of the annuity, has brought forward two witnesses, one of whom says it is worth £200, and another says it is worth £315, and states his readiness to give that price for it now.

[424] It appears that it is situate in the village of Faversham, has a frontage of 33 feet 8 inches and a depth of 158 feet, and would, if these witnesses be correct, be valuable for building purposes.

On this evidence, I am of opinion that the Defendant has failed in shewing that he gave the full or indeed the true market value for the property. I think that the evidence given on his part also, if it stood alone, would fail. It is the first time that I remember seeing, in evidence in the estimate of an annuity by actuaries, the word "thereabouts" introduced, and indeed very rarely in the case of a surveyor's estimate of value. This is the more striking in the case of an annuity, because this is a mere sum in arithmetic, deduced from the data on which the actuary proceeds, depending on the number of years a life of sixty-seven is estimated to continue, and the rate of interest on which the calculation is based, and this element of uncertainty tells most unfavorably for the Defendant. There is some doubt, unquestionably, when a surveyor speaks as to value of a property which is not arrived at usually by a mere arithmetical calculation; but even then, the word "thereabouts" has a very unfavorable effect, when it is considered that witnesses of this character always give their testimony as strongly in favor of the side to support which they are called as their conscience will allow them to do.

On the other hand, Mr. Usher, though of course his evidence is to be submitted to a like ordeal, gives a strong test of the value of his estimate, when he says that he is now ready to give for the property the amount at which he values it.

A man who comes to a lone aged woman in the lower rank of life, and buys from her her property [425] without her having any consultation or advice on the subject with anyone else, except his solicitor, can only support the transaction, if questioned in a Court of Equity within a reasonable time, by proof that he gave the full value of the property for it. The Defendant, in my opinion, fails in doing so, and the transaction cannot stand.

It is an additional imperfection in the case of the Defendant, but one on which, if it stood alone, I should not have acted, that the deed of conveyance does not charge the annuity on the property itself, and that the right of distress on the cottages is clearly an inadequate security. The Defendant is said to be rich and the Mayor of Faversham, and the covenant of the Defendant would, therefore, I have no doubt, be a sufficient security; but the transaction must be regarded in the same light whether the purchaser be a rich one or a poor one, and this is a bargain between two persons very differently situated, where all the knowledge, wealth and influence were on one side, and poverty, age and ignorance on the other.

I must, therefore, order the conveyance to stand as a security for the money advanced on the annuity, and take an account of rents on one side and of the annuity on the other side, and, on payment of the amount found due, order the conveyance to be delivered up to be cancelled. The costs must follow the event and be set off against the amount to be found due.

NOTE.—Affirmed by the Lords Justices, 7th May 1864. [4 De G. J. & S. 388.]

[426] FLETCHER v. GREEN. Feb. 24, 1864.

[See *Marler v. Tommas*, 1873, L. R. 17 Eq. 11.]

Trust money was settled on a married woman for life, for her separate use, without power of anticipation, but with power to her to appoint the capital after her death by deed. The trustees lent part of the trust money to the husband on mortgage, and she consented to the investment by the mortgage deed. Part of the trust money having thereby been lost: Held that the wife had not, by executing the deed, appointed the reversion, so as to make it liable for the loss.

Trustees committed a breach of trust by lending trust moneys on mortgage. They instituted a suit to realize their security, in which the property was sold and the produce paid into Court and invested. In taking the accounts they were debited with the cash and not with the investment. On further directions, the stock was ordered to be sold, and the produce, after payment of the costs, was paid to the trustees. The funds having risen, there was a gain of £251 by the investment. Held, that the trustees were entitled to the benefit of this sum in discharge of their liabilities.

Trustees, in breach of trust, lent trust money to one of them, H. F. and his partners in trade. H. F. and his partners gave their bond to H. F. and his co-trustees for the amount, payable with interest at five per cent. No action at law could be maintained on the bond. Held, in a suit to make the trustees liable for a breach of trust, that H. F. was only liable to pay four per cent. on the loss which had occurred to the trust funds.

As to the right of co-trustees, who have committed a breach of trust, to contribution in a suit to make them replace the trust fund.

In 1828, upon the marriage of Richard Fletcher with Mary Green, certain moneys were vested in three trustees, John Green, William Green and Howard Fletcher, upon trust for the separate use of Mary Green for life, "and so and in such manner that the personal receipt only of Mary Green or of any person whom she may appoint to receive the same dividends, interest and annual income respectively, *after the same shall become due*, shall be the only sufficient discharge to the trustees or trustee for so much and such part of the dividends, interest and annual income respectively as in any such receipt shall be acknowledged or expressed to have been received." And after the decease of Mary Green, upon trust for such person as she should by deed appoint, and in default, for her husband and children.

The settlement contained a power to lend the trust [427] moneys on mortgage, but only with the consent in writing of Mary Green.

In 1829 the trustees raised £4000 out of the trust moneys, which they lent on mortgage to Richard Fletcher (the husband), Howard Fletcher (the trustee) and their three partners. The borrowers executed a mortgage, dated the 19th of January 1829, to the three trustees, Mrs. Green was a party to the mortgage deed, she thereby consented to the investment. At the same time, the five partners (including Howard Fletcher) executed a bond to the three trustees (also including Howard Fletcher) for securing the £4000 with interest at £5 per cent.

The mortgage was an insufficient security, and the security was taken by the trustees under such circumstances as to constitute a breach of trust, for which they were liable.

In 1834 the trustees instituted a suit of *Green v. Holden* to realize the security, and under the decree the property was sold, and, upon the application of Richard Fletcher and wife, the purchase-money (£3624, 5s. 6d.) was, in 1847, invested in £4095, 4s. 5d. £3 per cents.

By his report, made in 1855, the Master found that after deducting the £3608 paid into Court £392 was due on the security.

By the order on further directions (1856) the fund in Court was order to be sold, and the produce, after payment of the costs (£831, 5s. 11d.), was ordered to be paid

to the trustees, and the funds having risen in the meantime, a profit was made on the investment of £251, 14s. 11d.

[428] This bill was filed by Mrs. Fletcher and her children against the three trustees, to make them responsible for the breach of trust. Richard Fletcher was the only other Defendant. Four days before filing the bill, Mrs. Fletcher appointed the fund, subject to her life interest, to the Plaintiffs, her two children.

The cause now came on for hearing.

THE ATTORNEY-GENERAL (Sir R. Palmer) and Mr. W. Pole, for the Plaintiffs, argued that the trustees were liable for the deficiency of £4000, and that the £257, 14s. 11d. gained by the investment belonged to the trust. That Howard Fletcher the trustee was liable to pay interest at the rate of £5 per cent., for that was the rate of interest payable by him and his co-partners under the bond.

Mr. Selwyn, Mr. Archibald Smith, Mr. Baggallay, Mr. T. Stevens and Mr. Bristowe, for the Defendants. First. The Plaintiff Mrs. Fletcher had a power to appoint the fund by deed. She induced the trustees to lend the money to her husband, and, by executing the mortgage deed, she appointed the reversion so as to make it liable for the loss and to exonerate the trustees; *Hopkins v. Myall* (2 Russ. & Myl. 86); *Hughes v. Wells* (9 Hare, 749); *Thackerell v. Gardiner* (5 De G. & Sm. 58); *Brewer v. Swirles* (2 Smale & Gif. 219); *Lockhart v. Reilly* (25 Law J. (Ch.) 697).

Secondly. The profit made by the investment in the other suit of *Green v. Holden* must be taken as part of the money recovered for the benefit of the trust.

[429] Thirdly. The trustees are chargeable with interest only according to the usual rule, which is £4 per cent. This is not a suit to recover the amount due on the bond; all the five obligors ought to be parties to such a suit; *Cockburn v. Thompson* (16 Ves. 321).

They also argued as to the liability of each of the three trustees to contribute towards the share of the ultimate loss which had happened to the trust funds.

[THE MASTER OF THE ROLLS. The only question on which I have any doubt is the rate of interest for which the Defendant is liable. Can the Plaintiff claim interest beyond £4 per cent. ?]

THE ATTORNEY-GENERAL, in reply. The trustee has himself fixed the rate of interest with which he is chargeable; he has taken a bond from himself to himself with interest at £5 per cent.

THE MASTER OF THE ROLLS [Sir John Romilly]. On the first question I think the Plaintiffs are entitled to have the trust fund restored. It is perfectly clear that this was a consent given by a married woman who had no power to anticipate her income, for it is not argued that the words used in the deed do not amount to a proviso against anticipation. (15 Sim. 375, and 7 De G. M. & G. 597.) Consequently she could not dispose of her life interest. The Plaintiffs are therefore entitled to have the trust fund restored.

The next question is, the amount of capital and interest for which the trustees are liable. It is clear that the three trustees are jointly and severally liable, and [430] that the Plaintiffs are entitled to a decree against them all to make good the amount. This the representatives of Howard Fletcher, who has died during the suit, must answer out of his assets. If any one of the trustees should pay the whole, he may come against the others for contribution, and I shall then determine the question between the Co-defendants. At present I cannot decide whether there is any priority of liability. All are equally liable, and the Plaintiff is entitled to levy the whole against any one of them. If one should pay the whole, I shall be able to determine to what extent the others are liable to contribute.

I am also of opinion that interest is payable at £4 per cent. in this case. There is a peculiarity in this case which occasions the necessity of coming to this Court. One of the borrowers and lenders is the same person. Howard Fletcher is one of the three persons who lent the £4000, and one of the five persons who borrowed it. A man cannot sue himself, therefore the obligees cannot sue at law; but in equity I can and must distinguish between the character of trustee and that of debtor. If you can make him liable in his character of debtor, you may be entitled to £5 per cent. under his bond; but I am of opinion that you can do nothing at law, and the agreement to pay £5 per cent. is made in his character of debtor and not as trustee. In

equity you now sue him as trustee. I must treat him as a Defendant in that character and give interest at £4 per cent. against him.

With regard to the profit of £251, 14s. 11d., it appears that under the order of 1856, made in *Green v. Holden*, the stock in Court was sold, and produced £3859, 14s. 11d., of which £831, 5s. 11d. was applied, under the order of the Court, in payment of the costs, and the residue, [431] namely, £3028, 9s., was handed over to the trustees. They are, therefore, only liable to make good the difference between this sum and the £4000. That difference is the sum of £971, 11s.

There must be the usual decree against the trustees to pay the £971, 11s. and interest at £4 per cent., and also the costs of suit; and any of the parties are to be at liberty to apply to the Court as they may be advised.

[431] HAYMES v. COOPER. COOPER v. JENKINS. Feb. 25, 1864.

[S. C. 33 L. J. Ch. 488; 10 L. T. 87; 10 Jur. (N. S.) 303; 12 W. R. 539. See *The Heinrich*, 1872, L. R. 3 A. & E. 510; *Dallow v. Garrold*, 1884, 14 Q. B. D. 547; *In re Suffolk & Watts*, 1888, 20 Q. B. D. 698.]

The lien of a solicitor for his costs on a fund recovered by his exertions, cannot be affected by an assignment of the fund by the client, nor by a stop-order obtained by the assignee.

This was a suit for specific performance; and, in 1861, a decree was made for the Plaintiff (the purchaser) who was ordered to pay his purchase-money, consisting of £901, with interest, into Court. This he accordingly did.

The Defendant Jenkins, who was entitled to one-third of the purchase-money, employed Mr. Field as his solicitor in the suit.

By the order on further consideration, made on the 14th of January 1864, one-third of £656 stock, the fund still remaining in Court, was ordered to be paid to Jenkins.

Jenkins had, in 1863, been ordered to pay £73 for costs to Cooper; he made default, and on the 10th of February 1864 Cooper obtained an order *nisi* under the 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, s. 1, charging Jenkins' share in the fund in Court with [432] the £73, and stopping the payment or transfer of his share of the fund.

The case now came on upon the application of Cooper to make the charging-order absolute, and upon the petition of Field, the solicitor of Jenkins, to have it declared that he had a charge on Jenkins' share of the fund for costs of suit and for payment thereof.

The question was, whether Cooper or Field had priority?

Mr. Kay, for Cooper, moved to make the charging-order absolute. He argued that Cooper, having obtained the first stop-order, had priority over Field; and that he was entitled to the benefit of his greater diligence.

He referred to the 23 & 24 Vict. c. 127, s. 28 (passed to meet the decision in *Shaw v. Neale*, 20 Beav. 157, and 6 H. of L. Cas. 581), which empowers the Court, "in every case in which an attorney or solicitor should be employed to prosecute or defend any suit, &c., to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor," for his costs of suit. But then it declared that "all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bond fide* purchaser for value without notice, be absolutely void and of no effect as against such [433] charge or right." That this shewed that a *bond fide* charge might have priority over the solicitor's lien.

Mr. Selwyn and Mr. Roxburgh, for the solicitor. A solicitor's lien on a fund recovered has priority over all charges created by the client, or obtained adversely

against him. Cooper could only take subject to the rights of the solicitor, of which he must have had notice as a consequence of law; and the charging-order, by the Act of Parliament itself, is not to have any greater effect than if such debtor had charged such stock; 3 & 4 Vict. c. 82, s. 1.

Wilson v. Round (10 Jur. 34); *Wells v. Gibbs* (22 Beav. 204); *Slater v. The Mayor of Sunderland* (32 L. J. (Q. B.) 37); *Warburton v. Hill* (Kay, 470), were referred to.

THE MASTER OF THE ROLLS [Sir John Romilly]. My opinion is that the solicitor's lien is the first charge on the fund. I do not think that it was intended by the Solicitors' Act (23 & 24 Vict. c. 127, s. 28) to deprive solicitors of any right then existing, but merely to enable the Court to give solicitors a charge on the property recovered.

I have always understood the law to be, that a solicitor had an inherent equity to have his costs paid out of any fund recovered by his exertions; and that the Court would not part with it until these costs had been paid, except by consent of the solicitor.

It is not a question of priority, because it is an existing equity of the solicitor, which could not be [434] divested by any assignment by the client. If a sum of £1000 were recovered for A. B. by the exertions of his solicitor, and A. B. assigned it to C. D., who obtained a stop-order on the fund and gave notice of it to the Accountant-General, then, although C. D. would have priority over other incumbancers who had not got a stop-order, yet he could only claim that which the client could give him, namely, the fund subject to the solicitor's right.

Again, it is not a question of notice, because every man who knows there is a fund in Court, knows also that it is liable to the lien for costs of the solicitor, through whose exertion the fund has been obtained, and the assignee has the benefit of those exertions as well as the assignor. If the statute had not passed, I should not have had any doubt on the subject, but this Act declares the Court shall have power to declare that the solicitor is entitled to a charge for his costs, and that all conveyances to defeat it, unless to a *bonâ fide* purchaser for value without notice, shall be void. My opinion is that where a man knows that there is a fund in Court, he knows also that it is subject to the solicitor's lien for his costs in recovering it, and that he is entitled to be paid in the first instance. The Act, however, clearly points out that there may be a *bonâ fide* purchaser who may have priority. As to that I express no further opinion than this, that the present is not such a case, for Mr. Cooper had notice of the lien of the solicitor.

Therefore, Mr. Cooper's order must be made absolute; but it must be subject to the other order of the solicitor, who is entitled to his costs of this application, which must be added to those already ordered to be paid.

[435] THE HEREFORDSHIRE BANKING COMPANY. BULMER'S CASE.

Feb. 27, 29, March 2, 1864.

An executrix who was also residuary legatee, held not to be personally liable as contributory in respect of shares belonging to her testatrix, though she had received dividends for six years and had signed two receipts without the qualification "as executrix," and had passed her residuary account, treating the shares as part of the clear residue, it appearing that formalities required by the deed of settlement for making her a shareholder had not been complied with.

Jane Clarkson was the registered owner of twenty-five shares in this company, which had been ordered to be wound up. She died in 1857, having appointed Cicely Bulmer her executrix and residuary legatee.

Cicely Bulmer proved the will, and on the 12th of August 1859, she passed her residuary account at Somerset House, debiting herself with the twenty-five shares, valued at £192, 10s., and shewing a clear residue of £297, 11s. 1d. And she thereby declared it to be a just and true account, and offered to pay the sum of £8, 10s. 6d. for the duty, after the rate of £3 per cent. upon the sum of £297, 11s. 1d.,

being the whole of the said residue and moneys to which she was entitled and intended to retain to her own use.

Cicely Bulmer received the dividends on the shares for 1858, 1859, 1860 and 1861, and she gave receipts for them as executrix. In 1862 and 1863 she signed receipts for the dividends without adding the words "as executrix of Jane Clarkson." This appeared to have been in consequence of her name having been introduced into the list of persons entitled to dividends, in lieu of the name of Jane Clarkson; this was first done in 1862, but why, or under what circumstances, or by whose direction it was done, did not appear, nor did it appear that it was done with her privity. In the share [436] register book the shares still stood in the name of Jane Clarkson, and no transfer or alteration had taken place in it.

The 16th clause of the deed of settlement provided in the usual form, that the executors, &c., of deceased shareholders should not be deemed or considered as shareholders, in respect of shares held by them in those capacities, until they should be duly admitted as shareholders, in pursuance of the deed. And the 19th clause provided, that when any executor, &c., of any deceased shareholder should be admitted as a shareholder, he should execute a deed subjecting him to the rules and liabilities, and immediately after the execution of such deed, but not before, he or she should become a proprietor or shareholder in respect of such shares as aforesaid. The 20th clause provided that executors, upon executing such deed, but not before, should be entitled to receive the dividends which should be due to them as executors in respect of such shares.

The company having been ordered to be wound up, the official liquidator sought to place Cicely Bulmer on the list of contributories, in her individual, and not in her representative, character as executrix.

Mr. Swanston, for the official liquidator. Mrs. Bulmer is personally liable as contributory; she assented to the bequest of these shares; and in her return to the Legacy Duty Office she represented that she had retained them for her own use. She received the dividends for six years, and in the years 1862 and 1863 she signed a receipt for them as owner, and not as executrix. She is therefore the absolute owner of these shares, and ought to be placed on the list without qualification.

[437] Mr. Roxburgh, *contra*. Mrs. Bulmer is only liable as executrix. She signed the last two receipts accidentally, in the form they were presented to her, but no transfer of the shares has ever been made into her name; none of the formalities which are required by the deed to make her a shareholder have been complied with; and the deed is distinct, that until then she is not to be considered a shareholder or entitled to receive the dividends. The company still retain their remedy against the assets of the testatrix, and while so entitled, another person cannot be made liable in respect of the same shares. He cited *Keene's Executors' case* (3 De G. M. & G. 272); *Armstrong's case* (1 De G. & Sm. 568); *Ness v. Armstrong* (4 Exch. Cas. 21); *Gouthwaite's case* (3 Mac. & Gor. 187); *Hall's case* (1 Mac. & Gor. 307); *Crosfield's case* (2 De G. M. & G. 128).

Mr. Swanston, in reply.

Feb. 29. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon a perusal of the deed of settlement and the evidence in this case, I am of opinion that Mrs. Cicely Bulmer must be fixed on the list of contributories of the company as executrix of Jane Clarkson, and not in her individual capacity.

On looking at the deed of settlement, clauses 16 and 19, I find that they have not been complied with. Cicely Bulmer's name ought to have been introduced into the share register list, either in her individual character or as executrix, but it was not done in either character. It would have been open to her to have [438] chosen in which character she would have it introduced, and the company could not have compelled her to incur a personal liability. If the question had been put to her, and the dividends detained until she had elected, she might have claimed solely as executrix, and the company could not have forced her to do otherwise. The company ought to have done this. As far as I can judge from the evidence, though this is doubtful, if it had been done, she would only have accepted the shares as executrix, and would not personally have become a shareholder; for she desired to sell the shares, and found that she could not. I am of opinion that the company,

having omitted to do this, and to fix in what character she took the shares, it is not in their power to exercise the option for her, and cannot now choose that which is most profitable to them. The provisions of the deed of settlement ought to have been complied with; and this not having been done, I am of opinion that she remained owner of the shares in the same character in 1862 and 1863 that she was in 1848; and that the alteration of her name in the list of dividends received does not, though she signed her name without any addition, constitute, in the absence of any other proceeding, a transfer of the shares from her in her character of executrix to her in her character of residuary legatee. I must fix her as contributory as legal personal representative of Jane Clarkson, and if necessary, she must account for the estate of her testatrix. The official manager must have his costs; and she may retain her costs out of her testatrix's estate.

Mr. Roxburgh submitted that, as she had always assented to being put on the list as executrix, she ought to have her costs.

[439] THE MASTER OF THE ROLLS. I find that she consented to be put on the list as executrix before the case was brought into Court, and I therefore think she must have her costs.

[439] *Re BEVAN AND WHITTING. March 3, 1864.*

[See *In re Faithfull*, 1868, L. R. 6 Eq. 325. *In re Galland*, 1885, 31 Ch. D. 302.]

The Court will, before the completion of a taxation, order the delivery up of papers by a solicitor to his client, either upon payment into Court of the amount claimed, or in case it appears from the solicitor's own account that a balance is due from him to his client.

On the application of their client, an order had been made for the delivery and taxation of his solicitors' bills. It appeared from the bills and the cash account themselves that a balance was due from the solicitors to the client.

An application was now made, before the Taxing Master had made his certificate, that the solicitors might be ordered to deliver over the client's papers.

Mr. Haig, in support of the application.

Mr. Selwyn, Mr. Baggallay and Mr. Fry, *contra*, contended that the application was premature and inconsistent with the existing order for taxation, which directed when the deeds and papers were to be delivered over. That, in addition, the lien of the solicitors might be prejudiced, and their security for the costs of the proceeding defeated. That such an application as the present was strange and without precedent.

THE MASTER OF THE ROLLS [Sir John Romilly]. The only thing strange is the opposition to this application. Where a solicitor sends in his bill, and claims a stated balance to be due to him, the client is entitled, as a matter almost of course, to have his papers [440] delivered over to him on payment of the amount claimed into Court. So, where a balance appears due from the solicitor, the order is that the solicitor shall pay it into Court. Here, there appears to be a balance of £104 due from the solicitors, which is amply sufficient to secure any costs of the taxation.

The client is entitled to the order for the delivery of the papers within ten days, and to the costs of the application, as the solicitors have refused to deliver the papers when applied to.

[440] *PHILLIPS v. EDWARDS. Feb. 11, 12, March 7, 1864.*

[S. C. 3 N. R. 658.]

The doctrine of part performance of a parol agreement is not to be extended by the Court, and it is inapplicable to a case where a trustee has a power to lease, at the request in writing of a married woman, which has not been made.

Land was vested in a trustee for the separate use of Mrs. E., a married woman, and the deed gave the trustee a power to lease at the request in writing of Mrs. E. The trustee and Mrs. E. agreed, by parol, to let the property to the Plaintiffs, and a lease was prepared, approved of and executed by the trustee and by Mrs. E.; but before their solicitor had parted with it and before the Plaintiffs had executed it, Mrs. E. recalled her assent to it. She had made no request to the trustee "in writing." Held, that there was no contract binding on Mrs. E. and no part performance, and that the Plaintiffs could not enforce the agreement.

This suit was instituted by two gentlemen named Phillips and Wigan, against Mr. and Mrs. Edwards and Mr. M'Niell, for the specific performance of a contract under the following circumstances :—

By an indenture, dated 10th August 1855, a piece of land and some cottages were assigned to the Defendant M'Niell, for the residue of a term of ninety-nine years from the 16th of June 1835, except the last ten days of the term, upon trust for the separate use of the Defendant Harriet Edwards, the wife of James Edwards. The indenture contained a power to the trustee, at any time during the life of Harriet Edwards, *at her request in writing*, to demise the property.

[441] In October 1861 various negotiations took place between the Plaintiffs and Mrs. Edwards and her trustee for letting the land and cottages to the Plaintiffs. Ultimately, it was verbally agreed that the land should be let to the Plaintiffs for ninety years, from the 3d of December 1861, at a rent of £45 per annum. Nothing in writing had hitherto passed between the parties, and certainly nothing to bind Mrs. Edwards, who had made no request in writing, according to the provisions of the power. However, she and her trustees both considered the matter as settled, and accordingly a draft lease was prepared, and sent for approval to the Plaintiffs' solicitors in January 1862. Some slight alterations were made by them, which were approved of by the Defendants' solicitors, and thereupon, at their request, the Plaintiffs' solicitors caused the draft to be engrossed in duplicate. An appointment was made at the office of Mr. Harbin, the Defendants' solicitor, for the 5th of February 1862, for the purpose of executing the lease. The lease was fully explained to Mrs. Edwards, and she freely and voluntarily signed, sealed and delivered it, fully understanding the contents thereof, and handed it to her solicitor. This the Court held to be the result of the evidence. Her trustee, Mr. M'Niell, did the same, on the evening of the same day. Mrs. Edwards, after she had left the office of Mr. Harbin, repented of what she had done, and she wrote on that day two letters, one to Messrs. Harbin & Smith, her solicitors, and the other to Mr. M'Niell, her trustee, which were as follows :—

"February 5th.—Sir,—I beg to inform you that those deeds signed to-day are to be retained by you, as it is not by my wish or sanction they were done. I have never written anything to allow its being done, as my settlement deed expresses. I have once written to you not to prepare [442] them. Mr. M'Niell stated he had arranged all with Phillips. I shall move to have this matter set aside; it is not carried out according to the terms of settlement, and this was not my wish.—I am, Sir, your obedient servant,

"HARRIET EDWARDS."

"To Mr. Harbin."

"February 5th.—Sir,—I have written to Mr. Harbin by this post, to inform him I shall not allow them to pass into Phillips, as it was much against my wish for him to have it. I have never given my consent, nor will I; I should have consented had all been done as purposed, but now I do not. I shall move to alter it, as my settlement deed clearly states what is to be done.—I am, Sir, your obedient servant,

"H. EDWARDS."

"There are many points which ought to have been arranged, such not being done, I most distinctly state I will not give the lease.

"H. EDWARDS."

"To Mr. M'Niell."

These letters were received by the persons to whom they were addressed on the following morning, the 6th of February 1862. At this time, the Plaintiffs had not executed the counterpart of the lease, nor did they do so until after they had received notice of Mrs. Edwards' intention to retire from the transaction. The lease remained in the hands of Messrs. Harbin & Smith, and the Defendants Mr. and Mrs. Edwards refused to complete, insisting that there was no contract binding them or the estate.

Mr. Selwyn and Mr. Speed, for the Plaintiffs, cited *Fletcher v. Fletcher* (4 Hare, 67).

[443] Mr. Godfrey, for Mr. M'Niell.

Mr. Fry, for Mr. and Mrs. Edwards, argued that there was no existing contract in writing, and no sufficient part performance to take the case out of the statute, and that the preparation and signature of the deed, which had never been out of the possession of her solicitor, was not sufficient for that purpose; *Cooke v. Tombs* (2 Anst. 420); *Whaley v. Bagnel* (1 Brown, P. C. 345). That no request in writing had been made, without which no binding agreement could exist, and that the contract of a *feme covert* could be enforced; *Martin v. Mitchell* (2 Jacob & W. 425).

Mr. Speed, in reply.

March 7. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit for the specific performance, by the Defendants, of a contract to grant to the Plaintiffs a lease for ninety years, from December 3d, 1861, of a parcel of land at Putney, at a rent of £45 per annum. The defence is, that no contract binding on the Defendant Mrs. Edwards, or her trustee, Mr. M'Niell, has been entered into. The circumstances are these. [His Honor stated them.]

The two letters written by Mrs. Edwards to Mr. Harbin and Mr. M'Niell were received on the 6th of February. At this time the Plaintiffs had not executed the counterpart of the lease, nor, as I understand the evidence, did they until after they had received notice of Mrs. Edwards' intention to retire from the trans-[444]-action. This, however, is not, I think, very material; it is plain that throughout they intended to abide by the arrangement, and whether they executed the counterpart a little sooner or later is not very material. Nothing of importance took place after this until this bill was filed.

The question is, in this state of circumstances, whether there is any contract binding on the Defendant Mrs. Edwards, and I am of opinion that there is not. Except by the execution of the indenture of lease, there is no contract in writing entered into or binding upon the Defendant Mrs. Edwards. The power to the trustees was only to arise on request in writing, and no such request was given, except by the execution of the deed of demise on the 5th of February 1862.

The doctrine of parol agreements and part performance (a doctrine certainly not to be extended by the Court), appears to me to be inapplicable to this case, where an agreement, whether by parol or in writing, could not be entered into by the trustee, except on the request in writing of Mrs. Edwards, and when, consequently, any parol agreement entered into by him could only be provisional and conditional upon the proper requisites being supplied to him to make it effectual. But even if considering that originally a complete parol agreement had been entered into, that is, as complete as a parol agreement can be, I am unable to see anything amounting to part performance; in fact nothing is alleged as constituting part performance, with the exception of the execution of the indenture of demise on the 5th of February 1862. But however important this act may be, it is not properly an act of part performance, which means, the parties on both sides acting as if the agreement had been carried into execution, [445] such as payment of purchase-money and letting into possession. The execution of this indenture may be a completion of a contract, but it cannot, I think, properly be considered as part performance of a parol agreement. If it be the contract executed, the parol agreement has ceased to exist and is merged in it, and all that the Court must look at is the terms of the indenture. But if it be an act of part performance, then the original parol agreement is the matter which the Court is to enforce, and the terms of which it is to investigate.

The consequence is, that in every way of looking at it it comes round to the same question, and the full extent of it is this:—What is the effect of a parol agreement to lease a plot of land, followed by the approval, on both sides, of the draft lease, and by the execution of the indenture of demise itself by the lessor, but

countermanded by him before the delivery of it to the intended lessee, and before the lessee executed the counterpart. I am of opinion that there exists a *locus penitentie* in the lessor, and that he may, at any time before the solicitor or his agent has delivered over the lease to the lessee, countermand the delivery of it and refuse to be bound by it. I am of opinion that such execution does not constitute a contract.

It is argued, with perfect truth, that a contract need not be signed by both parties, and that if A. sign a contract offering to sell certain lands to B., and send it to him, B. may accept it and thereupon enforce the performance of it. But, for the purpose of making it binding on the signer, the contract must be sent to B., either by A. or his agent duly constituted for that purpose. But what is more germane to the present question is this:—in the case of a contract, A. may countermand it and refuse to perform it at any time [446] before B. has accepted it and before B. has also thereby bound himself to perform it.

But nothing of that sort occurred here; and if the most formal contract had been prepared and signed by the Defendants, and given to their agent to be delivered to the Plaintiffs, they or either of them might have stopped the whole thing before the document left their agents' hands.

But if this be not a contract, what is it? If it be anything at all, it is a legal demise of the property; if it be not, then it is nothing. If it be a legal demise of the property, then the proper remedy of the lessee would be by action at law. That any action could be maintained at law, either of ejectment to obtain possession of the land, or of detinue to obtain possession of the indenture, or of damages for the injury sustained by the Plaintiffs, is what I am far from expressing to be my opinion. But as I am strongly of opinion that there is no contract, and that there is no parol agreement partially performed which can entitle the Plaintiffs to recover in this case, it only remains to be considered, whether the Plaintiff is entitled to have the deed delivered up to him by the decree of a Court of Chancery, notwithstanding the opposition of the Defendant Mrs. Edwards. It is true, as it is argued for the Plaintiffs, that there are some cases in which a grantor executes a deed, which is valid and binding on him though he retains it in his own custody and does not part with it, of which many instances, such as *Fletcher v. Fletcher* (4 Hare, 64), are to be found in the books; but the deed has not been held to be valid in any case where the deed implies mutuality, that is when some important act is to be [447] done by or on the part of the person to whom it is to be delivered, such as the payment of purchase-money or the execution of the counterpart. In all such cases, the deed is executed as an escrow, and has no force of validity until the actual delivery of it to the person who has to perform the act in return. I do not say that in every case the performance of the act, on his part, is necessary to give the deed validity, for the act may be waived; but even in those cases the delivery must be made to him or his agent.

If A., by parol, agrees to sell Whiteacre for £1000 to B., A. executes the deed of conveyance, and gives it to his solicitor to be delivered to B. in exchange for £1000. B. never pays the £1000, and never gets the deed. I am of opinion the execution of the deed by A., and the delivery of it by him to his solicitor does not, in that event, transfer the legal estate in the land to B.; but that A. may, as soon as it appears that B. will not or cannot pay the purchase-money, cut off the seal and signature, and get the stamp allowed as a spoiled stamp at Somerset House; and that the deed is then a mere piece of waste parchment, conferring no right on anyone.

That is what occurs in this case; and the bill must be dismissed with costs.

[448] GARLAND v. RIORDAN. March 10, 1864.

The Plaintiff relieved from the necessity of filing a printed bill; in an injunction case, where the matters of the suit had been arranged under an order made prior to the expiration of fourteen days from filing the written bill.

This being an injunction case, a written bill only had been filed. The Court had granted an *interim* injunction to last until to-day.

Mr. Roberts now stated that the parties had agreed on an order to be made,

which would dispose of the case; and he asked that the Court would dispense with the necessity of filing a printed bill, for otherwise, under the 9th General Order, r. 4, the written bill would be taken off the file as of course, and the solicitor would be liable for costs, upon his undertaking.

Mr. Hallett, for the Defendant, assented to the order and application.

THE MASTER OF THE ROLLS [Sir John Romilly] thought that the necessity of filing a printed bill might be dispensed with, and he ordered it accordingly.

[449] THE PRESIDENT OF THE UNITED STATES OF AMERICA v. DRUMMOND.

April 16, 19, 1864.

[S. C. 33 L. J. Ch. 501; 10 L. T. 321; 4 N. R. 7; 10 Jur. (N. S.) 533; 12 W. R. 701.
See *United States of America v. Wagner*, 1867, L. R. 2 Ch. 590.]

A person, whose name was English, but whose domicile of origin was not shewn, held a commission in the English Army. He sold out in 1810, and subsequently resided, down to his death, in France, there he formed a French connexion, there he educated his son as French, and there he died; and his whole property was in French Rentes. Held, that his domicile at his death was French, and that legacy duty was not payable on his assets.

The question which arose upon this petition was, whether legacy duty was payable on the property of Henry Lewis Dickenson, deceased.

He had been an officer in the English Army, but had sold out in 1810. He had resided the latter years of his life in France, and died at Paris on the 17th of July 1819.

By his will, dated at Paris on the day of his death, he bequeathed as follows:—

"I give and bequeath the whole of my property whatsoever to my brother James Smithson, Esq., in trust to be disposed of as follows:—I give to Mrs. Mary Ann Coates (going by my name, and the mother of my son Henry James Dickenson, placed at the school of M. Auboin, at Bourg la Reine) the half of the income which my property shall produce, to be enjoyed by her during the term of her natural life." He then gave the remainder of his property to his son.

His will was proved in England in 1820 by James Smithson, his property in this country being sworn under £20. In fact the whole of his property was in France and consisted nearly entirely of French Rentes.

His brother James Smithson died in 1829, and by his will, dated in 1826, he described the son of Henry [450] Lewis Dickenson as "the son of my late brother Colonel Henry Lewis Dickenson."

A claim for legacy duty on the property of Henry Lewis Dickenson having been made, on behalf of the Crown, against the estate of James Smithson, which was administered in this Court, a petition was presented by his legal personal representatives, asking that it might be declared whether any duty was payable.

Mr. Nalder, for the Petitioners.

Mr. Hanson, for the Crown, argued that the fact of the testator having been an officer in the English service at once fixed his domicile in England, and that it required proof of the fact and of his intention to change it, which the evidence failed to prove. He referred to *Ommaney v. Bingham* (5 Ves. 757); *Phillimore on Domicil* (p. 72); *Lyall v. Paton* (25 Law J. (Ch.) 746); *Forbes v. Forbes* (Kay, 341); *Attorney-General v. Dunn* (6 Mee. & W. 511); *Hodgson v. De Beauchesne* (12 Moor, P. C. C. 285); *In re Steer* (3 Hurl. & N. 594); *Stanley v. Bernes* (3 Hagg. 373); *Munroe v. Douglas* (5 Mad. 379); *Moorhouse v. Lord* (10 H. of L. Cas. 272); *Bremer v. Freeman* (10 Moor, P. C. C. 306).

Mr. Baggallay and Mr. Cates, for the Plaintiff, argued that the residence in France continued for a considerable period and down to the testator's death, and that the circumstances of his whole property and family being there were *prima facie* evidence of the domicile of the testator being in France, and that this was not rebutted by any

[451] evidence to the contrary. As to the English form of his will they cited *Anderson v. Laneville* (9 Moor, P. C. C. 325).

April 19. THE MASTER OF THE ROLLS [Sir John Romilly]. The Attorney-General claims legacy duty in this case, and the question depends on whether Henry Lewis Dickenson was a domiciled Englishman at the date of his death.

The facts respecting him in the evidence are extremely few and meagre. The name is English, but where he was born is unknown, and from his not bearing the family name of James Smithson, who in his will calls him "my brother," and to whom Henry Lewis Dickenson left his property, it is supposed that he was an illegitimate child. However, he obtained a commission in the English Army which would give him an English domicile. After this, he sold his commission and retired from the Army in 1810. He made a will dated at Paris on the 17th July 1819, by it he gave his property to Henry James Dickenson, described in his will as placed in a school in France, and who was the son of the testator and of a person who afterwards became Madame De la Batut, and who appears to have always lived and died in France.

The will was in English. The property was wholly in the French Rentes; nor does it appear clearly why the will was proved here, unless, as it was not in the proper French form, it was thereby intended to give it validity in France as the will of an Englishman. The testator died in Paris in 1820. These are all the facts.

[452] Upon the whole I think that, upon these facts, I should infer the domicile to have been French. He appears, as far as anything is known, to have always lived there, to have made a French connection, to have educated his son as French, and to have died in France. I think the burthen of proof lies on the Crown to establish the right to duty on the French property of the testator, and that they have failed in doing so.

I must order accordingly.

[452] HAMMOND v. SMITH. Dec. 21, 1864.

[S. C. 9 L. T. 746; 10 Jur. (N. S.) 117; 12 W. R. 328.]

A debtor wrote to his creditor, "I will pay you as soon as I get it in my power."

Held, that the Statute of Limitations did not commence running until the debtor became of ability to pay.

A legacy by a debtor to a creditor held to be a *pro tanto* discharge of the debt, it appearing that the testatrix had made a proposal to that effect to her creditor, and that he had not objected to the arrangement.

In 1852 Sarah Smith, a baker, was indebted to the Plaintiff Hammond, a miller, in the sum of £566, 5s. 1d., for which she gave a written acknowledgment. She retired from business in 1852, and went to live with her parents, who were advanced in years.

The Plaintiff in 1853 applied for payment, and in answer Sarah Smith, on the 25th of November 1853, wrote: "The time may not be long before I shall be able to discharge my debt to you. I can get no money at present. Should I get any paid me, you shall very soon have it."

On the 4th of March 1856 Sarah Smith wrote to the Plaintiff, stating that her parents were living, but were of great age and in a precarious state of health. She added, "I will pay you as soon as I get it in my power; before I cannot. I have nothing to pay with, or I should willingly do it."

Sarah Smith's mother died, and her father died about [453] seven days after, viz., on the 9th of February 1861. Sarah Smith then became entitled to personal property amounting to about £1200 and to a freehold messuage.

In 1861 the Plaintiff renewed his application for payment, and on the 9th of July 1861 Sarah Smith wrote to him referring to her difficulties, and added, "There will be interest due I suppose some time in August; when I receive I shall send to you half-yearly, that is all I can do; you must share with me according to what I have

got. At my death you shall receive £300; I shall have it put in my will, which at present is not made. I cannot pay you interest for more than the half, or there will be nothing left to live on. You can write and say if you approve of that what I have said to you, if not, you can act as you think proper."

The Plaintiff, on the 20th of July 1861, wrote to Sarah Smith as follows:—

July 20th, 1861.—Madam,—I received your letter of the 9th inst. respecting your affairs, for which I am much obliged. Of course I cannot expect you to give up all your interest to me, and if you will give me some security for £300 you name, bearing interest at £5 per cent., and for the £300 to be paid six months after your death, I shall be satisfied, as the loss will be to me and my family. As I am much in want of money at the present time, I will accept £400 and give you a clear discharge. Please write and let me know which of the two propositions you approve of in the course of a few days.

On the 30th of July 1861 Mrs. Smith wrote to the Plaintiff as follows:—"I shall receive my money half-yearly. As soon as I receive any, I shall send to you what is given for my or father's money (£4, 10s. per cent.), [454] and I can give you no more. If there should be any alterations after a time, I will make it to you, but at present all must remain as it is now placed. Any security you want I will give you, but no one can take from you what is willed to you, neither do I wish they should."

Mrs. Smith, on the 6th of September 1861, sent the Plaintiff £5, with a letter, in which she said: "I have enclosed a £5 bank note, which I hope you will receive safe. I could not make it convenient to send more, as they sent me short, but I will send when I can do it."

There was no further correspondence bearing on the points.

Sarah Smith died in May 1862, having by her will, dated the 5th of October 1861, bequeathed the sum of £200 to the Plaintiff, whom she called "her friend," but without assigning any reason for the bequest.

The Plaintiff in February 1863 instituted this creditors' suit against the executrix of Mrs. Smith to obtain payment of his alleged debt, and for the administration of the estate.

The executrix by her answer said, "I am advised that the claim of the Plaintiff for his alleged debt is barred by the statutes for the limitation of actions and suits, and that, at all events, the Plaintiff can only claim the sum of £300, with interest at the rate of £5 per cent. per annum from the 20th day of July 1861, being the date of the letter in which he stated he would be satisfied with the arrangement hereinbefore mentioned; and I accordingly submit to pay him the legacy of £200 actually given him by the will, and the further sum of [455] £100, with interest at the rate of £5 per cent. on the aggregate sum of £300 from the 20th day of July 1861, less the sum of £5.

Mr. Selwyn and Mr. E. F. Smith, for the Plaintiff. The Plaintiff's debt is not barred by the statute; the testatrix, by her letter of the 4th of March 1856, promised to pay it "as soon as she got it in her power," and the statute therefore only began to run from the time at which she became of ability to pay; *Waters v. Earl Thanet* (2 Q. B. Rep. 757); this period was on the death of her father. But in addition, there was a part payment of £5 in September 1861.

Secondly. The gift of the legacy was not a satisfaction of the debt; *Crammer's case* (2 Salk. 508).

Mr. Baggallay and Mr. Pontifex, for the Defendant, argued, first, that the letters were insufficient, as an acknowledgment, to take the case out of the statute; *Richardson v. Barry* (29 Beav. 22); *Hart v. Prendergast* (14 Me. & W. 741); *Rackham v. Marriott* (2 Hurl. & Nor. 196); and that the £5 was not attributable to the debt; *Nash v. Hodgson* (6 De G. M. & G. 474). Secondly, that the legacy was bequeathed expressly in part satisfaction of the debt; that the Plaintiff had assented and acquiesced in the testatrix's proposal, and was bound by an act done for his benefit on the faith of his assent; *Russell v. Jackson* (10 Hare, 204); *Tee v. Ferris* (2 Kay & J. 357); *Wallgrave v. Tebbs* (*Ibid.* 313).

Mr. E. F. Smith, in reply.

[456] THE MASTER OF THE ROLLS [Sir John Romilly] was of opinion that the

letter of the 4th of March 1856 constituted a distinct promise, on the part of the testatrix, to pay the debt when she should be of ability, and that the statute did not begin to run until the death of her father, when she first had the means of paying the debt, and that consequently "the debt of £566, 5s. 1d. due from Mrs. Smith to the Plaintiff was not barred by the Statute of Limitations."

On the second point, he held that the bequest, having been intended by the testatrix as part payment of the debt, and that intention having been communicated to the Plaintiff, and not objected to by him, the Plaintiff "was not entitled to the legacy of £200 bequeathed to him by the will of Mrs. Smith in addition to the debt." The Defendant, admitting assets, was ordered to pay the Plaintiff the £566, 5s. 1d. with interest from the present time.

[457] BROOKE v. LORD MOSTYN. Feb. 15, 16, 17, 18, March 17, 1864.

[S. C. 12 W. R. 616; varied on appeal, 2 De G. J. & S. 373; 46 E. R. 419; 34 L. J. Ch. 65; 11 L. T. 392; 10 Jur. (N. S.) 1114; 13 W. R. 115, 248. This case was reversed in the House of Lords, but the reversal did not affect the law as laid down in 2 De G. J. & S. 373. See L. R. 4 H. L. 304. See also *Fadelle v. Bernard*, 1871, 19 W. R. 555; *Boswell v. Coaks*, 1884-86, 27 Ch. D. 455; 11 App. Cas. 240.]

As to the practice of the Court in sanctioning a compromise on behalf of infants. If the Court, having all the necessary facts before it, sanctions a compromise on behalf of infants, and it afterwards turns out that the Court was mistaken, the infants have no redress, it being an error of judgment for which there is no remedy. But if, by suppression or misstatement, the Court has been led to an erroneous conclusion, the persons who have done this are amenable, and the Court will if possible set aside the transaction as against the innocent party.

The facts of this case are fully stated in the judgment.

Mr. Selwyn, Mr. Freeman, and Mr. Cutler, for the Plaintiff.

Mr. Baggallay and Mr. Jones Bateman, for Lord Mostyn.

Sir Hugh Cairns, Mr. Speed, Mr. Hobhouse, Mr. Southgate, Mr. De Gex, Mr. Woodroffe, Mr. Dickenson, Mr. Druce, and Mr. Macnaghten, for the Defendants.

Mr. Selwyn, in reply.

The following cases were referred to, viz. :—As to the effect of misrepresentation and concealment of material facts; *Clapham v. Shillito* (7 Beav. 146). And as to the deception on the Court having invalidated the transaction; *Brydges v. Branfill* (12 Sim. 369). As to the binding effect of the proceedings on the infant who was a party; *Morison v. Morison* (4 Myl. & Cr. 215); and *Calvert v. Godfrey* (6 Beav. 97). As to the Defendant being purchaser for valuable consideration without notice, and this being an available defence without the legal estate, and as to his priority; *Joyce v. De Moleyns* (2 Jones & Lat. 374); *Attorney-General v. Wilkins* (17 Beav. 285); *Phillips v. Phillips* (31 Law J. (Ch.) 321); *Greenwood v. Churchill* (6 Beav. 314); *Finch v. Shaw* (19 Beav. 500, and 5 H. of L. Cas. 905).

[458] March 17. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted by an infant, who has become adult in the course of the progress of it, asking this Court to declare that a compromise or arrangement entered into in March 1843 is not binding on him. This was a compromise sanctioned by the Court, after a report of the Master finding that the arrangement was for the benefit of the infant, and it was carried into execution by and under the authority of orders made by this Court.

Before I proceed to examine the facts of this case, which I shall have to do in some detail, and also to state my opinion on the evidence adduced, it is desirable that I should state what I consider it to be the law which applies to such cases, and what it is that the Plaintiff must prove to enable the Court to give him the relief he seeks to obtain. If, in the course of a suit or any other proceeding in this Court, a compromise is proposed between one or more adult persons and one or more infants, the Court takes steps to ascertain whether it will be for the benefit of the infant or

infants that the proposed compromise should be accepted. Formerly this was done by a reference to the Master to ascertain that fact, at present it is done sometimes by reference into Chambers, and sometimes without adopting that course, if the Judge, after considering the evidence presented to the Court, is of opinion that, without further investigation, it is sufficient to enable him to decide on the matter. In dealing with such a question, it is the duty of a Judge (and, as I believe, a duty always performed by him) to consider carefully the facts, and to determine, upon such consideration, what is best to be done for the infant, in like manner as a father would act for a son in similar circumstance. No doubt in such cases, [459] especially when the result of this evidence is doubtful, the Court is much influenced by the opinion of the nearest relatives and guardians of the infant, who have no interest in the matter except to promote the advantage of the child. When this has been done, and the Court has decided in favour of the arrangement, and the arrangement has been thereupon carried into execution, the whole thing is concluded. If it should afterwards turn out that the Court was mistaken, the infant has no redress; it was an error of judgment for which there is no remedy and which cannot now be altered. But this is only where the whole of the facts which were necessary to enable the Court to form an opinion have been brought fully and honestly before the Court. The Court is far from being infallible; and if, by suppression or misstatement, the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice, in exactly the same manner as they would have been where the deception had been practised on persons other than the Judge, and without the intervention of the Court to sanction it. This is an equity which extends far beyond the case of infants, and extends to every case where the Court has been intentionally deceived, and has been made the involuntary instrument of depriving others of their just rights. Whenever this occurs, the Court will, as far as possible, redress the injury inflicted; the case of *Bridges v. Branfill* (12 Sim. 369) is an instance of this character. In all such cases, the Court will afterwards, if possible, set aside the transaction as against the innocent party; or if that be not possible, will, as far as it can, prevent the further operation of it upon him. But in order to induce the Court to take this step, it must be shewn that the parties to the transaction have intentionally sup-[460]-pressed truth as suggested error, in order to mislead the Court. The question I have to decide in this cause is, whether this has been done on the occasion to which I have been referred, and if so, by whom.

The facts are shortly as follows:—In 1818 Sir Thomas Mostyn made his will, by which (subject to a term of 500 years which he created therein) he devised the Cors-y-Gedol estate and the Plas-Hen estate to the use of the Defendant, the second Lord Mostyn, for life, with remainder to his first and other sons in tail male. He then declared the trusts of this term to be, to raise and pay various large legacies, amounting in the whole, provided all the contingencies occurred, to £75,000; and amongst them was a legacy of £20,000 to Eliza Mostyn, to be paid to her at twenty-one. In July 1826 Sir Thomas Mostyn republished his will, and he died on the 17th of April 1831. The will was duly proved by the first Lord Mostyn and Richard Parry, who were the executors. The Defendant Thomas Edward Mostyn Lloyd Mostyn, the eldest son of the second Lord Mostyn, attained twenty-one, barred the entail, and has died pending the proceedings in this suit.

At the death of Sir Thomas Mostyn, the Cors-y-Gedol estate was subject to a mortgage for £45,000; and the Plas-Hen estate was subject to a mortgage for £60,000. The debts of the testator which, in addition, were charged on the estates by the will of the testator, amounted to £132,090, 10s. 2d., making a total primary charge on the estates of £237,090, 10s. 2d. The amount of legacies charged on the said estates included in the term of 500 years amounted, as I have stated, in the whole to £75,000; but this sum included therein two legacies of £10,000 each to two sisters of the testator, [461] the interest of which was to be paid to them during their lives, and the capital was payable only in the event of their marrying, which event did not occur.

In June 1840 Eliza Mostyn married Captain Brooke, the father of the present Plaintiff, and thereupon the legacy of £20,000 was settled in the following manner: it was assigned to the two Defendants, E. Hyde Clarke and Geo. Rochfort Clarke, in

trust, during the joint lives of Captain and Mrs. Brooke, for the sole and separate use of Mrs. Brooke, and after the decease of either, to the survivor for life, and after the decease of the survivor, for the child or children of the marriage. The Plaintiff is the sole issue of that marriage, who has attained his age of twenty-one years during the progress of this suit.

The first Lord Mostyn had been advised, in the first instance, that all the legacies secured by the 500 years' term were, by the will of the testator, charged on all his devised estates, and thereupon he paid the legacy duty due in respect of all the legacies. He was subsequently better advised, and by the highest authority at the Bar, that this was erroneous, and that the Cors-y-Gedol and Plas-Hen estates were alone liable to pay these legacies; and thereupon he presented a memorial to the Commissioners of Stamps and Taxes for a return of the legacy duty, on the ground that the estates comprised in the term were not sufficient to pay the legacies, and that the full value of the estates would be absorbed by the debts which the personal estate was insufficient to pay. His first memorial was presented in 1842; the Commissioners of Stamps and Taxes would not entertain the subject without proof that the legatees had released the estates from their legacies. This was accordingly done.

[462] In order further to facilitate the administration of the estate an Act of Parliament was obtained.

The effect of the Act was as follows:—It received the Royal assent on the 30th of July 1842; it was intituled "An Act for vesting parts of the settled estates of the Honorable Edward Mostyn Lord Mostyn of Mostyn, in the county of Flint, in trustees, upon trust to sell, mortgage or exchange the same, and to lay out the moneys to arise therefrom in the payment of debts, charges, and mortgages upon or affecting the same or other estates settled to the same uses, or in the purchase of other estates to be settled to the same uses, and for other purposes." (5 & 6 Vict. (Private Act), c. xxxii.) This Act recited the will, and the insufficiency of the personal estate and of the Cors-y-Gedol and Plas-Hen estates devised for 500 years to pay the debts; and it enacted that the hereditaments in the schedules (which comprised the Cors-y-Gedol and Plas-Hen estates) should be discharged of the trusts and of the will, and be vested in three trustees for sale or mortgage, and the money thereby raised was to be paid into the Court of Chancery, and applied under the control and discretion of the Court; first, in payment of the costs; and in the next place, after paying any mortgage affecting the same, "in paying the debts, expenses, legacies, and annuities by the said will charged upon the said term of 500 years created in the Cors-y-Gedol and Plas-Hen estates; but so far and to such extent only as the said debts, expenses, legacies, and annuities so charged upon the said term ought to be paid under the trusts of the said will," and subject thereto in the manner in the said Act mentioned.

It is unnecessary to enter into the detail of how this [463] was effected with respect to the other legatees, or to relate what arrangements were made with them; the only material matter for consideration is, the manner in which the legacy of £20,000 so settled, as I have before stated, was released. This was accompanied as follows:—The first and second Lord Mostyn proposed to Captain and Mrs. Brooke and their trustees that they should accept the security of the bond of the second Lord Mostyn for the amount, to be paid in January 1851, when his eldest son the late Defendant, would attain twenty-one years, and also to pay interest thereon at the rate of £4 per cent. per annum in the meantime; and they assured the trustees and Captain and Mrs. Brooke that the estates were insufficient to pay the legacy, or any part of it, and that this proposal of giving a bond to secure the interest and ultimate payment of the principal arose from a desire to benefit them, and more especially from a wish to fulfil the wishes of the testator Sir Thomas Mostyn, as far as it was possible, although they were not legally bound to do so. That by this means Captain and Mrs. Brooke would get the legacy paid, and that, without it, they would get nothing.

After some negotiation this proposal was accepted, but in order to make it binding on the infant Plaintiff it was necessary to obtain the sanction of this Court to the arrangement. Accordingly, in November 1842, the bill in *Brooke v. Lord Mostyn* was filed for this purpose, praying that the legacy of £20,000 might be raised and paid

by sale of the said estates or a competent part thereof. In February 1843 a petition was presented in the name of the infant Plaintiff, stating the proposed arrangement, and praying for an inquiry to ascertain whether it was proper to be acceded to on the part of the infant; and on the 17th of February 1843 [464] an order was made referring it to the Master to ascertain and report on that fact to the Court. The necessary evidence was laid before the Master, which induced him to come to the conclusion that the arrangement was beneficial (on this evidence I shall have to comment presently); and on the 14th of March 1843 Captain and Mrs. Brooke released their interest in the estates comprised in the 500 years' term. On the same day the Master made his report, finding the arrangement was an advantageous one for the infant. On the following day, the 15th of March 1843, the trustees of Captain and Mrs. Brooke's marriage settlement released the estates included in the term of 500 years from all claim from them, and on the 17th of March 1843 the Court made an order confirming the arrangement on the part of the infant Plaintiff, and thereupon the Defendant Lord Mostyn executed a deed of covenant on the 20th of March 1843, by which he covenanted to pay £20,000 to the trustees on or before the 20th of January 1851, and to pay interest after the rate of £4 per cent. per annum in the meantime.

The property has now been sold; Plas-Hen has produced £187,882, 15s., besides leaving twenty-one lots not yet sold, and Cors-y-Gedol estate has produced the sum of £124,428, 2s. 9d., making a total of £312,344, 17s. 9d., and the portion of which remains unsold is estimated to be of the value of £8000, and probably, as the estimate is made on behalf of the Defendants, the estimate is a low one. In addition to all this, there is to be added the personal estate of the testator not specifically bequeathed, amounting in the whole to £46,262, 15s. 11d.

Since the hearing, I have, at my request, been furnished with a statement from the Defendants, verified by the affidavit of Mr. Cust, giving all the details by [465] which the figures are arrived at, and which is also accompanied by the comments and mode of stating the accounts of the Plaintiff. By this statement of Mr. Cust, it appears that the total amount of assets, including therein £46,671, 11s. 1d. received for rents of both estates up to the time of the sale, amounts to the sum of £427,435, 11s., and making the deduction of £46,671, 11s. 1d. for rents, a sum of £380,763, 9s. 10d. Whereupon it is pointed out, on behalf of the Plaintiff, that the amount of debts charged on the estate comprised in the term being, according to the Defendant's own statement, £237,090, 10s. 2d. and no more, and the legacies £55,000 and no more, after deducting therefrom two contingent legacies of £10,000, the capital of which never became payable, make together a total of £292,090 and no more as the charge on the property, leaving a balance, if the property had been sold at once, of £88,673 to provide against all contingencies of costs and the like, and thence they argue, with apparent force, that there must have been gross misrepresentation to induce the Court to believe that the property was not sufficient to raise and pay the legacies charged upon it.

Few things require more careful examination than an argument founded on figures, few things, I regret to say, are more deceptive than figures, and how they may be dealt with, and what different results may be produced from different modes of stating the same sets of figures, is well exemplified in this case. Two statements are sent in to me, one on behalf of the Plaintiff and another on behalf of the Defendants, both of them are drawn from the same sources, the data are identical, but only stated in a different manner.

I find the statement of the Plaintiff produces a surplus of assets over liabilities of the testator of £209,129, 6s. 5d. [466] for the purpose of meeting the payment of the legacies, and besides this surplus, the Plaintiff refers to the unsold lots and several other items, to which no actual money value has hitherto been assigned, and which he has not, therefore, brought into account.

On the other hand, the statement on the part of the Defendants shews a balance of £8228, 2s. 4d. and no more, being the whole that is applicable for the same purpose, that is for payment of the £55,000 legacies and interest on the two legacies of £10,000 each to the two sisters of the testator.

I have examined both accounts and compared the items in them with the admitted

and established data in order to form my own conclusion as to the results to be derived from them. Each is, of course, made out in the most favorable manner possible to the party who produces it. The Plaintiff's account omits many very material considerations; above all, it omits all question of costs, which have been very heavy, and unavoidably so, in the administration of this estate. The Defendants' account contains, in the statement of deductions, two items which, as far as I understand the amount, ought to be omitted or are at least of very doubtful admission. The first is for the expense of management, in addition to the sums allowed for repairs by the Master's report, this amounts to £7500. If I rightly apprehend the evidence, this has been deducted previously in the ascertainment of the amounts of the net rents, which are stated in the accounts of assets. The second is an item of £2000 for repairs of the Cors-y-Gedol estate since the date of the Master's report of the 8th July 1846, but I do not find on the opposite side of the accounts any entry for the rents of the Cors-y-Gedol estate received during the same period, that is since the [467] 8th of July 1846. If so, this item must be excluded. In addition to this, there are four items of estimated costs, amounting in the whole to £4500, but this appears to me to be reasonable. On one point of difference between the Plaintiff and Defendant, I think that the mode of taking the account by the Defendant is correct, and that is, that the Defendant is to be charged only with the net rental in estimating the value of the property. It is certainly shewn that large sums of money were expended out of the rents received, not merely in repairs, but also in improving the property, but the value of the improvements is shewn in the increased price obtained for the property. Even if I were taking the account adversely, that is, in order to charge the Defendants with repayment of everything they had received, as I should do against a mortgagee in possession, if I charged him with the full amount of the rents received, I must allow a corresponding reduction from the prices realised by the sale, a very vague and uncertain matter, and I am only estimating a probable result. I cannot, therefore, on the present occasion, do otherwise than take the account in this respect as the Defendants have stated it. However, on going through this account, and after making the largest deduction that could be reasonably expected to be made from it, if I were taking the account between the adverse parties in the manner I have above stated, it could not raise this balance, which would have been applicable towards the payment of legacies, above the sum of £20,000, and this would have had to be applied in payment of the legacies of £55,000, and this after taking into account the value of the unsold lots. It may well be that the unsold twenty-one lots would produce much more than the estimated value of £8000, but still, if the rest of this account is correct, the additional sums could not raise this surplus to anything [468] sufficient to do more than pay a small dividend on the amount which would have been due for principal and interest on the legacies at the date of the Master's report.

But, besides this, there are many other things to be taken into consideration in examining the question which alone I am now considering, viz., whether the actual produce of the estates would have been sufficient to have discharged the legacies and annuities given by the testator's will, one of which, and a very material one, is this: that, unless for this arrangement, the sale of the property would have been a forced sale under the direction of the Court, which would have probably diminished the prices realised, and would certainly have materially increased the expense. I think it needless to relate the various modes by which I have endeavoured to test the accuracy of the conclusion at which I have arrived on these accounts, but, on the best consideration that I am able to give to the matter, I am of opinion that the estates, if sold immediately after the passing of the Act of Parliament and under the provisions of that Act, or by order of this Court, they would not have produced a surplus sufficient to have paid anything but a small dividend of the legacies.

In addition to this, it is to be considered that a considerable additional price must be attributed to the fact that the estate was sold, under the provisions of the Act of Parliament, in fee-simple, and not for a term of 500 years. It is quite true that the reversion of an estate in fee-simple expectant on a term of 500 years would be worth nothing in the market, except to the owner of the term; but it does not therefore follow that the additional price obtained by selling the fee-simple [469] would not be

very considerable.(1) It is true, as I observed during the course of the argument, that this increased price, derived from the powers of the Act of Parliament, is not to be allotted entirely either to the termor or to the reversioner. It ought, no doubt, to be apportioned between them. But still, there has been a large increase of price, which has unquestionably been accomplished by the powers given in the Act of Parliament, which has enabled this property to be sold in the manner it has been. But allowing every increase of value, still my conviction is, that even if the legatees had waited till the sales could be realised as they have been, and even if the whole value of the property in fee-simple had been distributed, after payment of the liabilities, in payment of the legacies and annuities, it would still, even with the aid of the personal estate, have been insufficient to have paid more than a small portion of what would have been due on those legacies. In other words, that if no compromise or arrangement at all had been entered into, and the whole of Cors-y-Gedol and Plas-Hen estates instead of a term had been charged with the payment of these legacies, and that I was now to take the account of the produce of the property so charged, making only just allowances to the Defendants that the amount applicable towards payment of this legacy of £20,000 would be very small.

This conclusion, which I have arrived at, is a very material circumstance in favor of the Defendants. It is far from disposing of the whole matter; for, had I come to an opposite conclusion, and that to which the Plaintiff desires to lead me, it would not have proved [470] that fraud or deception had been used to induce the Court to sanction the arrangement; and though I have arrived at this conclusion in favor of the Defendants, it may still be that the Court was intentionally deceived and misled to pronounce the order sanctioning the compromise. I have therefore found it necessary to examine into the accuracy of the statements made to the Master and the Court, on the faith of which the report of the Master and the order of the Court were founded, because if I were of opinion that these were intentionally falsified, I should still be of opinion that the matter could not be binding on the infant, and that he would be entitled to call on this Court to assist him in preventing the order, and the release founded on it, from binding his interest.

On the occasion of the reference to the Master, the evidence was to this effect:— Lord Mostyn made an affidavit, in which he stated that Sir Thomas Mostyn owed to specialty and simple contract creditors £110,000, to mortgagees £105,000, making together £215,000; that the personal estate which would be realised consisted of £43,000, and that the total value of the estates comprised in the term was £151,800, making together £194,800, and leaving a deficiency of assets to meet the liabilities of £20,200.

Mr. Cynric Lloyd swore that the property had been estimated at £151,000 by competent surveyors, and that he believed that to be the real value of the property. The report he referred to was the report of Mr. Lygons, which report was, in fact, substantially to that effect. My present opinion is that they all under-estimated the value of the property. I believe, at that time, if sold in lots and only for the residue of the term of 500 years, it would have produced a much larger sum than £151,000; but I [471] come to this conclusion, assisted by the knowledge I derive from discovering what the property has actually produced. It is true that Mr. Jones Bateman stated that the property was, if well managed, worth £10,000 per annum, and would sell for £400,000. I think that this was as much an over-estimate the other way; it is obvious that it was so treated at the time, and that it was clearly disregarded by everyone as the mere loose expression of opinion of one who was not a surveyor, and who had not carefully investigated the subject.

After reading the evidence given thereon before the Master in as scrutinizing manner as I can, and testing it by subsequent experience, I am convinced that it was given *bonâ fide*. I have no doubt it was given, as it always is in such cases, with a view to depreciate rather than enhance the value of the property. This is a circumstance which, as everyone acquainted practically with these transactions is aware of,

(1) In *Edmonds v. Lord Foley*, reported 30 Beav. 282, the remainder (consisting of nine months) of an old term of 200 years, sold for £3000. See 7 Jur. 1268, and 31 Law J. (Ch.) 384.

and it is a matter carefully to be guarded against by the Court ; but I do not believe that any *bond fide* surveyor, not valuing it for any party in a cause, but merely as to what he considered the property would really fetch in the market, would have put the value of the estates comprised in the term at a higher sum than £200,000 ; and even putting the value of them at that amount, still, I think that the arrangement, as it then stood, was a reasonable one, and one proper to be carried into execution on behalf of the infant. Even now, with the assistance of what has since occurred with respect to the realisation of money by the sale of this property, and on the assumption that the legacy of £20,000 only formed part of legacies to the amount of £55,000, all similarly situated, and payment of which all the legatees could have enforced, if the Plaintiff or his trustees could have compelled payment of the legacy given to [472] Mrs. Brooke, I should be of opinion that the arrangement was a beneficial one.

It is important to observe what the arrangement was, even if tried by our present experience, and assuming the property to realize on a sale what it has never done. It avoided a long, expensive and doubtful litigation, after which it was very probable that nothing might have been realised in respect of the legacy, and when it was scarcely possible that the whole should be so realised. In the next place, whatever could be obtained would be at an uncertain and, as the result shews, a very distant period of time. In the third place, Captain and Mrs. Brooke and their son obtained the bond and covenant of a nobleman standing in the position of Lord Mostyn, by which document he bound himself that he would pay the interest on the £20,000 at £4 per cent. per annum until his eldest son came of age, which event was to take place in eight years, and then, that he would either pay the full amount of £20,000 to the trustees of the settlement, or that he would cause the amount to be charged or secured on his estates. No one, of course, at that time, conceived it possible that the bond and covenant of a gentleman standing in the position of Lord Mostyn, who at that time was a gentleman of large possessions, distinguished ancestors and untarnished honour, would, in the course of a few years, become utterly worthless. Even now, were a similar case to occur to-morrow with a gentleman situated as the Defendant, the second Lord Mostyn, was then, and after the sale of the estates for the moneys realised, I should, rather than take the long and expensive accounts which would now be necessary, sanction a similar arrangement on the part of the infant. All litigation stopped, all the expense and all the delay consequent on the sales of so large a property [473] avoided, a delay which in this case has exceeded twenty years, all the worry and expense on the part of the infant removed. Who could, at that time, have anticipated, who would now suppose, that in the short space of five years any nobleman or gentleman in such a position, not subject to the risks and casualties of trade or commerce, would have become utterly insolvent, and become the subject of adjudication by the Court of Bankruptcy ?

The position and situation of the Plaintiff and of his parents (one of whom has been removed from the scene before the catastrophe has occurred) is one which everyone must deeply feel. But though I feel much compassion for his position, the careful examination I have made of the evidence and proceedings in this case satisfies me that the compromise and arrangement of February 1843 was a proper one to be sanctioned by the Court ; that it was obtained by no fraud ; by no intentional misstatements, but fairly and honestly ; and that the Plaintiff is not entitled to any relief.

The bill must be dismissed, but I shall give no costs, except to Messrs. Clarke, the trustees of his marriage settlement.

NOTE.—The Plaintiff appealed [3 De G. J. & S. 373], and the Lords Justices, on the 20th of December 1864, declared that the compromise was not binding on the Plaintiff, on the ground that in the proceedings before the Master there had been a suppression of material facts known only to Lord Mostyn and his adviser. The case will, it is said, be carried by appeal to the House of Lords. [L. R. 4 H. L. 304.]

[474] CARR v. LIVING (No. 2). April 16, 1864.

Bequest by a man to his wife, to be applied for the maintenance, &c., of herself and their children: Held, that the right of an unmarried daughter to maintenance, &c., did not cease on her attaining twenty-one.

The testator gave his real and personal estate in trust to pay the income to his wife during her life, or as she should by writing appoint, but without power of anticipation, to the end and intent that the same might be for the sole, separate and peculiar use and benefit of his wife and their children, and applied for the maintenance and support of herself, and maintenance, education, clothing and support of such child or children. After the decease of his wife, the property was given to his children.

The testator died in 1840, and his widow afterwards mortgaged her interest and took the benefit of the Insolvent Act. At the hearing on further consideration in June 1860 (28 Beav. 644), there was but one child, Sophia Living, who required maintenance, and it was declared that she "was entitled, during the life of her mother or until further order, to be maintained, educated, clothed and supported by and out of the income of the residuary estate of the testator."

The residue amounted to £752 stock and £10, 19s. cash; and Sophia having since attained twenty-one, the question was, whether her right to maintenance had ceased.

Mr. Selwyn, for the Plaintiff.

Mr. J. H. Palmer and Mr. Lewin, for mortgagees.

[475] Mr. Baggallay, for the assignee. The daughter is living with the mother, and to continue the maintenance would be to give the whole income to the daughter and mother, notwithstanding her assignment and insolvency.

THE MASTER OF THE ROLLS [Sir John Romilly]. I see nothing to confine the daughter's right to infancy; although there might be some difficulty in the case of a son who ought to earn his own livelihood. I think the proper mode of construing the will is, that so much as may be required for the support of the daughter should be applied for that purpose notwithstanding she has attained twenty-one.

[475] ABADAM v. ABADAM. March 1, 2, 1864.

[S. C. 33 L. J. Ch. 593; 10 L. T. 53; 10 Jur. (N. S.) 505; 12 W. R. 615.]

See *Gleadow v. Leatham*, 1882, 22 Ch. D. 272.]

A testator appointed an annuity of £500 a year to his widow for life, "to be payable without any deduction whatever." Held, that it was not given free of income tax.

The testator, by his will dated in 1841, bequeathed a share of his personal estate to his son William for life, and after his death to his son's children. And he gave to his son a power to appoint a jointure to his wife not exceeding the yearly sum of £500 issuing out of the property, and to be paid without any deduction whatever.

The testator died on the 2d of June 1842.

The 5 & 6 Vict. c. 35, imposing income tax, passed on the 22d of June 1842, but it took effect from the 5th of April 1842.

The son afterwards, in 1847, made his will, by which he appointed the yearly sum of £500 to his wife for her [476] life for her jointure, charged on the property, and "to be payable without any deduction whatsoever."

The son died in 1852, and the question now was, whether the jointure ought to be paid free of income tax.

Mr. Selwyn, for the trustees. It has been decided that a testator may, by will, bequeath an annuity free from income tax; *Festing v. Taylor* (3 Best & Smith, 217); but his intention to do so must be clearly expressed. In *Festing v. Taylor* the direction was to pay the rent charge without any deduction on account of taxes, present or future, charged either on the rent charge or on the person entitled to it; but here there is simply a charge of the annuity payable "without any deduction whatever."

This is not sufficient; the income tax was not a deduction but a personal charge on the annuitant in respect of her income. The first testator could not have considered the income tax as a deduction, for it did not exist either at the date of his will or at his death.

Mr. Cole, for the widow. This annuity is bequeathed free from income tax. It having been determined, reversing the prior decisions, that there is nothing in the 5 & 6 Vict. c. 39, s. 103, to avoid a direction to pay an annuity free from income tax, and that a will does not come within that section, which relates to "contracts, covenants and agreements," it follows that income tax now stands on the same footing as legacy duty. This annuity, being payable "without any deduction," is clearly payable free of legacy duty, and, for the same reason, it is exonerated from the payment of income tax. The 5 & 6 Vict. c. 35, s. 102, enacts that upon [477] all annuities "there shall be charged" 7d. in the pound, and the person liable to pay the annuity is authorized to "deduct" the amount so charged. The tax is, therefore, both a charge on the annuity and a "deduction" from which the testator has exonerated it.

To relieve a bequest from the charge of income tax, it is not necessary to use the words "free from income tax;" any general words are sufficient for that purpose. In *Turner v. Mullineux* (1 John. & Hem. 334) some of the annuities were to be paid "free from all deductions," and it was held that they were free from the income tax; and in *Lord Lovat v. The Duchess of Leeds* (2 Dru. & Sm. 62), it was held that income tax was a tax "affecting" a mansion-house given to the duchess for life. He also referred to 16 & 17 Vict. c. 34.

Mr. Selwyn, in reply. In *Turner v. Mullineux* the Vice-Chancellor proceeded on this:—That the testator, on the face of his will, had shewn that he considered income tax to be a deduction. In *Lethbridge v. Thurlow* (15 Beav. 334), where an annuity was given to one for life, "clear of legacy duty and every other deduction whatever," it was held expressly that income tax was not a "deduction."

March 2. THE MASTER OF THE ROLLS [Sir John Romilly]. I have looked at the cases cited very carefully, and I am of opinion that they all come back to this:—What was the intention of the testator; was it directed against the income tax, and did he consider it in the nature of a deduction from the legacy. The matter is shewn in a moment in this way:—If a legacy be given to A. B. [478] "free from all taxes," and an annuity be given to C. D. "free from all deductions:" assume they are both of the value of £1000; no doubt they are both free from legacy duty; but the annuitant will have to pay the income tax, which the legatee will not. So if you give a specific legacy of £1000 stock to a person and say it shall be paid free from all deductions, the legacy duty will have to be paid by the executor and borne by the residuary legatee, but the legatee will still have to pay the property tax *de anno in annum* on the dividends of the stock as they become due. But it is argued that if it be an annuity worth ten years' purchase, not only legacy duty, but the income tax also, is to be deducted from the annuity, or the value of the annuity, which is the same thing. I find from *Turner v. Mullineux* that Vice-Chancellor Wood was of opinion that income tax is not properly a deduction from a legacy; he says, "This Court always holds that income tax is not a deduction." It is, I think, a tax on the income of the legatee from whatsoever source it may be derived.

All the cases proceed on this foundation: That if the testator expressly points to the deduction of the income tax, it is a bequest of so much additional to the legacy or annuity; and the Court of Exchequer Chamber has determined, notwithstanding the policy of the 103d section of the Act, that a testator may direct payment of that tax if he thinks fit.

I am of opinion that the testator has not done so in the present case, and that he has not pointed to the income tax as a deduction. I am, therefore, of opinion that the widow must pay the income tax for the future, and I will make a declaration to that effect.

NOTE.—See also *Wall v. Wall*, 15 Sim. 513, and *Floyer v. Bankes*, 33 Law J. (Ch.) 1.

[479] *In re GRAHAM'S WILL. April 16, 18, 1864.*

[See *Crozier v. Crozier*, 1873, L. R. 15 Eq. 283.]

Bequest of £140 to A. B., the interest to be paid to her during her life, and at her death to be paid to her children, followed by the appointment of a trustee, and by a direction (not limited to her life) to pay her the interest: Held, that A. B. took a life interest only, and not an absolute interest subject to the gift to her children.

William Graham made his will, dated the 14th day of December 1846, and he thereby bequeathed to his daughter Mary Graham the legacy or sum of £140, the interest or dividends arising from which to be paid to her during her life, and at her death the sum of £140 to be paid to her daughter Hannah when she attained the age of twenty-one; but should his daughter Mary have more children, then the said sum of £140 should be equally divided amongst them as they respectively attained the age of twenty-one. And the testator appointed his brother trustee, to lend out the above-mentioned legacy upon mortgage or other good security, and that, as the interest or dividends arising from the same should become due, the said trustee should receive and pay the same to his (the testator's) daughter Mary.

The testator bequeathed his residue to his son.

The testator died shortly afterwards, and Hannah and the other children of the testator's daughter Mary had all died under twenty-one.

The testator's daughter Mary being of advanced age, she and her husband claimed the fund absolutely, and presented a petition to obtain payment of it out of Court.

Mr. Humphrey, in support of the petition. This is an absolute gift in the first instance to Mary Graham, with [480] a gift over to her children, failing which, she retains her absolute interest. There is an unlimited direction to the trustee to pay her the dividends; this is a gift of the capital; *Campbell v. Brownrigg* (1 Phil. 301); *Salmon v. Salmon* (29 Beav. 27).

Mr. Mounsey, *contra*, argued that this was a distinct gift to Mary Graham for her life only, and that nothing followed in the will tending to enlarge that life interest; *Scavin v. Watson* (10 Beav. 200).

Mr. Humphrey, in reply, referred to *Lassence v. Tierney* (1 Mac. & G. 551).

April 18. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on the construction of this will is, whether a life interest or an absolute interest is given to the testator's daughter, and I am of opinion that it is only a life interest.

I am satisfied that the bequest to her forms one sentence only, and that the Court is not at liberty, where a testator says, "I give a legacy to A., the interest to be paid to her during her life," to divide the sentence and say it is an absolute gift with a superadded direction to pay her the interest during her life. This is a bequest of a life interest to her and nothing more. The testator afterwards appoints a trustee to lend out the legacy and pay her the interest; this is merely carrying into effect and executing the previous trust to her for life.

[481] If the testator had intended her to take an absolute interest, subject to the interest given to her children, he would have directed that, on failure of children, she was to take the legacy absolutely.

I am of opinion that upon the true construction of this will the gift to the daughter is only for life.

[481] *EADY v. WATSON. April 16, 1864.*

Upon a petition in a suit for payment of the income of a fund in Court to the Petitioner, the costs must be borne by the applicant.

The testatrix bequeathed her residuary estate to her executors, upon trust to pay the income thereof to her grandnephew Charles Grant Eady, or apply such income for his maintenance, use and benefit until he should attain the age of twenty-five

years, and on his attaining that age, to pay and transfer to him the whole of such residue, to and for his own use and benefit.

This suit was instituted for the administration of the estate, and by the decree on further consideration, made in June 1863, the income of the residue, which was in Court, was directed to be paid to the executors, "for the maintenance and education of Charles Grant Eady during his minority or until further order."

Charles Grant Eady, having attained twenty-one, presented a petition, praying that the income of the residue might be paid to him until he attained twenty-five, and that the costs of the petition might be paid out of the *corpus*. The petition was only served on the executors.

Mr. Graham Hastings argued that the costs of the petition ought to be paid out of the *corpus*, and not by [482] the Petitioner. He cited *Re Leake's Trusts* (32 Beav. 135); *Re Whitting's Settlement* (30 L. J. (Chanc.) 862).

THE MASTER OF THE ROLLS [Sir John Romilly]. There is a distinction between the cases. Where money is paid into Court under the Trustee Relief Act, it is for the protection of the fund and for the benefit of all parties.

But here this application is merely for the benefit of the Petitioner, and he, therefore, must pay the costs of the petition.

[482] SIMPSON v. BROWN. April 20, 1864.

The Plaintiff had in her possession or power letters which had passed between her solicitor and a third party referring to the subject-matter in dispute, some of which had been written in anticipation of, and the rest pending, the proceedings in the suit. Held, she was not bound to produce them.

The Plaintiff Mary S. Simpson was called upon to make the usual affidavit as to documents in her possession.

By her affidavit, she stated she had in her possession or power seven letters from John Louch to J. T. Miller. But she added they "are letters referring to the subject-matters in dispute in this suit; the said J. T. Miller having, as my solicitor, corresponded with the said John Louch concerning the same. Those marked one, two and three having been written in anticipation of, and the rest pending, the proceedings in this suit."

She insisted that these were privileged, and that she was not bound to produce them. A summons was taken out to consider the sufficiency of the privilege set up, and if it should be insufficient, then that the Plaintiff [483] might be ordered to produce them. The summons was adjourned into Court.

Mr. Baggallay and Mr. Batten, in support of the application, cited *Sawyer v. Birchmore* (3 Myl. & K. 572); *Steele v. Stewart* (1 Phill. 471); *Desborough v. Rawlins* (3 Myl. & Cr. 515); *Spenceley v. Schulenburg* (7 East, 357); *Marsh v. Keith* (1 Drew. & Sm. 342); and see *Ford v. Tennant* (29 Beav. 452).

Mr. Selwyn and Mr. Roberts, *contra*, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. It has been held that you are not entitled to see the evidence until the hearing. I am of opinion that the Defendant is not entitled to the production of these letters, for I think that in all cases in which a solicitor writes letters for the purposes of the suit, and solely for the purpose of properly conducting it on behalf of his client, and obtains answers in reply, his client is not bound to produce them. If he were compelled to do so, he would be telling his opponent what his evidence was to be. A solicitor is bound to conduct a suit in the best manner he can, and to obtain the best information he is able. When he has ascertained what can be proved, he will determine whether it is to be given in evidence or not, but, in either case, the inquiries he has made and the answers he has received are protected. He must necessarily, in the performance of his duties, make certain inquiries, and he is entitled to write to any person for that purpose, and is not bound, at the instance of the other side, to produce either his own letters or the answers to them.

[484] RADCLIFFE v. RUSHWORTH. April 14, 22, 1864.

A partnership between father and son, though admitted to exist as regards the world, held, under the circumstances, not to exist as between themselves.

From 1849 J. R. resided with his father and assisted him in his business. The sign-board, the invoices and the banking account were in the name of "R. & Son." They drew and accepted bills under the same title, and executed a deed which described them as co-partners. Held, nevertheless, after the death of the son, in 1862, upon the evidence, that they were not partners *inter se*. The circumstances relied on were:—the absence of any division of profits in the books, which were kept by the son, the absence of proof of the son's having any capital or being entitled to receive any share of the profits, the fact of his having, when he ceased to reside with his father, made no request for an account of the profits, but accepted £1 a week as a remuneration until his death (six months afterwards) and the testimony of the members of the family.

This bill was filed by the legal personal representative of James Rushworth deceased, alleging that the Defendant Radcliffe Rushworth carried on the business of a draper with his son James Rushworth from 1849 to the decease of James Rushworth in December 1862. The bill prayed the usual partnership accounts.

The Defendant wholly denied the existence of any partnership with his son, though he did not dispute or deny that, in divers ways, the son had been, by the Defendant's sufferance, held out to the world as the Defendant's partner in business. The circumstances are fully detailed in the judgment of the Court.

Mr. Hobhouse and Mr. Robson, for the Plaintiff.

Mr. Selwyn and Mr. Prendergast, for the Defendant.

Mr. Hobhouse, in reply, cited *Teed v. Elworthy* (14 East, 210); *Peacock v. Peacock* (2 Campb. 45); *Thompson v. Williamson* (7 Bligh, 432); *Lindley on Partnership* (p. 573).

[485] April 22. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this cause is, whether James Rushworth, deceased, was a partner with his father at the time of his decease.

This suit is instituted by the legal personal representative of the son, but practically for the widow of the son, who is still under twenty-one years of age, and the claim made is, for the usual decree in a partnership, viz., a winding up of the business, the sale of the stock and goodwill and getting in the outstanding assets. It is solely a question of fact to be established by the evidence. On behalf of the Plaintiff, facts are proved establishing that, as regards the world, neither the Defendant nor his deceased son could have disputed the partnership. On behalf of the Defendant, it is alleged and endeavoured to be proved that the business always belonged to him alone, and that deceased son and his other children, who assisted him in carrying on the business, had no other interest in it, except that out of the profits he maintained the whole family, who all lived together, but that the business, the sole control over it and the mode in which the profits were to be applied, depended on the mere will of the Defendant, which no one contested.

I must shortly refer to the facts to shew the result to which I have come. Somewhere about the year 1843 the Defendant established the business of a draper at Mytholmroyd, in the parish of Halifax. For six years or thereabouts he carried this on alone, and during a portion of this time, James, the deceased son, was apprenticed to a chemist and druggist. In 1849 James came to assist the Defendant in his business and lived with him, and also, in his house, carried on the business [486] of a chemist and druggist for a few years, after which it was discontinued; but, as I understood the evidence, this was carried on for the benefit of the father. In 1849 a signboard was put up in front of the shop, either by the Defendant or with his sanction or consent, intimating that the business was carried on by Rushworth & Son. For some time John Rushworth assisted in the business, and the printed heading of the invoices was Rushworth & Sons, in the plural, the final "s" was struck out in ink by James, but the print of the invoice was not altered.

It appears also that John Rushworth, another son of the Defendant, had established himself in a separate business at Huddersfield; he was unsuccessful, and in January 1860 he made a composition with his creditors by a deed to which his father and brother James were parties, who guaranteed 17s. 6d. in the pound to his creditors. In this deed the father and James are styled "*co-partners carrying on business under the style of Rushworth & Son.*"

They drew and accepted bills under the same title, and in February 1860 they opened a joint account with their bankers under the title of Rushworth & Son.

It would be difficult to find a case where a greater concurrence of circumstances seems to establish the existence of a partnership between the father and son; still, on the whole of the evidence, I am of opinion that this did not constitute a partnership between the father and his deceased son, so as to entitle the son to any definite share of the profits or of the capital of the concern. It may well be that the father and son may agree, that, as regards the world, they are to be treated [487] as partners, but that, as between themselves, no such relation should exist.

The two facts which have principally led me to the conclusion that such an understanding existed between the father and son in this case are the following:—In the first place, the books were kept by the son, and yet no trace of such a partnership is to be found in them. There is no trace of any division of profits between them, or of any payment to James, as or in respect of his share of profits. There is nothing to shew that James ever had any capital in the concern, or that he was entitled to receive any share of profits. That he received money, and that he drew for money on the joint account is unquestionably true; but I do not find that any divisions of profits were ever made from 1849, when he first became associated with his father, to June 1862, when he married and left his father's residence.

The second circumstance which weighs strongly with me is that in June 1862, when he left his father's residence, having married the daughter of the Plaintiff, he made no request for any account of past profits, but accepted £1 per week as his full remuneration, and from this time until his death, which occurred six months later, in December 1862, he never drew any money from the bank. These two circumstances go a great way to shew that the deceased son did not claim against his father any such right as is now set up against him by his son's legal personal representative.

In addition to this, there is the united testimony of the father, and of every member of his family confirmatory of this view. It is true that all these persons are interested to defeat the Plaintiff's contention, but still the fact proved by the daughters, that the profits earned [488] by them, separately, in their business of milliners have never been accounted for to them, separately, but that all of it has been united into one common stock, out of which they all lived, goes strongly to confirm the rest of the evidence. In fact, the father and the whole of his family seem to have been on the best possible terms down to the period of the marriage of James, and though his marriage was disapproved of by his brothers and sisters, it does not seem to have produced any other result than this: that the son went to reside with his wife in another house, assisted in the business as usual, and received for his doing so the remuneration of £1 per week, and also I think he was entitled to take such clothing and the like, as he required, from the stock.

I am therefore of opinion that James, if he were alive, would not be entitled to the decree now asked, and that his legal personal representative cannot do so in his place.

I must therefore dismiss the bill, but I shall do so without costs, for, after the facts I have stated in the early part of my observations, as to the manner in which the partnership has been held out to the world, it was scarcely possible for the Plaintiff to avoid bringing this case before the Court, unless he were willing to submit to a decree against himself for wilful default by the widow or any person principally interested in the son's estate; and the Defendant himself would have avoided it, had he, in conjunction with his son, expressed clearly, on paper, the terms on which they were associated together and held out to the world as partners.

[489] HODDEL v. PUGH. *April 29, 1864.*

[S. C. 10 L. T. 446; 10 Jur. (N. S.) 534; 12 W. R. 782.]

The vendor of a real estate died before completion intestate as to his real estate. Held, that the legal personal representatives of the vendor might maintain a bill against the vendor's heir and the purchaser for a specific performance, and that although the interest of vendor was equitable and the purchaser had since got in the legal estate.

The heir at law of a vendor, who refused to convey to the purchaser an estate sold by his ancestor, was ordered to pay the costs of a suit to compel him.

This suit was instituted by the executors of a deceased vendor against the purchaser and the vendor's heir at law, to compel them to complete the contract by executing the conveyance.

The contract was signed on the 26th of July 1860, and was in the following words:—

“Mr. Elias Pugh agrees to sell Pwlleront estate, and James G. Price agrees to buy the same for twelve hundred pounds.

“ELIAS PUGH.

“JAMES G. PRICE.”

Four days afterwards the vendor gave the purchaser notice to rescind the contract; but the latter insisted on its fulfilment, and an abstract of title was delivered in February 1861.

Some further delay took place on the part of the vendor, and on the 21st of August 1861 the purchaser filed his bill against him for a specific performance of the contract. The vendor, having been advised by counsel that he had no defence to the suit, agreed to fulfil the contract, and his solicitor accordingly wrote a letter to the purchaser stating that the vendor was ready to complete the sale.

The vendor died on the 21st January 1862, before the conveyance had been executed, having previously made his will, dated the 15th of January 1861, whereby [490] he appointed the Plaintiffs his executors, but he made no devise of the estate contracted to be sold, and the testator's interest therein descended on the Defendant Israel Pugh, his heir at law. The Plaintiffs were willing to complete the contract entered into by their testator, but the Defendant Israel Pugh refused to execute the conveyance of the property to the purchaser.

Under these circumstances the present suit was instituted, and the bill prayed that it might be declared that the Plaintiffs were entitled to have the contract specifically performed, and that the Defendant Israel Pugh might be declared a trustee for the Plaintiffs, as the personal representative of Elias Pugh deceased, of the lands contracted to be sold, and might be ordered to execute a proper conveyance and pay the costs of the suit.

It appeared that at the time when the contract was entered into, the legal estate in the property was vested in a mortgagee, who had, since the death of the vendor, transferred his security to the purchaser, and conveyed the legal estate to him.

The purchaser's first suit for specific performance, which had abated by the death of Elias Pugh, was not revived, the purchaser being satisfied to stay proceedings and rely on the promise of the vendor's executors to carry out the contract.

The grounds upon which the present suit was resisted by the heir at law were: first, that, at the time when the contract was entered into, the vendor was an old man, very illiterate, and not in a fit state to contract, and that advantage had been taken of his position by the purchaser to obtain his signature to the contract; secondly, that the consideration given for the estate was [491] insufficient; and thirdly, that as the purchaser had obtained the legal estate from the mortgagee, and the Plaintiffs, the executors, were willing to complete the contract, the concurrence of the heir in the conveyance was unnecessary.

No evidence was adduced in support of the charge of undue influence exercised

over and advantage taken of the vendor ; but as to the adequacy of the consideration, there was some evidence, on the part of the Defendant, that the value of the property was £1800. On the other hand, the Plaintiffs proved that the vendor had, shortly before the date of the contract, offered the property to the same purchaser for £1050.

Mr. Selwyn and Mr. Rendall, for the Plaintiffs. The suit ought not to have been defended. The delay which has taken place has been occasioned by having to deal with an obstinate and poor heir at law. He has been offered £50 for his concurrence, but he has insisted on being paid £200.

Mr. John Pearson, for the purchaser, explained the reason why the former suit had been discontinued, and stated that the purchaser was anxious to have the property.

Mr. F. O. Haynes, for the Defendant Israel Pugh, admitted that inadequacy of price was not, of itself, sufficient to entitle the Defendant to resist a specific performance, but he relied on the rule laid down in Lord St. Leonard's Vendors and Purchasers (p. 274 (14th edit.)), that "whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable." He argued that under such circumstances as the present, the Court would have regard to the hardness of the bargain and decline to enforce the contract ; *Baker v. Monk* (ante, p. 419, affirmed by the Lord Justices, 7th May 1864) ; *Day v. Newman* (2 Cox, 77). Again, the purchaser having obtained a conveyance of the legal estate from the mortgagee, the heir at law was a bare trustee of an equity of redemption, and had nothing to convey. Lastly, that the present suit was wholly unnecessary, as all the relief required might have been obtained, at a trifling expense by reviving the other suit.

THE MASTER OF THE ROLLS. My present impression is that the heir at law has mistaken his rights and duties. There was a distinct contract in existence when the testator died ; the consequence of which was that the purchase-money became part of his personal estate, the land having, by the contract, ceased to be real estate belonging to the testator. By his will he has disposed of his personal estate, and it follows that his personal representatives were entitled, in order to obtain the purchase-money, to file a bill against any person who merely filled the position of a trustee for the purchaser to obtain his concurrence in the conveyance of the property to the purchaser. This being a valid contract, the heir was only a trustee, and was bound to convey all his interest at the expense of the person requiring it. Mr. Haynes contended that the inadequacy of price, coupled with the advantage taken of an old man, was enough to disentitle the purchaser to a specific performance of the contract. I will read the evidence upon this part of the case.

There is only one other point which I should like to consider, and upon which, if necessary, I will hear Mr. [493] Selwyn, viz., what interest the heir has to convey, it being an admitted fact that the legal estate was in a mortgagee, and that such legal estate has become vested in the purchaser.

April 29. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion, in this case, that the Defendant Price could have enforced the specific performance of the contract, and that none of the circumstances stated by the Defendant Pugh are such as disentitled Price to that relief. It may be that the property was sold at an undervalue, but it was sold by the owner who had lived on it all his life, and the evidence fails in shewing that any undue influence was exerted by the purchaser, or that the vendor was induced to sell it by any unfair means.

It is clear that the contract could have been enforced against the vendor ; but he died, having made no provision for its completion, and his interest descended on his heir at law. The heir is called upon to convey, the whole matter is explained to him and he is offered £50, but he refuses, and says he will have £200, and he stands out for that sum.

The right of the Plaintiffs to make the Defendant Pugh convey all the right in the property which has devolved on him by reason of being heir at law of the vendor is clear. He has refused to convey, and the necessity of this suit has been caused by his refusal. I shall direct him to execute a proper conveyance of all his right, title and interest in the property by reason of his being heir at law, to be settled in Chambers if the parties differ. Pugh must pay the costs of the suit, which he has

occasioned, and the Plaintiff must pay Price's costs and have them over as against Pugh.

[494] SHAW v. BUNNY. March 3, 4, 1864.

[S. C. affirmed on appeal, 2 De G. J. & S. 468; 46 E. R. 456; 34 L. J. Ch. 257; 11 L. T. 645; 11 Jur. (N. S.) 99; 13 W. R. 374. See *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*, 1879, L. R. 6 Ind. App. 160. See also *Parkinson v. Hanbury*, 2 De G. J. & S. 450; L. R. 2 H. L. 1, and cases in note to that case, 46 E. R. 449.]

When a first mortgagee sells the mortgaged property to the second mortgagee, by virtue of a power of sale, the latter obtains, as against the mortgagor, an irredeemable title to the property.

The bill in this case was filed by Shaw against Bunny and Slocock, and it prayed a redemption of certain mortgaged property. The principal question related to four houses, the title to which was as follows:—

In 1852 they were mortgaged to Hallett and Hodgson for two sums of £1000 and £1000 with the usual power of sale.

In 1853 they were mortgaged to the Defendants Bunny and Slocock for £6000. The equity of redemption of these premises belonged to the Plaintiff Shaw.

In 1855 Hallett and Hodgson, under their power of sale, sold and conveyed the property to the Defendant Bunny for £1100.

The Plaintiff insisted that he was entitled to redeem upon repayment of the £1100; but the Defendants insisted that the equity of redemption had been destroyed by the sale.

There was other property comprised in the mortgages, to which, however, it is unnecessary to advert.

Mr. Baggallay and Mr. W. Morris, for the Plaintiff, argued that a second mortgagee could not, by purchasing the mortgaged estate from the first mortgagee, get rid of the equity of redemption, and thereby obtain an irredeemable title as against the mortgagor; but [495] that he was still liable to be redeemed on payment of what he had paid in defence of the title; *Baldwin v. Banister* (3 P. Wms. 251, n. (a)), in which case it was held, that the mortgagor was entitled to the benefit of a purchase made by the mortgagee of a right of dower affecting the mortgaged estate. So in *Murrell v. Goodyear* (2 Giff. 51, and affirmed 1 De G. F. & J. 432), a purchaser of an estate who had, prior to the completion, bought up an adverse title, was held only entitled to the price paid for it. They asked for a declaration that the Plaintiff was entitled to the benefit of the purchase made by the Defendant Bunny from Hallett and Hodgson.

Mr. Selwyn and Mr. E. Smith, for the Defendants. A second mortgagee, who purchases from the first, obtains thereby the same rights as a stranger. The right of redemption is destroyed by the sale, and the purchaser becomes the absolute owner. It is true that the heir or a trustee, who buys in an incumbrance, is allowed only what he pays for it; but that principle does not extend to persons not standing in that situation. Even the heir himself, who has a charge on the estate, in his own right, and buys up a charge on it for less than the amount due, is entitled to the full amount of the charge on it; *Davis v. Barrett* (14 Beav. 542). A mortgagee is not a trustee for the mortgagor; *Dobson v. Lund* (8 Hare, 216), in which the case of *Baldwin v. Banister* was disapproved of. (See the observation of V.-C. Kindersley in *Parkinson v. Hanbury*, 1 Drew. & Sm. 146.)

Mr. Baggallay, in reply.

March 4. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that when the Defendant bought the four houses from the first mortgagees, he got the absolute interest in them, and that the Plaintiff is not entitled to redeem them. I have looked at the case referred to by Mr. Baggallay, and I find that it does not bear out the principle contended for by him. I see no reason why a second mortgagee is to be treated differently from a stranger, if he buys the mortgaged property from the first mortgagee, nor any reason why he should not be at liberty to purchase it.

I am, therefore, of opinion, with respect to the four houses, that the Defendants

have an absolute title to them, so far as the Plaintiff is concerned, and that they are entitled to a declaration that they are the absolute owners of these houses.

NOTE.—The case was affirmed by the Lords Justices, on the 19th of January 1865; and was afterwards, on the 22d April 1865, compromised. [2 De G. J. & S. 468.]

[496] MILLER v. THURGOOD. *March 4, 5, 1864.*

[S. C. 33 L. J. Ch. 511; 10 L. T. 255; 10 Jur. (N. S.) 304; 12 W. R. 660.]

A testator had a freehold in Potter Street and a freehold in South Street, and he was entitled to two-thirds of a house and 18 freehold cottages in South Street, the other one-third belonging to his wife. By his will, he devised all his freehold messuages, "cottages," &c., in the two streets to his wife for life, she keeping them in tenantable repair, and then upon trusts for sale and division. Held that the wife was bound to elect between her one-third of the house and cottages and the other benefits given her by the will.

Mr. Thurgood, by his will dated in 1833, "devised unto his wife Mary Thurgood all and every his freehold messuages or tenement, *cottages*, hereditaments and premises situate in Potter Street and South Street in Bishops Stortford or elsewhere, with the appurtenances thereunto respectively belonging, to hold the same unto his wife Mary Thurgood and her assigns for her life, she and they keeping the same in tenantable repair. And from and after the decease of his wife Mary Thurgood he gave and devised the said messuages or tenements, *cottages*, heredita-[497]-ments and premises, with the appurtenances, unto his son Thomas Thurgood and his son-in-law the Plaintiff, to hold the same unto the said Thomas Thurgood and the Plaintiff Benjamin Miller, and their heirs, upon trust, as soon as conveniently might be after the decease of his wife, to sell all the said messuages or tenements, cottages, hereditaments and premises." He bequeathed the money to arise from such sale to his seven children.

The testator also bequeathed to his widow all his ready money and securities for money and other benefits.

The testator died in 1855, and his wife survived him and died in 1863.

The testator, at the date of his will and at his death, was entitled to the entirety of a freehold house in Potter Street and to the entirety of a freehold house in South Street. In addition to this, he was entitled to two undivided thirds of a house and eighteen freehold cottages in South Street, which he had purchased from his wife's brothers, his wife being, under her father's will, entitled to the remaining one-third of the house and eighteen cottages in South Street.

In 1820 Mr. and Mrs. Thurgood had executed a deed conveying the house and eighteen cottages in South Street by way of mortgage, the equity of redemption being thereby reserved to Mr. Thurgood. The mortgage deed contained a covenant that Mrs. Thurgood would levy a fine to make it effectual, but which had never been performed.

Under these circumstances it was insisted by the [498] children that the widow and her heir at law ought to be put to their election, between the one-third of the house and the eighteen cottages and the benefits given to the widow by the will. That they could take no beneficial interest under the will without giving effect to its provisions, by suffering the one-third of the house and eighteen cottages to be treated as subject to the trusts thereof.

Mr. Eddis, for the Plaintiff, a trustee, stated the case.

Mr. G. L. Russell, for the heir at law of the widow. No case of election is raised by this will; it is necessary for such a purpose that the words should be clear and unambiguous, and nothing must be left to surmise. A person is not, without strong indications of such an intent, to be understood as dealing with what does not belong to him; *Dummer v. Pitcher* (2 Myl. & K. 262). If a testator says, "I devise my freehold messuages," he must be taken to dispose only of his own property, and not of that belonging to another person. There is nothing to justify the Court in holding

that the testator thereby intended to give what was not his own. (*Ibid.* p. 276.) Here the testator had sufficient of his own to satisfy the gift, for he had a freehold messuage both in Potter Street and South Street. Again, this is a general devise, which is as insufficient to create a case for election, as it is to operate as an execution of a power; *Denn v. Roake* (5 Barn. & Cr. 720). The mortgage cannot be relied on as affecting the construction of the subsequent will. He referred to *Fitzsimons v. Fitzsimons* (28 Beav. 417); *Honywood v. Forster* (30 Beav. 14).

Mr. E. R. Turner, for the children. The widow was bound to elect. The testator devises his "cottages" in [499] South Street, and this, therefore, can only apply to the eighteen cottages of which he considered himself the owner. The case is governed by *Padbury v. Clark* (2 Mac. & Gor. 298, and 2 Hall & Twells, 341). In addition to this, the direction that his wife should keep the devised property in tenantable repair must apply to the entirety, and it shews that the intention was to deal with the whole, and not of two undivided thirds; *Howells v. Jenkins* (2 John. & Hem. 706); *Chave v. Chave* (*Ibid.* p. 713, note).

Mr. G. L. Russell, in reply.

THE MASTER OF THE ROLLS. My difficulty is this:—If the devise passes the share of the testator in the eighteen cottages, was it his intention to sell only the one-third?

March 5. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a question whether the heir at law of the widow is to be put to his election. There are many cases on the subject, but they all resolve themselves into this:—If a testator, having an undivided interest in a particular property, devises that property specifically to his co-owner, a case of election arises, and the devisee must elect between his own interest in the property and the interest he takes under the will. But if the testator does not dispose of it specifically, but by general words, such as "all my lands and hereditaments" or the like, no case for election arises, because there is other property of the testator's sufficient to satisfy the devise itself. All the cases cited, as *Padbury v. [500] Clark* (2 Mac. & Gor. 298); *Fitzsimons v. Fitzsimons* (28 Beav. 417), and *Honywood v. Forster* (30 Beav. 14), point in that direction; they are perfectly consistent with the other cases which were cited to me, and shew clearly that where there is a mere general devise no case for election arises.

That being the state of the law, the real question is, whether this will disposes of the property specifically. The testator had a freehold messuage in Potter Street, he had another freehold messuage in South Street, and in addition to this he had two-thirds of a messuage and of eighteen cottages in South Street. Having this property, he devises all his freeholds, &c., in those streets to his wife for life. Now, if he had devised them in these terms, "all and every my freeholds in Potter Street and South Street and elsewhere, with the appurtenances," I should be of opinion that no case for election arose. But he specifically points to his "cottages" in South Street, and that being so, I am of opinion that these words can only refer to the messuage and eighteen cottages of which he had only two-thirds, and consequently I am of opinion that a case for election arises.

It is also to be observed, though it cannot, for the construction of the will, be relied on by the Court that by executing a mortgage of the property with his wife and reserving the equity of redemption to himself, he intended and supposed that if he paid off the mortgage the whole would vest in him.

I am of opinion that, under the words of the will, this is a specific devise of the property, and that the whole was to be sold after the wife's death, and the only way of effecting this is, to say that the testator has disposed of the entirety, and that a case for election arises.

[501] SCOTT v. OAKELEY. April 10, 1864.

[S. C. on appeal 33 L. J. Ch. 612; 4 N. R. 258; 10 L. T. 801; 10 Jur. (N. S.) 648; 12 W. R. 897.]

A bank agreed with the promoters of a railway bill to deposit the Exchequer bills required to be deposited in Chancery by the Standing Orders of the House of

Commons, and it was agreed that the projectors should withdraw the bill at the third reading, unless the deposit should then have been repaid to the bank. Held, that there was nothing illegal or contrary to public policy in this arrangement. Held, also, that a bill would lie to compel the persons in whose names the Exchequer bills were invested to restore them to the bank.

By a Railway Act, the Parliamentary deposit was not to be paid out of Court until the company should give a certain bond, approved of by the Solicitor of the Treasury, whose certificate was to be sufficient evidence of the facts so certified. A bill to recover the deposit alleged that such a bond, but dated anterior to the Act, had been given and certified. Held, on demurrer, that this was sufficient.

This case came on upon a demurrer to the whole bill, which stated substantially as follows :—

In 1861 Oakeley and others promoted a railway bill in Parliament, and by the 57th Standing Order of the House of Commons, they could not proceed with it unless a deposit of £10,400 (being £8 per cent. on the estimate of the expense of the undertaking) should, previous to the 15th of January 1862, be paid into Court under the 9 & 10 Vict. c. 20.

The directors "having no funds at their command" for that purpose applied to the Union Bank to advance that sum.

The Union Bank consented to advance the sum of £10,400 in Exchequer bills for the purpose of such deposit, upon having the repayment thereof, together with interest at the rate of £5 per cent. per annum, and upon having the return of such Exchequer bills, and the interest which in the meantime should accrue thereon, secured as herein-after mentioned, that is to say—

"That the Exchequer bills should be deposited (pursuant to the Act of 9 & 10 Vict. c. 20) in the joint names of two nominees, one of whom was to be nominated [502] for that purpose by the directors, and the other by the Union Bank.

"That the directors should undertake not to proceed with the said bill to a third reading in the House of Lords, but to cause the said bill to be withdrawn from Parliament, unless, in the meantime and before the said bill should have arrived at that stage when, according to the practice in such cases, the said bill might be read a third time in the House of Lords, the said sum of £10,400 should have been repaid to or secured to the satisfaction of the Union Bank.

"That upon the withdrawal of the said bill, the nominees and directors should do and concur in all such acts and things as should be necessary for obtaining the delivery and payment out of Court of the said Exchequer bills, and the interest which in the meantime should accrue thereon, to the Union Bank, or to such person as the Union Bank should, in that behalf, appoint; and

"That the said £10,400 should be also secured by the joint and several promissory note hereinafter mentioned."

"The directors accepted the said terms," and the £10,400 in Exchequer bills were accordingly, on the 14th of January 1862, deposited by the Union Bank in Court in the joint names of Oakeley, who was nominated by the directors, and of Beattie on behalf of the Union Bank. Simultaneously the directors and their solicitors and Parliamentary agents gave the Union Bank a written undertaking to withdraw the bill in the event before stated, and Oakeley, Field and the solicitors gave their promissory notes for the amount, payable four months after date.

The bill passed the House of Commons, and arrived [503] at that stage at which it might be read the third time in the House of Lords. The Union Bank, on the application of the directors, consented to allow the third reading, upon the agreement that the directors would, as soon as practicable, procure the bond next referred to to be executed and delivered, and that Oakeley would concur in all necessary acts for obtaining the delivery of the Exchequer bills to the Union Bank.

The bill received the Royal assent on the 29th of July 1862, and the 26th section (1) provided that the £10,400 should not be paid out of Court unless the

(1) By the 131st of the Standing Orders of the House of Commons, a clause to this effect is required to be inserted in all railway bills.

company should, within the time limited for its completion, either open the railway or prove that half the capital had been paid up and expended. But it provided that if the company should, at any time after passing the Act, execute a bond, to be approved of by the Solicitor of the Treasury, conditioned for payment of that sum to Her Majesty, if the company should not open the railway within that time, or prove that half the capital had been paid up and expended, then the money might be paid out.

The bill stated that this bond, prepared to the satisfaction of the Solicitor of the Treasury, had been executed and delivered, and that it was dated the 19th of May 1862 (1); it also stated that the Solicitor of the Treasury had, by a certificate dated the 1st of June 1862, certified the preparation and delivery of the bond.

Oakeley, however, refused to concur with Beattie in an application to the Court to enable the Union Bank to obtain the redelivery of the Exchequer bills; and this bill was filed by Scott, the public officer of the Union [504] Bank, against Oakeley, Beattie and the railway company, praying a declaration that the Exchequer bills ought to be delivered to the Union Bank, and that Oakeley might do and concur in all acts necessary for that purpose.

To this bill Oakeley demurred, first, for want of equity; secondly, on the ground that the agreement was "against public policy and illegal," and thirdly, that all the directors were necessary parties.

Mr. Selwyn, Mr. Cole and Mr. Prendergast, in support of the demurrer. First, this was a mere loan to the railway company, and the proper course to recover it, or for remedy under the agreement, is by action at law, and not by a suit in equity. Secondly, the agreement is contrary to public policy, and this Court will not assist in enforcing it. The deposit by the bank instead of by the promoters was colorable, and an evasion of the Standing Orders and a fraud on the Legislature, and the agreement as to withdrawing the bill on the third hearing was an interference with the free action of the Houses of Parliament, and gave the bank a power of control over their proceedings, which made it a fourth estate. Thirdly, the bond alleged to have been given is not in compliance with the statute, it was dated the 19th of May 1862, and before the Act passed. Lastly, the other directors ought to have been made Defendants to this bill, for all the parties to a contract must be before the Court in the suit to enforce it.

Mr. Southgate and Mr. C. Locock Webb were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. Upon the statements contained in this bill, which I am bound to take to be true, I think the demurrer [505] cannot be sustained. In the first place, I look at the Standing Orders of Parliament with respect to the deposits required to be made upon the promotion of bills as I see them stated on this record, and it appears that the object of Parliament was this:—That £8 per cent. on the amount of money required for the purpose of the undertaking should be deposited as a security that the railway should be completed within a certain time, or proof given that one-half of the capital had been subscribed and expended on the works.

But I see nothing in the Standing Orders of the House of Commons, as stated here, which requires that the money deposited should be the actual money of the promoters of the bill; on the contrary, there is nothing that I can see, either in the Standing Orders of Parliament or in the reason for the thing itself, which prevents the persons bound to make the deposit from obtaining it by loan, or in any other legal mode. If the loan as between the lender and the borrower be legal, why should not the promoters resort to the same mode for obtaining a Parliamentary deposit as for any other purpose for which a deposit is required. Here a deposit is made by the promoters of the bill, which is advanced by the Union Bank of London, and it is deposited, as it notoriously is in all these cases, in the names of a nominee of the bank and of one of the promoters of the bill, in the name of the Accountant-General to the credit of the railway company. It is, therefore, peculiarly a subject-matter over which this Court has jurisdiction, because it is deposited with the Accountant-General of this Court in order that this Court may deal with it. If there

(1) This date was erroneous, instead of 1863.

were nothing else in the case, this would remove the effect of the observation, that this is a matter which would more properly be dealt with in an action at law, because this fund is intrusted to the Court of Chancery for certain [506] specific purposes which it has to deal with, and the Court will have to consider, at the hearing of this cause, whether it can deal with it or not, assuming of course that the facts in the bill are proved.

I pass by all the observations as to the creation of a fourth estate of the realm, namely, the Union Bank, whose consent would be required to the passing of an Act of Parliament, because that clause in the agreement does not in the slightest degree affect or fetter the powers of the Legislature, who may do exactly what they think fit on the subject, but it does affect the promoters of the bill. It might as reasonably be said that this agreement introduces a fifth estate of the realm, whose consent is required for the passing of the bill, namely, the promoters of the bill, for if they did not choose to proceed with the bill it unquestionably would not pass. It is the same thing as where persons enter into a contract which makes it inequitable that they should bring an action in another Court, or where they agree not to promote a private bill in Parliament; in which cases this Court grants an injunction to prevent a breach of the contract. But the last thing this Court would attempt to do would be to control the functions of any Court of law, and, if possible, still less to control the powers and functions of Parliament. It acts only *in personam*, against the persons bringing the action or promoting the private bill, and says, "You have entered into engagements which make it inequitable that you should be allowed to proceed in this matter, and, therefore, as against you, we will prohibit your proceeding." But if the Legislature, in spite of any contract of that sort, thinks fit to pass any measure, this Court has no jurisdiction to interfere.

Then the only question is, what is to be done here? [507] There is an agreement that the money shall be repaid or secured to the satisfaction of the Union Bank before the third reading of the bill in the House of Lords. The bill states that before the third reading in the House of Lords the Union Bank was applied to for its consent to the bill being read a third time, that they gave such consent upon the understanding and agreement that the directors would, on their part, as soon as practicable, procure the bond thereafter mentioned to be executed and deposited with the solicitor of the Lords Commissioners of Her Majesty's Treasury, and that Mr. Oakeley would, on his part, do and concur in all such acts and things as should be necessary for obtaining the delivery or payment out of Court of the said Exchequer bills for £10,400 deposited as aforesaid, and the interest which, in the meantime and since the date of such deposit, should have accrued thereon, to the Union Bank.

Mr. Oakeley comes here and by his demurrer admits this to be true, viz., that such an agreement was entered into.

Now, what has since taken place? The Act of Parliament has passed, which provides, not that this money should be retained by way of deposit in the Court of Chancery, because that would prevent its being applied in the construction of the railway, and would defeat the very object of the Legislature, which was, that sufficient funds should be forthcoming for carrying on the undertaking and completing the railway; but it provides, in the 26th clause, that the deposit shall not be paid out unless the company shall open the railway previously to the expiration of the period limited by the Act for its completion, or the company prove that they have paid up one-half the capital, and have expended [508] it for the purposes of the Act. But then comes this proviso:—That if, at any time after passing the Act, the company shall execute a bond with sureties, to be approved of by the solicitor of the Lords of the Treasury, conditioned for payment of £10,400, if the company shall not open the railway within the time limited, or prove to the satisfaction of the Board of Trade that the company have paid up one-half of the amount of their capital, and have expended it for the purposes of the Act, then the deposit shall be paid to the persons named in the warrant, and the moneys to be recovered upon such bond shall be dealt with in the like manner as the deposit would have been dealt with if such bond had not been executed.

The meaning of that clause is plain, it is, that after the Act has passed the money may be got out of the Court of Chancery, either on proof of a particular state of facts

to the Board of Trade or on the execution of this bond. The first question is, whether this has been complied with. It is said that it has not, because the bond bears date before the Act passed. But it is to be observed that the object of the bond is to satisfy the Lords of the Treasury that they will be able to enforce the payment of the amount of the deposit. For that purpose it is obvious that the material thing is procuring proper sureties, because if the company do nothing the right of suing them would be a matter of very little value, and the important thing is to have substantial sureties. If the Lords of the Treasury are satisfied with the bond given to enable them to perform their duties, I do not see that any other person has any right to interfere or to complain. It is also to be observed that, if this has not already been done, it may be done at any time, because the proviso in the clause is, "at any time after the passing of this Act." But then the clause proceeds [509] in these words, "and the certificate of the said solicitor to the said Lords Commissioners that such bond has been executed and deposited as aforesaid," &c., "shall respectively be sufficient evidence of the facts so certified." Then follows a statement, that by a certificate dated the 1st day of June 1862, under the hand of the solicitor of the Lords Commissioners of Her Majesty's Treasury, he certified that such bond had been prepared to his satisfaction and had been deposited with him. This the clause says shall be sufficient evidence of the facts so certified. What more can be required? The important thing is having proper sureties, and though the company may not have had any existence at the time when the nominal seal was put to the bond, and it might not bind or be of any value as against the company if it became necessary to put it in suit, still the essential thing is the having proper sureties, and if the Treasury, who are the obligees of the bond, are satisfied with the bond, I do not see that this Court has any reason to say that it should require another or a different bond to be given. But the validity or sufficiency of the bond is not the question which I have now to consider; it might arise upon an application for the payment of the money out of Court, and I might then require the Lords of the Treasury to be served in order to be assured that the Act had been properly complied with. It may appear at the hearing of this cause that the Act has then been fully complied with, even if it has not at present, because it may be done at any time.

There being, therefore, a sum of money in Court, which confessedly belongs to the Union Bank, and which was deposited there under an agreement with the Defendants and for their benefit, and all the formalities which entitle them to have the money paid out of Court having either been already complied with, or, if not, [510] being capable of being complied with, before the hearing of this cause, I am of opinion that this demurrer cannot be sustained.

I have lastly to consider the demurrer for want of parties, which alleges that all the directors ought to be made parties to this suit. Now it is to be observed that the directors fill two characters; they may be either personally liable in respect of their contract, or as directors and members of the railway company. In the latter character they are represented by the company, who are Defendants to the suit. It would not be proper to make them parties separately and distinctly in that character, and if they were so made, I think they might demur. As regards any personal contract distinct from the railway company, I do not find in this bill any allegation of an agreement which is sought to be enforced against them personally and irrespective of their character of directors, or from which they could derive any personal benefit. The persons who entered into the contract to restore the deposit to the Union Bank, and in whose names the fund stands, are Mr. Oakeley and Mr. Beattie. Mr. Beattie does not demur, and the company does not, I suppose, interfere in the matter.

The result is that, in my opinion, the demurrer must be overruled.

NOTE.—Affirmed by the Lords Justices, 6th June 1864.

[511] PACKER v. SCOTT. March 9, 1864.

Bequest of personal estate, in trust, when and as the child and children of A. B. should severally attain the age of twenty-one years, to pay and divide the same equally between them and the children of such of them (if any) as might depart this life under the age of twenty-one years; but so, nevertheless, that the children of any deceased child, on attaining twenty-one, should take between them such share only as the parent would have taken if living: Held, not too remote.

The testatrix, having made a devise and specific bequest to the Defendant Sarah Ware Scott, the wife of Henry B. Scott, bequeathed all her personal estate to her executors in trust to invest and to stand possessed thereof upon the following trusts.

"In trust, when and as the child or children of my said niece by her said husband shall severally attain the age of twenty-one years, *pay and divide* the same equally between them and the child or children of such of them (if any) as may depart this life under the age of twenty-one years; but so as, nevertheless, that the child, or the children collectively, of any deceased child, on their severally attaining the age of twenty-one years, shall take between them, equally, such share only as his, her or their parent would have taken if living. And I do declare and direct that so long as any child or children of my said niece, or any descendant of such child or children, shall be under the age of twenty-one years, and my said niece shall be living, the income arising from the share or shares of my said personal estate to which such child or children or descendant thereof shall be presumptively entitled shall be paid by my said trustees and trustee for the time being to my said niece, to be applied by her in and for their respective maintenance and education." She authorized the trustees to advance any sum not exceeding £100 for each such child or descendant of a child by and out of their shares, for their advancement. And she directed, in the event of the decease of her niece "before the said shares should have become [512] payable," the trustees to apply the income towards the maintenance of the persons respectively who might then be presumptively entitled thereto.

The testator died in 1854. Sarah Ware Scott had had twelve children, ten of whom were born in the life of the testatrix, and eight of them were still living.

This suit was instituted by the executors to have the rights and interest of the parties declared.

Mr. Busk, for the Plaintiffs.

Mr. Hobhouse and Mr. Colt, for Sarah Ware Scott, the next of kin of the testatrix, argued that the trusts of the personal estate were too remote and void. They cited *Webster v. Boddington* (26 Beav. 128); and see *Gooch v. Gooch* (14 Beav. 565; and 3 De Gex, M. & G. 366); *Greenwood v. Roberts* (15 Beav. 92); *Read v. Gooding* (21 Beav. 478); *Seaman v. Wood* (22 Beav. 591); *Cattlin v. Brown* (11 Hare, 372).

Mr. Selwyn and Mr. Wickens, *contra*, were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. I should be striking words out of this will if I held that the payment or division could be postponed until the children of a deceased child of the niece attained twenty-one; for the attainment by a child of the niece of the age of twenty-one is stated to be the period at which the gift is to take effect. If the limitation had been to the great-grandchildren of A. B., such great-[513]-grandchildren to take when the child of a living person attained twenty-one, I should hold the gift perfectly good.

This gift to the children on attaining twenty-one is not made void, by saying that the children of a deceased child, on attaining twenty-one, shall take their parent's share, and I will therefore declare that the gift to the twelve is valid.

[513] FLETCHER v. GREEN (No. 2). April 16, 1864.

Contribution between trustees cannot be enforced in a suit instituted against them to repair a breach of trust for which they are all liable.

John Green, William Green and Howard Fletcher, the three trustees of a marriage

settlement, had committed a breach of trust, whereby £1323, 6s. 11d. had been lost to the trust.

By the decree, made on the 24th of February 1864 (*ante*, p. 426), it was declared that John Green, William Green and the executors of Howard Fletcher (deceased) were jointly and severally liable to make good the loss, and they were ordered to pay the amount into Court.

The executors of Howard Fletcher alone paid the whole amount into Court, and they afterwards called upon John Green and William Green to pay their shares, which they failed to do.

A motion was now made, on behalf of the executors of Howard Fletcher, that John Green and William Green might pay to them "the whole, or so much and [514] such part as the Court might order and direct of the sum of £1323, 6s. 11d."

Mr. Baggallay and Mr. Bristowe, in support of the motion, argued that the authorities shewed, that the Court had jurisdiction to determine the liability of Co-defendants *inter se*, where the facts sufficiently appeared upon the pleadings. That such appeared to have been the opinion of the Court when, at the hearing of the cause, it was said, "if any one of the trustees should pay the whole, he may come against the other for contribution, and *I shall then determine the question between Co-defendants.*" That there would be no advantage to the Respondents by filing a bill, but on the contrary, for much trouble and expense would be saved by determining the question on the present motion, upon which both sides might go into additional evidence, without the trouble and expense of preliminary pleadings, which would be useless. Lastly, that the tendency of modern decisions was to relax the strict rules of pleading.

Mr. Selwyn and Mr. A. Smith, objected that questions affecting Co-defendants alone could not be determined on motion, there being no issue joined between them, and that the relief asked could only be obtained by bill.

The following authorities were referred to: *Coote v. Lowe*, cited in *Holton v. Lloyd* (1 Molloy, 31, note); *Perry v. Knott* (4 Beav. 179); *Pitt v. Bonner* (1 Younge & C. C. C. 670); *The Mayor of Berwick v. Murray* (7 De G. M. & G. 497); *Lockhart v. Reilly* (1 De G. & J. 464); *Chamley v. Dun*-[515]-*sany* (2 Sch. & Lef. 710-718); and see *Conry v. Caulfield* (2 Ball. & B. 255-271); *Going v. Farrell* (Beatty, 475); *Green v. Pledger* (3 Hare, 172); *Eccleston v. Lord Skelmersdale* (1 Beav. 396); *Trevelyan v. White* (1 Beav. 588); *Goodwin v. Clewley* (2 Beav. 30); *Cottingham v. Earl of Shrewsbury* (3 Hare, 627).

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot make any order upon this motion, if it be opposed; in fact it would be making a decree in favor of one Defendant against another. My judgment has led to some misconstruction; when I said that all the trustees were jointly and severally liable to the Plaintiff, and that "if any one of the trustees should pay the whole, he may come against the others for contribution, and I shall then determine the question between Co-defendants," I did not mean to say that the equities of the Defendants, as between themselves, could be determined in this suit.

By waiver of form, as is frequently done in Chambers, this question might be determined, but it may be better for the Respondents to have a bill filed, and to have the facts and grounds distinctly stated in it, in order that they may be clearly put in issue, and the Respondents are entitled to insist on this being done. I never heard of a case in which one of several Defendants could adversely obtain contribution from his Co-defendant in a suit instituted to make them both liable. I have no power to make the order asked, and I must therefore refuse the motion with costs.

[516] FIRTH v. RIDLEY. April 13, 1864.

Specific performance of an agreement between four persons, regulating the right to all their future patented inventions, refused, on the following grounds: First, that it was too vague and uncertain as to its duration; secondly, that it involved a contract for personal services of an uncertain duration; thirdly, the want of mutuality in regard to one of the stipulations; and, fourthly, that the position of

the parties had been materially varied by the assignment by one, to a stranger, of all his interest under the agreement.

In March 1861 Ridley and Rothery obtained a patent for improvements in hewing or working coal, and in May 1861 Donisthorpe obtained a patent for a similar purpose.

In June 1861 the following agreement was entered into between Ridley, Rothery, Donisthorpe and Firth :—

“Memorandum of Agreement made 27th June 1861.

“Firstly. That the patent for coal getting, obtained in the names of Robert Ridley and Joseph Rothery, shall, when complete, be transferred to Mr. G. E. Donisthorpe, for and on the joint account of the said Donisthorpe and W. Firth.

“Secondly. That all expenses already disbursed by said Ridley and Rothery, up to this time, and also all accounts yet remaining unpaid, amounting to not exceeding £50, shall be paid by said Donisthorpe and Firth, and also all further expenses in obtaining the patent.

“Thirdly. That all future improvements or patents for coal-working, invented or patented by the said Donisthorpe, Ridley, Rothery or Firth, shall become the property of the said G. E. Donisthorpe, and, in consideration of these arrangements, he shall pay to the said Robert Ridley £15 per cent., and to the said Joseph Rothery £5 per cent. of all profits which he may make out of the said patent or patents or future improvements, in addition to the wages or salary of £3 net, per week, to said Ridley.

[517] “Fourthly. That all profits on patents to be obtained by said parties in foreign countries, for the purposes named, shall also be liable to the £15 per cent. and £5 per cent. allowance respectively.

“Fifthly. That said Ridley shall give the whole of his time to the business named, and shall follow, in all cases, Mr. Donisthorpe’s instructions as to the employment thereof.

“Sixthly. That no charge shall be made upon the West Ardsley Company for the use of the machines made or to be made hereafter, but that said company shall have the free use of any of the patent machines on payment of cost of manufacture.

“Seventhly. That said Ridley and Rothery shall be exempt from all expenses or losses which may be incurred in obtaining all said patents or defending the same.”

In November 1861 Donisthorpe, Firth and Ridley obtained a third patent for a similar purpose.

Ridley continued in the service until May 1863, and in June 1863 Ridley and Jones (with whom he had become associated) obtained a fourth patent for a similar purpose.

In October 1863 Rothery, in consideration of £500, assigned to Bower all his right under the agreement of June 1861.

This suit was instituted by Firth, Donisthorpe and Bower, who carried on business under the style of “The West Ardsley Coal Company,” against Ridley and Jones, praying that Ridley might be compelled specifically to perform the agreement of the 27th of [518] June 1861, so far as it was, or purported to be, obligatory upon him, and might assign to the Plaintiffs his share of the first, third and fourth patents, and for an injunction against Ridley and Jones from using the fourth patent, which, it was alleged, was an infringement on the prior ones.

Mr. Grove, Mr. Baggallay and Mr. Fooks, for the Plaintiff.

Mr. Southgate and Mr. Bagshawe objected : first, that the agreement of the 27th of June 1861 was not a final agreement ; secondly, that there was no mutuality ; thirdly, that no specific performance could be decreed of a contract for personal services ; fourthly, that the contract was too uncertain, as to its duration, to enable the Court to direct its performance.

Mr. Baggallay, in reply.

The following cases were relied on : *Sykes v. Dixon* (9 Adol. & E. 693) ; *Lees v. Whitcomb* (5 Bing. 34) ; *Flight v. Bolland* (4 Russ. 298) ; *Johnson v. The Shrewsbury, &c., Railway Company* (3 De G. M. & G. 914) ; *Stocker v. Wedderburn* (3 Kay & J. 393) ;

Stocker v. Brockelbank (3 Mac. & Gor. 250); *Pickering v. The Bishop of Ely* (2 Younge & C. (C. C.) 249); *Ogden v. Fossick* (32 L. J. (Ch.) 73); *Peto v. Brighton, &c., Railway Company* (1 Hem. & Mil. 468); *Brett v. The East India and London Shipping Company* (12 W. R. 596); *Bidgway v. Wharton* (6 H. of L. Cas. 238).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiffs cannot enforce this contract. There are, as it appears to me, several very serious defects in it. In the first place it is much too uncer-[519]-tain, and this objection is, in my opinion, insuperable:—viz., that it is impossible to state during what period the agreement is to last. The third clause provides that all future improvements or patents for coal-working, invented or patented by Donisthorpe, Ridley, Rothery or Firth, shall become the property of Donisthorpe. That means all the future improvements or inventions which they shall ever thereafter make; how can I limit it to the duration of the two then existing patents? According to the literal meaning of these words, the agreement would continue as long as any patent invented by any one of these four persons, at any future period of their lives, should remain in force. It is impossible to say that it is to stop at the termination of any one patent, for a subsequent patent for an invention obtained years afterwards would be included in it.

Then Ridley is to receive £15 per cent. and Rothery £5 per cent. out of all profits which Donisthorpe may make out of the patents, in addition to the salary of £3 a week to Ridley. That would go on as long as any profits are derived from these patents, and would extend over the whole period, and nobody has power to put an end to it, previously to the determination of the agreement. There is nothing to define at what period it is to stop, or whether (as was suggested) it is to be at the death of any of these persons, though profit may be subsequently derived from the patents; for, assume that these parties all concur that the agreement should go on and be binding after Mr. Donisthorpe's death, would they not be entitled to the profit subsequently made by the patents? This would bind his executors and his estate if profits were made from the patents, and to what extent or how long would that go on no one could decide.

[520] But the difficulties do not rest here, there is another very serious one connected with the fifth paragraph, which is that "Ridley shall give the whole of his time to the business named, and shall follow, in all cases, Mr. Donisthorpe's instructions as to the employment thereof." That must mean, he shall give his whole time during the duration of the agreement. It is impossible to say that the cases of *Ogden v. Fossick* (32 L. J. (Ch.) 73) and *Sykes v. Dizon* (9 Adol. & E. 693) do not apply to this case. Here is an express contract by Ridley that he will devote the whole of his time to the business, that is, during the duration of the contract. But, on the other hand, there is no contract on the part of Donisthorpe or the West Ardsley Coal Company to employ him during that time. Mr. Donisthorpe might have nothing at all to do with the business, while Ridley might be compelled to give the whole of his time to this business, and yet derive no profit whatever from it. If this constituted a contract, the cases decide that it could not be specifically enforced. Then it is said that this is not a material part of the contract, but a collateral matter. But it is distinctly expressed in the fifth clause of the contract; and it would be a new doctrine in this Court to reject one of the seven clauses of an agreement and say it is not material, there being nothing more certain than this:—that a contract must be enforced in its entirety, or not at all.

Then the difficulty which has arisen with respect to Rothery only shews more completely the extreme uncertainty of the contract. If I saw my way clearly to the specific performance of the whole contract, I might allow the bill to stand over with leave to amend by adding him as a party; but his retirement [521] has completely varied the character and effect of the agreement, so far as regards him. Ridley is entitled to £15 per cent. of the benefit of all Rothery's inventions. Rothery was one of the inventors of the first machine, and, for aught we know, he may have invented or be capable of inventing several others of great value; Ridley is entitled to £15 per cent. of the profits of all those inventions. But, if this arrangement between Rothery and Bower stands, Ridley can never get a penny from any invention Rothery makes; for Rothery is entitled under the contract to £5 per cent., and no more of the profits of all the inventions made by him, and he

has assigned the whole of that to Bower. If, therefore, he is still a party to the contract of June 1861, and if the conditions of it are still obligatory upon him, it is obvious that he will never make another invention, for he can get no benefit from it. Under the contract, £95 per cent. goes to Donisthorpe and Ridley, and under the subsequent assignment, the remaining £5 per cent. goes to Bower. Ridley, therefore, is completely deprived of all benefit under it.

The contract, therefore, is radically vague, it is a contract for personal services of an uncertain duration, which any of the parties could put an end to at any period of time, and the moment it was put an end to it would be of no efficacy whatever.

I am of opinion, therefore, that the bill must be dismissed with costs, this not being a contract which this Court can enforce.

NOTE.—Affirmed by the Lords Justices, 30 June 1864.

[522] *NEWMAN v. SELFE. March 4, 5, 1864.*

[S. C. 33 L. J. Ch. 527; 10 L. T. 152; 12 W. R. 564.]

The Court may direct a sale instead of a foreclosure, under the 15 & 16 Vict. c. 86, s. 48, without the consent of the mortgagor, and may direct the sale to take place at once.

This suit was instituted by a first mortgagee against the mortgagee and several *puius* incumbrancers, and it prayed a foreclosure.

Mr. Selwyn and Mr. Bowring, for the Plaintiff, did not object to a sale of the property, under the 15 & 16 Vict. c. 86, s. 48, at the end of three months; but asked that, in the event of a redemption decree being made, one day might be appointed for all the incumbrancers to redeem.

Mr. Jessel, Mr. Fitzhugh, Mr. E. G. White and Mr. Shebbears, for the subsequent incumbrancers, also concurred in an early sale of the mortgaged property. They cited *Hurst v. Hurst* (16 Beav. 372).

Mr. T. A. Roberts, for the mortgagor, did not object to the usual decree for foreclosure; but he stated that the property consisted of building land at Surbiton, and that an immediate and forced sale could not be effected without a considerable sacrifice and loss. He argued, that as a mortgagor was entitled to six months to redeem, so he was entitled to a delay of six months before a sale, in order to enable him to make arrangements for paying off the mortgages. He cited *M'Lloyd v. Whitley* (22 L. J. (Ch.) 1038), in which the Court would not, in the absence or without the consent of the mortgagor, deprive him of the usual period of six months to redeem. He observed that, on payment of interest, the Court would extend the usual time given by the decree for [523] redemption, and that it had even been extended after a foreclosure absolute.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will consider the point, but I think that the Plaintiff's proposal to allow three months is very reasonable; the sale would then take place in June. I will see whether a mortgagor is entitled to insist, whatever may be the situation of the property, on delaying a sale for six months.

March 5. THE MASTER OF THE ROLLS. The question is, what time ought the Court to give for the sale of the mortgaged property, and whether, under the 48th clause in the statute, the Court has the power, notwithstanding the resistance of the mortgagor, to direct a sale of the mortgaged property, or whether it is obligatory on the Court to give him six months to obtain the money.

I am of opinion that it is not obligatory on the Court either to require the consent of the mortgagor, or to give him any time to obtain the money. It is true that six months are usually given for that purpose in cases of foreclosure, but if all the other incumbrancers require a sale, and the mortgage has been in arrear for many years, and the interest is still unpaid on some of the mortgages, the Court has power to direct a sale at once, if it thinks fit. It is proposed by the mortgagor, that

six months should be given ; but I have no doubt that September would be the least favorable month in which to sell this property, and that it would be much better to sell it in the summer or spring, and it being proposed by the Plaintiff that the sale should take place [524] in three months, I think that this will be the proper period. I will direct the sale to take place in June, with liberty in the meantime for the mortgagor to apply, and if he will pay into Court a reasonable sum, I shall probably extend the time.

[524] LORD PALMERSTON v. TURNER. *April 25, 1864.*

[S. C. 33 L. J. Ch. 457 ; 10 L. T. 364 ; 4 N. R. 46 ; 10 Jur. (N. S.) 577 ;
12 W. R. 816.]

By a contract for the sale of an estate, it was stipulated, "that if, from any cause whatsoever, the purchase should not be completed," on a day named, the purchaser should pay interest on his purchase-money from that day until the completion. It became necessary to institute a suit to rectify the power under which the vendors sold, in order to make a good title, and a delay occurred in completing. There being no wilful default on the part of the vendor, Held that the purchaser was bound to pay interest, and was entitled to the corresponding rents.

By an agreement, dated the 19th of July 1861, the Earl of Malmesbury, on behalf of himself and the trustees of his marriage settlement, agreed to sell to the Defendant, Mr. Turner, the fee-simple of some property for £14,200, the purchase-money was to be paid and the conveyance executed on the 29th day of September then next, up to which time the vendors were to clear all outgoing, and from which time the purchaser was to be entitled to possession ; and the purchaser, on such payment of the remainder of the purchase-money, was to be entitled to a conveyance of the property, to be prepared at his expense by his solicitor, but to be executed by all necessary parties at the expense of the vendors, who, being trustees only, were not to enter into any other covenant than that they had done no act to incumber the property conveyed. And if, from any cause whatsoever, the purchase should not be completed and the purchase-money paid on the day thereinbefore stipulated, the purchaser was to pay interest from that day until the completion of the purchase at the rate of £4 per cent. per annum.

On the 8th of August 1861 the vendors' solicitors furnished an abstract of title to the purchaser's solicitors, who made various requisitions and objections thereto, one of which was as to the sufficiency of a [525] power of sale contained in the settlement, it being doubtful whether this power of sale, given to the trustees, at the request of the person "*seised of the freehold and inheritance*," could be exercised by the present earl, who was only tenant for life in possession, and not seised of the inheritance.

This question was argued before the Master of the Rolls in a suit of *Phillipson v. Turner* (see 31 Beav. 407), who, in March 1862, expressed his opinion that the power could not then be exercised.

A suit of *Malmesbury v. Malmesbury* was instituted in May 1862 by the Earl of Malmesbury to rectify the settlement ; and under decree made in that suit on the 24th of July 1862 (31 Beav. 416), the power was rectified, and the power of sale then became clearly exercisable. A supplemental abstract was sent on the 12th of November 1862, and the conveyance was subsequently (in April 1863) executed by the vendors and retained by them. The purchase-money was paid over in August 1863, reserving the question of the liability of the purchaser to pay interest on his purchase-money to be determined.

This suit was instituted by the vendors, nominally for the specific performance of the agreement, but substantially to have it determined whether the purchaser was liable to pay interest on his purchase-money from the 29th of September 1861 to the 18th of August 1863. The Plaintiffs relied on the terms of the contract, and also on acts of ownership done by the purchaser in the interval, by cutting timber, adding to a cottage, digging a pond, and altering fences.

Mr. Selwyn and Mr. C. Hall, for the Plaintiffs, re-[526]lied on the express words of the contract to pay interest, and argued that the delay in completion had arisen from unforeseen difficulties, and not from any wilful neglect or default of the vendors; *Sherwin v. Shakspeare* (17 Beav. 267, and 5 De G. M. & G. 517); *Esdaile v. Stephenson* (1 Sim. & St. 122); *Monck v. Huskisson* (1 Sim. 280); *De Visme v. De Visme* (1 Hall & Twells, 408, and 1 Mac. & Gor. 336); *Vickers v. Hand* (26 Beav. 630); Sugden's Vendors (p. 637 (14th edit.)).

Mr. Baggallay and Mr. F. O. Haynes, for the Defendant Mr. Turner, argued that the vendors, who had taken on themselves to sell without any power to do so, were not entitled to take advantage of the stipulation as to interest. That the delay had arisen from the necessity of instituting a suit, by means of which they had acquired the right of selling the property.

Mr. Hardy, for the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am satisfied that there is a contract here which the Court will specifically enforce, and that, according to the true construction of that contract, the Defendant is bound to pay interest on the purchase-money from the day on which the purchase was to have been completed.

I cannot assent to the view that there is no contract. Here is an express contract entered into between Lord Malmesbury on behalf of himself and the trustees of his marriage settlement on one side, and Mr. Turner, the Defendant, on behalf of himself and his trustees on the other side. It required this sanction on behalf of the Defendant, namely, that the Court should approve of it; but as soon as the Court [527] had done so, the contract, so far as the Defendant is concerned, was complete. Therefore the question of interest, which is a matter solely between Lord Malmesbury on the one hand, and Mr. Turner on the other, is, whether the latter is bound to pay interest from the 29th of September 1861, the day specified in the contract.

I assent, as I did in the case of *Vickers v. Hand* (26 Beav. 630) to the decision of the Lords Justices in the case of *Sherwin v. Shakspeare*, in which this passage occurs: Lord Justice Knight Bruce says (5 De G. M. & G. 527), "My conception of the rule applicable to a case of that description I find expressed by Lord St. Leonards in his smaller publication upon the Law of Vendors and Purchasers, where he says, 'but where the delay is occasioned by the state of the title, and is not wilful, that seems to fall within the provision of *any cause whatever*.'" Then Lord Justice Knight Bruce says that he agrees in that proposition without any qualification.

Then I refer to the passage in this contract, which was thus:—"If, from any cause whatsoever, the purchase should not be completed, and the purchase-money paid on the day hereinbefore stipulated [that is the 29th September 1861], the purchaser shall pay interest, from that day until the completion of the purchase, at the rate of £4 per cent. per annum." Lord St. Leonards has laid down, and the cases have all settled, that the words "if from any cause whatsoever" are to be read "if from any cause whatsoever other than the wilful default of the vendor," and that is the meaning of this passage. Of course the vendor cannot get an increase of interest by wilfully keeping back the abstract; but, if he is guilty of no wilful default, the contract is that the purchaser shall pay interest from the day stipulated [528] in it. Is this a case of that description? There is no question that there was no wilful default on the part of Lord Malmesbury, or the trustees. They delivered the abstract of title, which pointed out the defect and the question whether they had full power to sell the inheritance. The point was referred to me in Chambers, and I was of opinion that, by a defect in preparing the settlement, the power, as it stood, did not contain an authority to sell. Whereupon they filed a bill to correct the settlement, and on that bill I directed the settlement to be reformed. How can it be said that this is not a fair question, where the title is imperfect and was rendered perfect at a subsequent period. It is said that the vendors were not able to sell at the time from which the interest is to be paid, but is not that the case in every instance of a defective title? It is the meaning of the words "defective title;" they do not mean that Lord Malmesbury had no interest whatever in the property, for he had a life-estate, which he could have sold and conveyed at any time; but the expression means that he was not able, at that time, to convey the whole, entire and absolute interest in fee-simple in the property; and, according to the authorities, the contract says that if there be

no wilful default on the part of the vendors, the purchaser shall pay interest from the time specified in the contract.

I am of opinion, therefore, that Mr. Turner must pay interest at £4 per cent. from the 29th September, and that, on the other hand, Lord Malmesbury and his trustees must account to Mr. Turner for the rents of the property received by them during that period.

As I proceed entirely on the construction of the contract, it is not necessary for me to go into the effect of the exercise of acts of ownership by the purchaser.

[529] THE NEW THEATRE COMPANY (LIMITED). BLOXAM'S CASE. April 18, 1864.

[S. C. affirmed on appeal, 4 De G. J. & S. 447; 46 E. R. 991; 33 L. J. Ch. 574; 10 L. T. 772; 12 W. R. 995. See *Ramsgate Victoria Hotel Company v. Montefiore*, 1866, L. R. 1 Ex. 111; *Shackleford's case*, 1866, L. R. 1 Ch. 570. Referable only to specific circumstances, *Pellatt's case*, 1867, L. R. 2 Ch. 528. Distinguished, *In re Universal Banking Corporation*, 1867, L. R. 3 Ch. 40. See *In re Saloon Steam Packet Company*, 1867, 37 L. J. Ch. 50; *Adam's case*, 1872, L. R. 13 Eq. 481.]

B. applied verbally for shares in a company, and he paid the deposit to the secretary on his undertaking to return it if he did not get the shares in a few days. The shares were allotted to B. two days after, and an entry to that effect was made in one of the company's books, but no letter or notice of allotment or scrip certificates had ever been sent to B., and there was no acceptance or further act on his part. Held, that he was a contributory.

This company, established under the 25 & 26 Vict. c. 89, had been ordered to be wound up. This was an application on behalf of the official liquidator, to settle Mr. Bloxam on the list of contributories in respect of 100 shares.

It appeared that Mr. Bloxam had verbally applied for 100 shares, and he was told by the secretary that he could have them on payment of the deposit.

He called at the office of the company in Cornhill on the 25th of April 1863, and handed to the secretary his cheque for £100 for the deposit upon the shares; but before handing it over he asked the secretary when he could have the shares, and was told by him that he could have them in a few days, as the company were about to allot them. He then stipulated with the secretary that if he did not get the shares in a few days, the secretary would return him the cheque. The cheque was duly paid into the bankers of the company.

The shares were actually allotted to Mr. Bloxam on the 27th of April, at a meeting of the directors, and his name was entered as the allottee for 100 shares in "the register of allotment of shares." It was not shewn that Mr. Bloxam's name had been entered in the share registry book (25 & 26 Vict. c. 89, s. 25).

Mr. Bloxam did not sign any written application for [530] the shares, and no letter of allotment, no scrip certificate of the shares, and no return of the allotment, had ever been sent to him.

It did not appear that Mr. Bloxam had ever applied for the scrip certificates, but he had called at the office in Cornhill and found it closed, and he was told that the company had gone to pieces, but the office had, in fact, been removed to Westminster. He appeared to have done nothing further, when, on the 27th of July 1863, the company was ordered to be wound up.

Mr. Selwyn and Mr. Beavan, for the official liquidator, argued that Mr. Bloxam ought to be placed on the list of contributories, for the contract for the shares by application and payment of the deposit was complete when the shares had been allotted to the applicant by the company, and that nothing further was wanted to make the allotment effective. They cited *Ex parte Yelland* (5 De G. & Sm. 395); *Ex parte Cookney* (26 Beav. 6, and 3 De G. & J. 170).

Mr. Roxburgh, *contra*, argued that no perfected and complete contract, fixing Mr. Bloxam with the ownership of any particular shares, existed. That an allotment alone, without notice to the allottee, was insufficient, for it was not possible to know

what number of shares had been allotted, or which they were. That here there had been no notice, no acceptance of the shares, and that no entry on the share registry, as required by the Act, had been proved.

THE MASTER OF THE ROLLS [Sir John Romilly]. I must hold Mr. Bloxam to be a shareholder. *Cookney's case* and *Yelland's case* determine this:—That if [531] a person applies for shares and pays what is necessary, and has the shares allotted to him, he becomes a shareholder, and that the application need not be in writing.

Here Mr. Bloxam applies for 100 shares, and he is told he can have them, he then pays a deposit of £100, the secretary promising him that, if they are not allotted, the cheque shall be returned. There is a book called the register of allotment of shares, which answers all the requirements of a register, and in this the allotment to Mr. Bloxam appears. It is true that no further deposit is made, and that no notice of the fact of allotment was given to him. But if the company had been extremely prosperous, how could the company deny that Mr. Bloxam was a shareholder, how could they dispute the fact after this entry in their book? After accepting his money they allot him these shares. The rights and obligations are co-extensive, and I must hold him to be a contributory.

NOTE.—Affirmed by the Lords Justices, 1st July 1864 [4 De G. J. & S. 447]; and see *Best's case*, Lords Justices, 26th May 1865; *Redmond's case*, M. R. 22d June 1865; *Thompson's case*, M. R. 13th June 1865.

[532] WHITGREAVE v. WHITGREAVE. April 16, 20, 1864.

Covenant in a marriage settlement to settle the wife's after-acquired property (save and except "any estate or effects already settled to her separate use):" Held, that a legacy afterwards bequeathed to her for separate use was not included in the covenant.

By the settlement made, in 1851, on the marriage of Miss Maria T. Whitgreave with Mr. Eyston, some property was settled on the ordinary trusts for the parents and their children. And it was "thereby further agreed and declared" and the husband covenanted with the trustees in the following terms:—

"That all and every the real and personal estate and effects, whatsoever and wheresoever, of, to or over which Maria T. Whitgreave, or any person or persons in her right or for her benefit, shall or may, at any time after solemnization of the said intended marriage during her said intended coverture, be seised, possessed or entitled, or have any beneficial power of disposition, at law or in equity, either under or by virtue of her parents' marriage settlement, or any appointment or appointments made or to be made in pursuance thereof, or the will or any codicil or codicils thereto of either of her parents, or as their or either of their next of kin or otherwise howsoever (save and except the aforesaid several properties so settled by Maria T. Whitgreave as aforesaid, and her personal apparel and ornaments, and savings of her separate income, and any estate or effects *already settled to her separate use*, and any real or personal estate to be acquired after the solemnization of the said intended marriage, and not being, in each instance, an accession of the clear value of £1000 at the least, and also except all and every estates or interests, estate or interest restricted to the life of the said Maria T. Whitgreave, to all which last-mentioned estates or interests it is hereby agreed and declared she shall be entitled for her separate [533] use) shall be forthwith" settled on the same trusts as those before expressed.

Mr. Whitgreave, the father of Mrs. Eyston, died in 1863, having bequeathed to her a legacy of £3000 and a share in his residuary personal estate *for her separate use*, independent of her husband.

The question was whether, under the terms of the settlement, this bequest ought to be settled.

Mr. Selwyn, Mr. Dickinson, Mr. Young and Mr. Bovill, for different parties.

April 20. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is,

whether a clause in a marriage settlement included a legacy which was bequeathed to the wife for her separate use, and I am of opinion that it does not.

The covenant is to settle the after-acquired property, save and except "any estate or effects already settled to her separate use." The words "already settled to her separate use" cannot mean that which was settled at the date of the settlement, but future-acquired property not so settled when she acquired it. I am of opinion that the legacy is not included.

[534] TEASDALE v. SANDERSON. April 14, 1864.

[See *In re Leslie*, 1883, 23 Ch. D. 564. Explained, *Farrington v. Forrester* [1893], 2 Ch. 461.]

A. B., one of several tenants in common, had been in the personal occupation of part of the property. In a suit by another tenant in common for partition and an account of rents: Held, that unless A. B. were charged with an occupation rent, he could not be allowed for substantial repairs and lasting improvements made by him on any part of the property.

This suit was instituted by one of several tenants in common, against the others, for a partition of the estate and for an account of the rents and profits received by the Defendants, who had been in exclusive possession for about fourteen years.

One of the Defendants was in personal occupation of part of the premises, and had, as he alleged, expended a sum of £60 in necessary repairs and improvements of the property.

Mr. Baggallay and Mr. Rowcliffe, for the Plaintiff.

Mr. Speed, for the Defendant, resisted being charged with an occupation rent for the part occupied by him, for in *Griffies v. Griffies* (8 Law Times, 758) it was held that, where one of the tenants in common is in occupation of the estate, he cannot be made liable for rent or waste.

He asked, at all events, to be allowed for the repairs and lasting improvements on the part of the property not occupied by him.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that these accounts must be reciprocal, and, unless the Defendant is charged with an occupation rent, he is not entitled to any account of substantial repairs and lasting improvements on any part of the property.

[535] PARKER v. BINGHAM. March 15, 1864.

A creditor obtained a judgment against the executor, and, on the same day, a decree was made for the administration of the estate. Held, that the judgment creditor had obtained no priority.

A judgment at law was obtained by a creditor against the legal personal representative, and on the same day a decree was made for the administration of the testator's estate. The question was whether, under these circumstances, the judgment creditor had obtained priority over the simple contract creditors of the testator.

Mr. Tennison Edwards and Mr. Bagshawe, for the different parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. The decree was a judgment in favor of all the creditors, and I consider that the judgment and decree were obtained at the same moment. The judgment creditor must come in *pari passu* with the other creditors.

[536] WILSON v. ATKINSON. April 25, 1864.

[S. C. reversed on appeal, 4 De G. J. & S. 455; 46 E. R. 995; 33 L. J. Ch. 576; 11 L. T. 220; 4 N. R. 451. See *In re Ball's Trust*, 1879, 11 Ch. D. 271; *Emmins v. Bradford*, 1880, 13 Ch. D. 493; *In re Watson's Trusts*, 1886, 55 L. T. 317; *Stoddart v. Saville* [1894], 1 Ch. 483; *In re Mare* [1902], 2 Ch. 115; *In re Smith's Settlement* [1903], 1 Ch. 373; *In re Brydone's Settlement* [1903], 2 Ch. 84.]

A settlement, made on the marriage of a widow, contained no gift to her issue, but it provided that, in default of appointment, the fund should be held in trust for the persons who would be entitled, under the statute, if she had died intestate "and without having been married." And it was declared that A. B., her illegitimate daughter, should, for the purposes of that trust, be deemed to be her lawful child. Held, by the Master of the Rolls, that as lawful children could not take under this trust, so neither could A. B., the illegitimate child. The Lords Justices were, however, of a different opinion.

In 1863 Mrs. Wilson, then a widow, who had an illegitimate daughter named Jane E. H. Atkinson, married a Mr. Simpson.

By the settlement made on their marriage, dated the 26th of August 1863, two sums of £4500 and £300 were vested in trustees, upon trust for Mrs. Wilson for her separate use for life, without power of anticipation, and subject thereto as she should by deed or will appoint, and, in default of appointment, in trust for Mrs. Wilson absolutely, in case she should survive Mr. Simpson, her said intended husband; but in case Mrs. Wilson should die in the lifetime of the said Mr. Simpson, her said intended husband, then in trust for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the decease of Mrs. Wilson, if she had died possessed thereof, *intestate and without having been married*, such persons, if more than one, to take as tenants in common and in the shares in which they would have taken under the same statutes. And it was thereby declared that Jane Elizabeth Hogarth Atkinson, the daughter of the said Jane Wilson, should, for the purposes of that trust, be deemed to be the lawful child of Mrs. Wilson.

The settlement contained no limitation to the issue of the marriage.

Mrs. Wilson died in September 1863, without having [537] executed her power, leaving her husband surviving. Her mother and sister were her next of kin.

Jane E. H. Atkinson claimed the fund absolutely.

Mr. Shebbeare, for the Plaintiffs, the trustees.

Mr. Selwyn and Mr. Blackmore, for Jane E. H. Atkinson. The object of the words "without having been married" was merely to exclude the husband.(1)

Mr. Speed, for the next of kin. This is a deed and not a will, and it must therefore be construed strictly. The persons to take are those who would be next of kin of Mrs. Wilson had she died "without having been married." Her legitimate children could not have taken under this trust, and *à fortiori* her illegitimate daughter must be excluded.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot but suspect that this deed does not carry into effect the intention of the parties, and that, if the original instructions had been preserved, the settlement might have been rectified.

Nothing can be more absurd than this trust, but I must take it as I find it. The words are perfectly distinct and clear; they exclude the husband, the children, the grandchildren, and all the descendants of Mrs. [538] Wilson. She might have had a number of children who would all be excluded, and having excluded all her children,

(1) See *In re Norman's Trust*, 3 De G. M. & G. 965; *Mitchell v. Colls*, John. 674, and 9 House of Lords Cases, 601; *Pratt v. Mathew*, 22 Beav. 328; *Laird v. Tobin*, 1 Moll. 543, which were cited before the Lords Justices.

the deed says that, "for the purposes of that trust," Jane Atkinson "should be deemed to be the lawful child of the said Jane Wilson." This induces me to believe that she did not intend to exclude any child, but only her husband. If the words had been "without having been married to Simpson," it would very plainly exclude the children of that marriage.

I must construe the words as I find them, and I am of opinion Miss Atkinson is excluded, first, because all the children are excluded; and, secondly, because she is merely placed in the excluded class.

NOTE.—Reversed by the Lords Justices. [4 De G. J. & S. 455.]

[538] WYLEY v. THE EXHALL COAL MINING COMPANY (LIMITED).

April 12, 13, 1864.

In a suit against a company to restrain trespass, liberty was given, under the 25 & 26 Vict. c. 89, s. 87, to the Plaintiffs, after a winding-up order, to proceed with the suit.

This suit was instituted by the owners of the manor of Newland against this company and its secretary and manager and the mortgagees of the manor, praying an injunction to restrain the company and its servants from digging and carrying away the minerals under certain turnpike roads within the manor. It also prayed damages.

An injunction had been granted on the several undertakings of the Plaintiffs, since which an order had been made to wind up the company. By the 25 & 26 Vict. c. 89, s. 87, the suit could not proceed except with the leave of the Court.

[539] Mr. Jessel, for the Plaintiffs, now moved for leave to proceed, stating that the Plaintiffs were desirous of striking out the prayer for damages in order to enable them to proceed against the directors for the *tort* personally; secondly, to make the injunction perpetual; and, thirdly, to provide for the payment of the costs of the secretary and manager.

Mr. Southgate, for the official liquidator, resisted the application, and insisted that the Plaintiffs ought to go in under the winding up.

Mr. Jessel, in reply. The Plaintiffs cannot prove under the winding up unless their right is admitted or established, and if the Plaintiffs be not allowed to proceed, the other Defendants will move to dismiss the bill for want of prosecution.

THE MASTER OF THE ROLLS [Sir John Romilly]. I must give the Plaintiffs general leave to carry on the suit as they think fit. There may be funds belonging to the company sufficient to answer the damages, which I cannot determine on this application. I will also give the Plaintiffs leave to amend, but not by adding any new parties.

[540] DAVIES v. OTTY. *April 12, 1864.*

[S. C. 10 L. T. 284; 10 Jur. (N. S.) 506; 12 W. R. 682; affirmed on appeal, 2 De G. J. & S. 238; 46 E. R. 366; 10 L. T. 632; 12 W. R. 896; 4 N. R. 256. For subsequent proceedings, see 35 Beav. 208.]

A bill, which sought to enforce a trust of lands, did not allege that such trust was in writing. Held, on demurrer, that this was sufficient, for the Statute of Frauds only refers to the proof of a trust by some writing.

This case came on upon demurrer to the whole bill. The bill, in substance, stated as follows:—

That by a deed, dated the 17th of January 1860, in consideration of £200 therein stated to have been paid to the Plaintiff by the Defendant, the Plaintiff conveyed to the Defendant and his heirs, absolutely, a piece of land and two houses at Tranmere. The bill alleged that the object of so doing was that the Defendant might manage

the property and affairs of the Plaintiff during his intended absence from Tranmere, where he was then living. The bill alleged that no money was paid and no consideration passed, and that it was not intended to vest any beneficial property or interest in the Defendant. That shortly afterwards the Plaintiff abandoned his intention to remove from Tranmere, and applied to the Defendant to reconvey the property, which he refused to do, alleging that the deed was in fact, as well as form, a conveyance by way of sale. The bill stated that such allegation was entirely unfounded. The bill alleged that the Defendant had in his possession deeds from which the matters aforesaid would appear.

The bill prayed that the Defendant might reconvey the property to the Plaintiff. It, however, in no way stated that the alleged trust was in, or was evidenced by, any writing.

To this bill the Plaintiff demurred for want of equity.

[541] Mr. W. W. Cooper, in support of the demurrer. By the 7th section of the Statute of Frauds (29 Car. 2 c. 3, s. 7), it is enacted, "That all declarations or creations of trusts or confidences of any land, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect." When, therefore, "the Court is called upon to establish or act upon a trust of lands, it must not only be manifested and proved, by writing signed by the person by law enabled to declare the trust, that there is a trust, but it must also be manifested and proved by writing, signed as above, what the trust is;" *Smith v. Matthews* (3 De G. F. & J. 139); and a defence, founded on the Statute of Frauds, may be taken by demurrer; *Wood v. Midgley* (5 De G. M. & G. 41). Here the case stated is a mere parol trust, the "declaration or creation" of which is, therefore, by statutory enactment, "utterly void and of none effect."

Mr. Baggallay and Mr. H. M. Jackson were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this demurrer must be overruled. I do not express any opinion whether the Statute of Frauds applies to this case or not, because I am clearly of opinion that where the Plaintiff says, by his bill, I purchased an estate in the name of A. B., and he is a trustee for me, and I can prove that he is a trustee, the Defendant cannot demur to the bill, on the ground that the Plaintiff does not state that, when he comes to prove his case at the hearing, he has some writing to [542] establish it. The Plaintiff, no doubt, must prove his case at the hearing, and he may then produce a letter or something else in writing to establish the facts which he alleges by his bill. The Defendant wants me to introduce something into the bill and to assume that the Plaintiff cannot prove his case by some writing, although he admits the truth of that case by his demurrer. When a Defendant demurs, it is the same as if he put in an answer admitting every statement in the bill. If that were done, it would dispense with the necessity of proving the facts alleged by the bill, which would, as it were, be taken *pro confesso*. When the cause is heard, the trust must be proved by legal evidence, that is, by some statement in writing. The demurrer must be overruled.

NOTE.—This decision was affirmed by the Lords Justices on the 3d of June 1864; and at the hearing of the cause on the 15th of February 1865 a decree was made for the Plaintiff by the Master of the Rolls. [2 De G. J. & S. 238.]

[542] *Re THE WATERLOO LIFE, &C., ASSURANCE COMPANY. CARR'S CASE.*
April 23, 1864.

The deed of association of the Waterloo Assurance Company, which bound the policy-holders, contained a power to dissolve, and thereupon the directors were to get from another company an undertaking to pay all future liabilities, and to transfer to such company so much of the funds as should be agreed on between the contracting parties as would be sufficient to enable the latter company to comply with their undertaking. Held, that the amount to be paid over was a matter of agreement between the two companies, with which the policy-holders had no concern,

and that a policy-holder, who refused to be transferred, had no claim upon the Waterloo Company.

This company was registered under the 7 & 8 Vict. c. 110, and carried on business as a life assurance company under a deed of settlement dated the 10th of November 1851.

The 43d clause authorized the dissolution of the company by an extraordinary general meeting.

[543] The 183d clause was as follows :—

"That immediately upon the dissolution of the company, the board of directors shall, out of the funds or property of the company, pay and satisfy all claims and demands on the company arising from assurances or other contracts or engagements, and shall obtain from some other assurance company, or from the directors or managers of some other assurance society or company, an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities or other contracts or engagements, when and as the times for the payments and satisfaction of the same shall respectively arrive, and shall cause to be transferred to some other assurance company, or to some of the trustees or directors of such other assurance society or company *so much of the funds or property of the company as shall be agreed upon between the contracting parties as will be sufficient*, with the premiums that may become payable in respect of all their existing policies, *to enable the society or company, from whom or from whose directors or managers the undertaking shall have been obtained, to comply therewith*, and shall make such arrangements with the said assurance company, or the said directors or managers, in regard to their said undertakings, as the board of directors shall, in their discretion, think fit, and shall cause to be done and executed all such acts, deeds and things as, in the opinion of the board of directors, shall be necessary or advisable for carrying the same arrangements into effect. And if any funds or property of the company shall remain, after answering the purposes aforesaid, shall cause the same" to be realized and divided amongst the proprietors, shareholders and members of the company.

At an extraordinary general meeting of the shareholders, held on the 8th of August 1862, an agreement [544] to transfer the business of the Waterloo to the British Nation Life Assurance Association was confirmed. By this arrangement, the Waterloo Company was to pay to the British Nation a moiety of their gross premium income during one year, and the British Nation was to undertake the liabilities of the Waterloo Company and indemnify it therefrom.

Notice of the transfer was given to the policy-holders.

On the 6th of December 1862 the Waterloo Company was ordered to be wound up.

Under the winding up, claims were made by Mr. Carr and other policy-holders of the Waterloo Company under the following circumstances :—

In 1852 and 1855 respectively, Mr. Carr had effected insurances in the Waterloo Company for the term of his own life for the sums of £200 and £800 at annual premiums of £5, 9s. 8d. and £9, 8s. The policies provided that the funds and other property of the said company should be subject and liable, *according to the provisions of the deed or deeds of settlement* of the said company, to pay to the executors, administrators or assigns of the said assured, within three calendar months next after satisfactory proof of the death of the said assured, &c., the sums assured.

Mr. Carr tendered to the official liquidator the premiums which became payable after the winding-up order, but he refused to receive them. Mr. Carr then effected new life policies in another office, and had to pay £2 per cent. *extra* in consequence of his greater age. He then claimed against the Waterloo Company £207, 11s. 8d., being the amount of the valuation of the loss sustained [545] and to be sustained by him by effecting two new policies at the increased premiums.

Mr. Carr contended that the premiums on his policies, which became due since the date of the winding-up order, having been duly tendered by him in sufficient time to the official manager, he was bound to accept the same and to have kept the policies on foot, and that he, Mr. Carr, was at liberty to refuse to have his policies transferred to the British Nation, which was a younger office than the Waterloo.

That, as, by the second proviso on the policy, it was stated that the capital stock of £400,000 alone should be liable to make good all claims and demands upon the company, and that the directors were not to be liable, except for the unpaid part of their shares in the company, Mr. Carr, the claimant, had really a lien on the particular funds of the company, and that no valid transfer could be made, in the case of a policy-holder not being a policy on the participation principle, or, in fact, that a transfer might perhaps have been binding in the one case but not in the other.

The Chief Clerk adjourned the argument of this claim into Court, in order that the decision of the Master of the Rolls might be obtained as to the rights of this class of policy-holders.

Mr. Selwyn and Mr. De Gex, for Mr. Carr, argued that the 183d clause of the deed enabled the directors to transfer the business, but that it was not binding on the policy-holders. Secondly, that the power was conditional on sufficient funds being transferred to the second company to enable it to satisfy all demands, and that the condition had not been complied with, half [546] a year's premiums being clearly inadequate for that purpose. Thirdly, that Mr. Carr was entitled to prove for the estimated value of the loss he would sustain; 25 & 26 Vict. c. 89; *Evans v. Coventry* (25 L. J. (Chanc.) 489, and 26 L. J. (Chanc.) 400); *Re English and Irish, &c., Society* (1 Hem. & Mill. 79); *Ex parte Tindal* (8 Bing. 402).

Mr. Baggallay and Mr. Swanston, for the official liquidator, relied on the terms of the deed of settlement, of which the policy-holders had full notice and were bound, and argued that the 183d clause only required so much of the funds to be handed over as should be agreed upon between the two companies. That this arrangement was *bonâ fide*, and that it was not shewn that the provision was insufficient in amount to meet the liabilities.

THE MASTER OF THE ROLLS [Sir John Romilly]. This question depends solely on the construction of the 183d clause of the deed establishing the company, of which clause the claimant had notice and by which he is bound.

The question is whether the claimant, who, in 1852 and 1855, effected policies for his whole life without profits for sums amounting to £800 at the ordinary premiums payable at that time, has now any claim on the company.

In 1862 the company, when it came to an end, had power to transfer him over to the other company, but only on performing strictly the requirements of the 183d clause. But I am of opinion that the Waterloo [547] Company was entitled to do, and that it was justified in doing, all that it has done. The Waterloo Company was bound to obtain from some other assurance company an undertaking to satisfy all claims on the company when the time for satisfying the same should "arrive." Mr. Carr's is a claim which will arise at a future period, and the British Nation Company is bound to undertake to satisfy all his claims, and they have done so. The clause then requires that the Waterloo Company shall cause to be transferred to the British Nation Company so much of its funds and property "as shall be agreed upon between the contracting parties as will be sufficient, with the premiums that may become payable," to enable it to comply with the undertaking.

In the first place, who are the contracting parties? They are the Waterloo Company, which is giving up business, and the British Nation Company, which is undertaking to perform the engagements of the Waterloo Company. The assured are not contracting parties. The Waterloo Company is to cause to be transferred to the British Nation Company so much of the funds as shall be agreed upon as will be sufficient to enable them to comply with their undertaking. What does that mean? It does not mean they are to transfer so much as in the opinion of a Court of Justice shall be sufficient, but so much as shall be agreed upon between the contracting parties; and provided the company undertaking the liabilities is satisfied, and the amount is arranged, then the assured are bound by it. It is not an agreement that any sum of money shall be actually paid.

I am of opinion it rests solely on the agreement between the contracting parties. The Waterloo Company agree with the British Nation Association on what [548] is sufficient, and say that nothing beyond the half-year premiums is required for this purpose. I am of opinion, provided the transaction is *bonâ fide* and there is no fraud to affect the parties, that this is an arrangement or agreement by which the assured

are bound. There is no evidence before me to shew that the transaction is not perfectly *bona fide*. The claimant has not called on the British Nation Company for the performance of their obligation, and, as far as I can judge, the security of the claimant for the ultimate performance of it is greater than what he had before.

I am of opinion that the policy-holders are bound, and that if they do not choose to accept the undertaking of the British Nation Company they cannot prove against the Waterloo Company.

[548] THE COLONIAL LIFE ASSURANCE COMPANY v. THE HOME AND COLONIAL ASSURANCE COMPANY, LIMITED. May 9, 1864.

[S. C. 33 L. J. Ch. 741; 10 L. T. 448; 4 N. R. 129; 12 W. R. 783. See *Merchant Banking Company of London v. Merchants' Joint Stock Bank*, 1878, 9 Ch. D. 567.]

Application by "The Colonial Life Assurance Company" for an injunction to restrain another company (lately established) from using the style of "The Home and Colonial Assurance Company, Limited," refused.

In 1846 the Plaintiffs' company was established, and it was incorporated in 1855 by the name of "The Colonial Life Assurance Company."

In 1864 the Defendants' company was incorporated under "The Companies Act, 1862" (25 & 26 Vict. c. 89), by the name of "The Home and Colonial Assurance Company, Limited."

This suit was instituted by the Plaintiffs to restrain the Defendants using the name and style of "The Home and Colonial Assurance Company," or any other name resembling that of the Plaintiffs.

[549] THE ATTORNEY-GENERAL (Sir R. Palmer) and Mr. Rowcliffe now moved for the injunction. They argued that the name and style adopted by the Defendants was so similar to that previously used by the Plaintiffs as to be an infringement of their rights. That it was calculated to mislead the public, and prejudice the Plaintiffs.

They referred to The Companies Act, 1862 (25 & 26 Vict. c. 89, s. 20); *Clement v. Maddick* (1 Giff. 98); *Ingram v. Stiff* (5 Jur. (N. S.) 747); *Shrimpton v. Laight* (18 Beav. 164); *Edelsten v. Edelsten* (1 De G. J. & Sm. 185); *Croft v. Day* (7 Beav. 84); *Rodgers v. Nowill* (6 Hare, 328).

Mr. Rolt, Mr. Selwyn and Mr. Eddis were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. The object of this application is really to obtain a monopoly of the use of the word "Colonial." If a company cannot call itself "Colonial," it cannot call itself "London and Colonial," or "Liverpool and Colonial." It is the exclusive use of the word Colonial which the Plaintiffs desire to have.

There are three classes of cases which ought to be distinguished; one is that of trade marks, where a firm has for a considerable time carried on their trade, using a distinctive mark on their goods. In that case, if, without any intention to defraud, another person uses that trade mark, this Court will interfere to restrain him. (*Millington v. Fox*, 3 Myl. & Craig, 338.) That is not the present case. Another class **[550]** of cases is where a man sets up business and uses the name of another person. Again the name may become the name of a firm by succession, and this Court would interfere to prevent a person using that name, although there might be no existing member of the firm of that name. Such as is the case of *Messrs. Child & Co.* There is a similar class of cases which have been termed symbolical cases, such as the "Atlas" or the "Globe" Assurance Company. This is something in the nature of a trade mark.

But if a company which does colonial business cannot call itself "Colonial" it is obvious that, under a species of assertion that the word colonial is symbolical, the Plaintiffs might prevent every other person using it as descriptive of his trade. It is obvious that such a claim cannot be maintained; it would establish a monopoly of the use of the words "Home" and "Colonial." Such a contention has never been

advanced before. You may find in the directory "The London Assurance Company" and "The London and Liverpool Assurance Company," "The Law Life Company" and "The Equity and Law Life Company," where the same words are used in both cases. So you have the *Times* and the *Hereford Times*: but no one ever supposed that the *Times* newspaper could apply for an injunction. This is a stronger case.

I am of opinion that there is no case for an injunction, and the motion must be refused.

[551] CATLEY v. SAMPSON. May 9, 25, 1864.

[S. C. 34 L. J. Ch. 96; 10 L. T. 519; 10 Jur. (N. S.) 993; 12 W. R. 927.
Distinguished, *Hall v. Heward*, 1886, 32 Ch. D. 435.]

A legal personal representative cannot, alone, institute a suit to administer the real estate of an intestate, for the purpose of having it applied towards the payment of his debts under the 3 & 4 Will. 4, c. 104.

One seized of property in fee mortgaged it for a term, and afterwards died intestate and without heirs. Held, that his administratrix could not maintain a suit to redeem the mortgage, for the purpose of making the property available for the payment of the intestate's debts.

In 1843 some fee-simple property was conveyed to William Catley to uses to bar dower, and with a declaration against dower.

William Catley married the Plaintiff Susan Catley in August 1847, and in October 1847 he conveyed the property to a mortgagee for 1000 years, subject to a proviso for cesser of the term on payment by Catley, "his heirs, executors or administrators," of £120 and interest in April following.

In 1861 William Catley died intestate and without heirs, and his widow obtained letters of administration. She instituted this suit against the persons entitled to the mortgage, claiming, by virtue of her alleged right to dower, a right to redeem the mortgage.

The Defendant shewed clearly that the Plaintiff had no right to dower, and they denied her right to redeem the mortgaged premises.

The cause now came on for hearing.

Mr. Selwyn and Mr. J. F. Villiers, for the Plaintiff. The equity of redemption of this estate constitutes assets for the payment of the debts of the intestate under the 3 & 4 Will. 4, c. 104, and the mortgagees are liable to be redeemed in order to give effect to rights of the creditors; *Beale v. Symonds* (16 Beav. 406).

[552] In order to make the real estate available, it is not necessary that the bill should be filed by a creditor; *Dinning v. Henderson* (2 Coll. 330); *Price v. Price* (15 Sim. 484); *Rodney v. Rodney* (16 Sim. 307; 2 Spence, 661). It is the duty of the administratrix to see that the debts are paid, and the suit is properly instituted by her, for she represents the interests of all the creditors. The deed also gives to the "administrator" of William Catley the power to redeem.

Mr. Hobhouse and Mr. Prendergast and Mr. Southgate and Mr. Birkbeck, for the Defendants. The equity of redemption of the term and the reversion in fee escheated to the Crown: the cause cannot therefore proceed, for the Attorney-General is not a party.

The suit is, in terms, instituted by the widow in respect of her dower, and not as administratrix, and her right to dower is clearly displaced. The suit does not profess to be one on behalf of the creditors of the intestate, nor is it alleged that there is any such creditor. Again, the Plaintiff is not entitled as administratrix to file any such bill; *Bradshaw v. Outram* shews that an administratrix could not be made a Defendant to a bill to foreclose, and conversely she cannot sue as Plaintiff to redeem. The Plaintiff is an officer of the Probate Court, and her duty ceases when she has properly administered the personal assets; she has no right to interfere with the real estate, which is not committed to her care.

The Act 3 & 4 Will. 4, c. 104, points only to a liability of the real estate "at the suit of creditors," and not at the suit of executors or administrators. This case, how-

[553]-ever, is governed by *Tubby v. Tubby* (2 Coll. 136), in which it was held that "the administrator ought not to be sole Plaintiff in a bill for administering the intestate's real assets."

They also referred to *Viscount Downe v. Morris* (3 Hare, 394).

Mr. Selwyn, in reply.

May 25. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted by the legal personal representative of a deceased mortgagor, who died intestate and without heirs, against the mortgagees for a term of years of the estate of the mortgagor, to redeem that mortgage.

One objection, which undoubtedly is a very serious one, is raised *in limine*. It is this:—that the suit is defective in point of parties, inasmuch as the reversion in the freeholds, subject to the mortgage term, is unquestionably vested in the Crown, and yet the Attorney-General is no party to this suit. It is said in argument that if this be all that is required, the Crown will appear by counsel and disclaim all interest in this suit. But this does not remove the objection; for though the right to redeem is in the Crown, it does not follow, because the Crown renounces that right, that such renunciation confers any right or power on anyone else.

The case for the Plaintiff is put thus:—Where there is a mortgage in fee and the mortgagor dies intestate, the mortgagee cannot keep the property for his own use and benefit, but any person who is a creditor of the [554] mortgagor may redeem him and make the property available for the payment of the debts of the mortgagor. That if this be true, it must necessarily follow that the legal personal representative, who represents all the creditors, can do the same, and that in fact it is only a suit by the legal personal representative to get in property which, by the statute of 3 & 4 Will. 4, c. 104, is made assets for the payment of simple contract creditors.

I was at first inclined to assent to this line of argument, but further consideration has satisfied me that it cannot be sustained.

In fact, the very point is determined in *Tubby v. Tubby* (2 Coll. 136), which lays down that a legal personal representative cannot alone institute a suit to administer the real estate of an intestate, and this case seems to have been acted upon ever since. Certainly there is no instance of any case to the contrary, and the words of the statute (3 & 4 Will. 4, c. 104) are, that when any person shall die seised of real estate, which he shall not by his will have charged with the payment of his debts, "the same shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity *at the suit of any of the creditors of such debtor*, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who dies seised of freehold estates was or were before the passing of this Act liable to, in respect of such freehold [555] estates, at the suit of creditors by specialty, in which the heirs were bound."

None of the cases cited have extended the words of the statute, and the case of *Beale v. Symonds* (16 Beav. 406), before me, which was much relied upon, does not support the case of the Plaintiff.

I am therefore of opinion that the Plaintiff cannot sustain the suit by reason of being the legal personal representative of the mortgagor.

I have, in so treating the case, considered it in the most favorable light for the Plaintiff, for not only are the necessary facts not proved, but in truth the case is not rested on this argument, for it must be observed that the bill, as originally framed, relies on the ground of the Plaintiff being entitled to dower; that relief is prayed and redemption required on that footing, and this is still the frame of the suit. If the right of the Plaintiff to dower were proved, it would no doubt entitle the Plaintiff to redeem the mortgage in question, but her right to dower is disproved.

In this state of circumstances, the case of the Plaintiff fails and the bill must be dismissed.

[556] CHAPMAN v. CHAPMAN. May 30, 1864.

[See *Stockdale v. Nicholson*, 1867, L. R. 4 Eq. 367.]

In a bequest "to brothers and sisters, or their representatives in equal shares:" Held, that representatives meant executors or administrators, and not the next of kin.

The testator desired that, in case his daughter Frances Chapman should marry, the sum of £1400 should be settled on her for her separate use for life, and then on her husband for life, and the principal to go to her children; "but if there should be no children, then to all her brothers and sisters, or their *representatives*, in equal shares."

She married, survived her husband, and died in 1861 without having had issue.

Some of the brothers being dead, the question was as to the meaning of the word "representatives."

Mr. Bedwell contended that "representatives" meant "next of kin." He cited *Re Porter's Trust* (4 Kay & J. 188), and see *Re Henderson* (28 Beav. 656); *In re Crawford's Trusts* (2 Drew. 230); *King v. Cleveland* (26 Beav. 26, and 4 De G. & J. 477).

Mr. I. J. Hamilton Humphreys was not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think it must mean either executors or administrators. The *prima facie* meaning of the word representative, so far as relates to real estate, is the heir, and so far as it refers to personal estate, is the executors, if [557] any have been appointed, or if not, the administrators. The burthen of proof lies on anybody contending the contrary. Here I see nothing to shew that the testator intended anything different from the ordinary and usual meaning of the word.

I am of opinion that the testator intended that, on the death of his daughter without having had children, her brothers and sisters should take; but if any of them should be then dead, then that their shares should go as part of their estate.

[557] COGENT v. GIBSON. May 30, 1864.

A contract for the sale of a patent specifically enforced at the suit of the vendor, although all he required was the payment of the purchase-money.

The Plaintiff Cogent was entitled to a French patent for improvements in the manufacture of saddles. In 1863 the Defendant agreed to purchase from the Plaintiff the patent right to manufacture and sell these saddles in England for £125, and Cogent was, at the expense of the Defendant, to obtain the English patent.

The patent was obtained, and this was a bill by the vendor against the purchaser for the specific performance of the agreement.

Mr. Selwyn and Mr. C. H. Blake, for the Plaintiff.

Mr. T. H. Terrell, for the Defendant, argued that this was not a proper case for the interference of this Court, for all the Plaintiff required was the purchase-money, which he might obtain by action at law. He argued, secondly, that the patent right was of no value.

[558] THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiff is entitled to a decree for specific performance.

I am of opinion that in all these cases the rights of the vendor and purchaser are mutual and correlative. I had to consider the point lately, in a case where the Plaintiff, the vendor of land at Harrogate, had nothing to do but to receive a sum of money, and I held that he could come to this Court for specific performance.

It is true that the vendor may bring an action to recover the damages, but he is also entitled to come here for a specific performance.

I am of opinion that, where there is a valid contract for the sale of a patent, this

Court will specifically enforce it in a suit by the purchaser against the vendor, and will make the latter execute a conveyance. I am also of opinion that the opposite is equally true, and that the vendor may come into equity for the purchase-money.

The Plaintiff is entitled to the usual decree for specific performance.

[559] *Re JEWITT. June 8, 1864.*

[S. C. 33 L. J. Ch. 730; 10 L. T. 556; 10 Jur. (N. S.) 814; 12 W. R. 945.

See *In re Freston*, 1883, 11 Q. B. D. 557.]

A solicitor, while on his way to attend a summons at Judges' Chambers, is privileged from arrest.

An attachment had issued out of this Court against Mr. Jewitt, for non-delivery of his bill of costs within the time limited by a taxation order.

He was arrested on his way to attend a summons for his client at the Judges' Chambers, Serjeants' Inn.

Mr. W. H. Terrell now moved for his discharge. He argued that a solicitor was not only privileged whilst in attendance upon the Court, but in going and returning; *In the Matter of O'Neill* (1 Sausse & Sc. 78); *Fitzmaurice's case* (1 Moll. 512); and that the principle extended to the present case, for in *Moore v. Booth* (3 Ves. 350) Lord Loughborough said, "I am told it is understood at Serjeants' Inn that parties attending at the Judges' Chambers are always protected."

Mr. Wickens, *contrà*, submitted that there was no authority for saying that the privilege extended to such a case as the present, except a mere *dictum* in *Moore v. Booth*.

THE MASTER OF THE ROLLS [Sir John Romilly]. On the authority of that case, I must discharge Mr. Jewitt. He will be liable to be arrested again, unless he makes some arrangement or complies with the order. I shall simply discharge him.

[560] *FRANKLINSKI v. BALL. April 7, May 4, 5, 1864.*

[S. C. 10 L. T. 447; 10 Jur. (N. S.) 606; 12 W. R. 845.]

The Defendant, a mortgagee, agreed to grant a lease to the Plaintiff, but upon the mutual understanding that the mortgagor was to concur. The mortgagor having refused his concurrence: Held, that the Plaintiff was not entitled to insist on having a lease from the mortgagee alone; and secondly, that he was not entitled to damages in equity.

In 1828 Mr. Slattery mortgaged two leasehold houses to the Defendant Sir William K. Ball. The mortgage deed contained a power of sale, but no power to lease.

In 1863 the Defendant agreed to let one of the houses to the Plaintiff for the remainder of the term. The Court, upon the evidence, came to the conclusion that the Plaintiff knew that the property was under mortgage, and that it was on both sides considered that the agreement was for a lease to be approved of and concurred in by the mortgagor, and that it proceeded on the mutual understanding that the mortgagor was to concur therein.

The mortgagor, however, refused to concur in the lease, and the Plaintiff afterwards filed this bill for the specific performance of the contract, or, in the alternative, that the Defendant might pay damages.

Mr. Hobhouse and Mr. G. Hastings, for the Plaintiff. If the mortgagor will not concur in the lease, the Plaintiff is willing to take such title as the Defendant can give, and to accept a lease from the mortgagee alone. The Defendant is bound, to the extent of his interest, to give effect to his contract; but if not, then the Court

ought to assess the damages under Sir Hugh Cairns' Act (21 & 22 Vict. c. 27), and direct the Defendant to pay the amount; *Howe v. Hunt* (31 Beav. 420); in [561] which case the mortgagee would not concur in a lease agreed to be granted by the mortgagor, and the Court awarded damages to the Plaintiff; *Soames v. Edge* (1 Johns. 669).

Mr. Selwyn and Mr. Lindley, *contra*. A mortgagee has no power to grant a lease without the assent of the mortgagor; *Hungerford v. Clay* (9 Mod. 1); and a power to sell does not authorize the granting of a lease; *Evans v. Jackson* (8 Sim. 217). The Defendant has received from the mortgagor a formal notice to redeem, and after payment of the mortgage money, the Defendant will become a mere trustee for Slattery. This Court will never compel a man to do an act which involves a breach of trust; *Mortlock v. Buller* (10 Ves. 292). The Plaintiff consents to take what the Defendant can give; but what will be the consequence? The mortgagor will obtain a decree for redemption, which will direct a reconveyance free from all incumbrances, and with this the Defendant would, by reason of the lease, be unable to comply, and the Defendant would be obliged to file a bill against the lessee, in the name of the mortgagor, to set aside the lease. Besides this, the Defendant would be unable to sue for his mortgage money, if he should so deal with the mortgaged property as to render it impossible for him to restore it unincumbered on payment of the debt; *Palmer v. Hendrie* (27 Beav. 349).

Secondly. But the contract was conditional on the mortgagor joining; the mortgagee, in effect, agreed to concur with the mortgagor in granting a lease. The Plaintiff well knew that the Defendant had only a mortgage title, and he contracted for a lease from the [562] mortgagor, confirmed by the mortgagee; when, therefore, the mortgagor refused to concur, the contract was at an end. It is true that this stipulation is not contained in the written contract, but a Defendant may prove a parol term of a contract by way of defence to a bill for specific performance.

As to damages, this is not a proper case for assessing them in equity, for the Plaintiff well knew that he was entitled to no equitable relief when he filed the bill; he knew that the concurrence of the mortgagor was essential, and that it could not be obtained, and that his remedy was at law. The damages, if any, would only be nominal, the Defendant having throughout acted *bonâ fide*; *Flureau v. Thornhill* (2 Sir W. Blackstone, 1078, and see Dart. 501).

Mr. Hobhouse, in reply.

May 4. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case is, whether, on the construction of the three documents which constitute the agreement in this case, the Defendant is bound to grant to the Plaintiff a lease of certain mortgage premises without the concurrence of the mortgagor. The perusal of the evidence, in this case, satisfies me that the Defendant never intended to grant any lease of the property in question without the concurrence of Mr. Slattery, the mortgagor.

But this will not conclude the question, for it is necessary further to consider, whether the Plaintiff was or was not cognizant of such intention on the part of [563] the Defendant, at the time when the contract was entered into. If he was not, there arises this question, whether, when a mortgagee agrees to grant a lease of part of the mortgaged property of which he is not in possession, the intended lessee can insist on such a lease being granted to him, although the mortgagor will not concur, the consequence of which is, that the lease is subject to all the inconveniences which the mortgagee may afterwards sustain, in case the mortgagor should file a bill to redeem and insist on taking the accounts against him with wilful default, that the lease was not granted for such a rent, and on such terms and covenants as were proper, having regard to the state of the property. I do not know that this point has ever been decided, but I do not think it necessary to inquire further into it on the present occasion, because, on the evidence, I am satisfied that it was, on both sides, considered that the agreement was for a lease to be approved and concurred in by the mortgagor. The evidence shews that the Plaintiff was aware at that time that the Defendant intended to obtain the concurrence of Slattery, and all the facts confirm it. Accordingly, the Defendant employs Mr. Slattery's solicitor, Messrs. Dean, and not his own solicitor, to prepare the lease; and it is not until it is found that Mr.

Slattery will not concur, and that a suit is threatened, that Mr. Hanrott, the Defendant's solicitor, is employed in the matter.

What I am asked to do, in a case where the consequences may be very serious to the Defendant, if he should hereafter have to account under a decree for wilful default, is to compel him to execute a lease to the Plaintiff which the Plaintiff may be deprived of to-morrow by the mortgagor, and that in a case where both parties knew, at the time of the agreement, that [564] the property was under mortgage, and that the assent of the mortgagor was essential to give a good title, and where the agreement proceeded on the mutual understanding (not, it is true, expressed in writing) that the mortgagor should join.

When an agreement is entered into for the lease of a property, it is to be understood that all proper persons are to join in the lease. This is clearly so as regards the lessee, and the Plaintiff could not have been compelled to take the lease without the concurrence of Slattery. I think it is equally true as regards the lessor, if the want of the concurrence of a third person would or might inflict an injury on the lessor, and when this circumstance was known to the intended lessee at the date of the agreement. Here, the Plaintiff, when he filed his bill, knew that this concurrence could not be obtained. He might have been entitled at law to compensation for damages, if he could shew that he had sustained any, but he is not entitled to specific performance.

The bill must be dismissed, but without costs, in consequence of the incautious mode in which Defendant entered into the agreement.

Mr. Hobhouse asked that there might be added to the decree a statement that it was without prejudice to any claim at law for damages.

May 5. THE MASTER OF THE ROLLS. I can make no reservation, and I must simply dismiss the bill without costs. In my opinion, it is not a [565] case in which I should give either costs or damages; but I do not intend to fetter a Court of law on the subject.

[565] KING, on behalf, &c., v. MARSHALL. June 1, 2, 6, 1864.

[S. C. 34 L. J. Ch. 163; 10 L. T. 557; 10 Jur. (N. S.) 921; 12 W. R. 971.
Distinguished, *In re Marine Mansions Company*, 1867, L. R. 4 Eq. 609.]

A company granted debentures, whereby they charged "all the lands, tenements and estates of the company and all their undertaking:" Held, that the unpaid calls and the capital not called up were not charged by such debentures.

On the 12th of January 1859 the Asphaltum Company, Limited, was duly registered pursuant to the provisions of the Joint Stock Companies Act, 1856, as an incorporated company with limited liability.

The articles of association provided that the company might at a general meeting resolve upon borrowing money, either by way of mortgage of the whole or any part or parts of the property of the company, or by debenture notes, or by such other security or securities as the directors and the person or persons advancing or lending such money should mutually agree upon.

An extraordinary general meeting, held on the 12th day of December 1859, authorized the directors to borrow upon such terms and conditions as they might think fit. The directors accordingly borrowed certain sums, on the security of debentures of the company, from different persons, and amongst them from the Defendant Chappell.

The debentures given to Chappell and the other debenture creditors were sealed with the common seal of the company, and were in this form:—

The Asphaltum Company, Limited, thereby acknow-[566]-ledged themselves to owe Chappell £100, advanced by him, Chappell, to the company, to be repaid by the company on or before the 16th day of August 1864 with interest. It then proceeded as follows:—"And the said company hereby charge *all the lands, tenements and estate of the said company and all their undertaking*, as a security for the due payment

of the said principal sum and interest at the time and in the manner aforesaid." And it was declared that all the debenture creditors should be entitled to the benefit of their respective charges *pari passu* and without any preference or priority the one over the other.

At the time of the issuing of the debentures the company were entitled to certain mines situate in the island of Cuba, which contained large quantities of a substance called chapapote or asphaltum, and also to certain plant, oil and material, and a stock of chapapote or asphaltum, and to certain patent and other rights and privileges.

Under a resolution passed in May and confirmed in July 1862 the company was being wound up voluntarily. At the date of the resolution for winding up some arrears were still due from shareholders in respect of calls already made, and four shillings a share remained uncalled for.

The liquidators got in such arrears and calls, but the amount was not sufficient to pay the debts of the said company, which was insolvent.

Questions had arisen as to how these sums ought to be disposed of. Chappell and the other debenture-holders contended that the moneys received by the [567] liquidators in respect of the arrears and call were comprised in and charged by their debentures, and that they were applicable, in the first place, to the payment of the debentures, and that the residue only was applicable in discharge of the other debts due to the general creditors of the company.

This bill was filed by King (a general creditor of the company) on behalf of himself and all others the creditors (other than the holders of debentures) of the Asphaltum Company, Limited, against the liquidators and Chappell (a debenture-holder) praying:—

That the true construction of the debentures might be ascertained and declared, and particularly, that it might be declared that the moneys received by the liquidators, in respect of the arrears of calls and calls on shares made by the liquidators, were not comprised in or charged by the debenture, and were applicable to the payment of all the debts of the company.

Mr. Jessel, for the Plaintiff. The unpaid calls are not charged by these debentures. All that is charged is, first, "the lands, tenements and estate," where the word "estate" means something similar to lands and tenements, and is therefore confined to real estate; and secondly, "the undertaking," which, according to Companies Clauses Consolidation Act (8 & 9 Vict. c. 16, ss. 2, 41, 42, and Schedule (C)) means "the undertaking or works of whatever nature by the Special Act authorized to be executed." Unpaid calls constitute mere debts, and uncalled capital does not constitute property, but merely a power for the company to require it. If the debentures included everything, both [568] real and personal, it would be impossible for the company to carry on its business.

Mr. Marten, for the debenture-holders. The word "estate" is *nomen generalissimum*, and will, by its own proper force, carry the realty as well as the personalty; *The Mayor of Hamilton v. Hodsdon* (6 Moo. P. C. C. 76, 82). The unpaid calls are debts due to the company; 19 & 20 Vict. c. 47, s. 22; 20 & 21 Vict. c. 14, s. 13; and are now provable in bankruptcy; 21 & 22 Vict. c. 60, s. 18.

They are therefore part of the property, estate and capital of a company, and are included in the words "estate" and "undertaking." The debenture-holders have priority over the general creditors of the company in respect of these calls; *Robson v. McCreight* (25 Beav. 272); *Furness v. The Caterham Railway Company* (27 Beav. 358); *Legg v. Mathieson* (2 Giff. 71).

Mr. Swanston, for the official liquidators.

Mr. Jessel, in reply.

June 6. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case is as to the construction of the debentures which have been issued by the company, and whether they include the unpaid calls and the calls to be made by the company. The words of the debentures are these:—"The company [569] hereby charge all the lands, tenements and estate of the said company and all their undertaking as a security." The question is, if they include the unpaid existing calls and the future calls of the company, and I am of opinion they do not.

In the first place, the word "estate" in the sentence "lands, tenements and

estate" is a word *ejusdem generis*, and the meaning is that the company charges its lands and tenements and other like property, such as hereditaments and what may properly be called hereditaments. It is impossible to extend it to a charge on the personal estate; the more especially as if it were so extended, the word "undertaking" would be unnecessary; and if these words included everything in the world the company possessed, it would not be necessary to go further.

Next, as to the charge by the company of "all their undertaking," the Lands Clauses Consolidation Act gives a clear and accurate definition of the word "undertaking," and I think that that is the proper definition in this case. If the charge included debts due to the company, it could not carry on its business, and it could not sell anything without allowing the debenture creditors to receive the money. I cannot distinguish one debt from another debt, and the calls constitute mere debts due to the company. It would paralyze the proceedings of a company, and prevent it carrying on its business, if I held the contrary. I am consequently of opinion that the general creditors are not precluded from coming against such portion of the undertaking as is not included in the definition of that word in the Railway Act, and I must make a declaration according to first paragraph of the prayer of the bill.

THE MASTER OF THE ROLLS afterwards referred to a case recently decided by Vice-Chancellor Kindersley and affirmed by the Lords Justices of *The British Provident, &c., Society, Ex parte Stanley* (33 L. J. (Ch.) 535) in which it was held that future calls could not be mortgaged under a power to borrow "on the security of the funds or property of the society."

[570] *Re HAWKIN'S TRUSTS. June 11, 13, 1864.*

[See *Lewis v. Mathews*, 1869, L. R. 8 Eq. 281.]

A bequest of a legacy for the enlargement of a parish church is not void under the Statute of Mortmain. Bequest to an executor for his trouble, held not payable, he having been prevented by severe illness from proving the will and from ever acting.

The testatrix by her will, dated the 7th of November 1862, bequeathed to the Rev. W. Edelman a legacy of £500 "for the enlargement of his church at Merton."

She also appointed him one of her executors, and gave him a legacy of £200 "for his trouble."

The testatrix died on the 10th of November 1862. At her death Mr. Edelman was confined to his bed, severely ill, and suffering under a malady of which he died about seven weeks after the testatrix. He did nothing as executor, and he manifested no intention as to whether he would or would not act in that character.

[571] Two questions arose, first, as to the validity of the gift for the enlargement of the church; and secondly, whether the executor was entitled to his legacy.

Mr. Hobhouse and Mr. Bristowe, for the residuary legatee, contended that the first legacy was void under the Mortmain Act (9 Geo. 2, c. 36), as it tended to bring further land into mortmain, and that it did not come within the exception of the 43 Geo. 3, c. 108, s. 1, the testatrix having died before the expiration of three months from the date of her will; *Dixon v. Buller* (3 Younge & C. 677); *The Church Building Society v. Barlow* (3 De G. M. & G. 120).

Secondly. That the executor, who had neither proved the will nor acted, was not entitled to a legacy given to him "for his trouble;" *Harrison v. Rowley* (4 Ves. 212); *Williams on Executors* (5th ed. 1152); *Brydges v. Wotton* (1 Ves. & B. 137).

Mr. Humphrey, for the representative of Mr. Edelman, argued that the legacy to the executor was payable, unless it could be shewn that he had expressed some intention not to act; and that here, nothing but severe illness and death had prevented the executor from performing the duties of his office.

Mr. Martindale, for the present incumbent of Merton. The legacy for the enlargement of the church is clearly valid, unless you can shew that the statute cited

is a disabling, instead of what it professes to be, an enabling statute. For the purpose of enlarging the church, it is not necessary to obtain any additional land; but even if it were left discretionary, either to procure additional land, or make the improvements on the old site, still that [572] discretion would make the gift good; *Attorney-General v. Parsons* (8 Ves. 186); *The Mayor, &c., of Faversham v. Ryder* (18 Beav. 318, and 5 De Gex, M. & G. 350).

Mr. Swanston, for the sole surviving executor.

THE MASTER OF THE ROLLS. I am of opinion that the legacy of £500 for the enlargement of the church is valid. The amount ought to be invested and carried over to the separate account of this legacy, with liberty to apply at Chambers. I shall not require anyone but the incumbent to attend; and on proof that the money has been properly expended, I shall order payment to him.

I feel some difficulty as to the legacy to the executor.

June 13. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, the question which I reserved for consideration was this:—Whether a legacy which was given to an executor for his trouble was payable to him. The testatrix died on the 10th November 1862, and the executor died on the 31st of December following, having, during the whole of that interval, been so ill, that it was impossible for him to rise from his bed to prove the will, or take on himself the office of executor. I was at first not satisfied that he might not be entitled to the legacy, he being prevented by the act of God from performing the duties of that office. I have, however, been since referred to a case of *Hanbury v. Spooner* (5 Beav. 630), [573] which seems to have decided the exact point, that the executor is not entitled. In that case, an aged executor, who was incapable by bodily and mental infirmity of proving the will, was held not entitled to a legacy given by the testator's will to him as executor. That is the exact point here. It is true that a greater length of time had elapsed in that case than in the present—for there the testator died in 1839 and the executor in 1841; but that can make no difference, the principle is the same, and if the executor is unable to prove, he is not entitled to the legacy. The Master found, in that case, that, during the whole period, the executor, from mental as well as bodily infirmity, was wholly incapable of undertaking the duty of executor; and Mr. James Parker argued that to disentitle the executor he must refuse to prove the will, and also that the executor was released from the condition by the act of God, he being, by the act of God, unable to perform it. But Lord Langdale, without hearing the other side, held that the executor was not entitled to the legacy.

I cannot make any distinction between three weeks and three years, and I must hold that the executor is not entitled.

NOTE.—See *Calvert v. Sebbon*, 4 Beav. 222, and the note thereto; *Angermann v. Ford*, 29 Beav. 349, and the note at page 352; *Griffiths v. Pruett*, 11 Sim. 202; *Christian v. Devereux*, 12 Sim. 269.

[574] WATSON v. WATSON. April 26, 1864.

[See *In re Peacock's Estate*, 1872, L. R. 14 Eq. 240.]

A legacy by a parent or a person *in loco parentis* to a child is not satisfied by occasional small gifts in the testator's life. Thus, a legacy of £2500 was held satisfied *pro tanto* by a gift of £1000. Stock on marriage, but not by gifts of £80 and £100, or by an annual allowance of £60 a year.

In order to create a case of satisfaction of a legacy given by a person *in loco parentis*, that relation must exist at the date of the will.

A legacy being held *pro tanto* satisfied by a gift of stock: Held, that its value must be ascertained as at the time of the gift.

The testator, by his will dated in 1837, bequeathed "to his grandchild Sarah Watson Graham, daughter of Captain Joseph Graham," the sum of £2500.

On the marriage of Sarah Watson Graham in 1858, the testator had given her a

sum of £1000 £3 per cents., which had been settled by her marriage settlement. The testator had made her other gifts, and, about three months previous to her marriage, he had given her £80. He had also, in 1861, given to her and her husband £100, and he had also voluntarily made them an allowance of £60 a year, payable quarterly, from their marriage to his death.

The testator died in 1862 without having revoked the legacy.

Sarah Watson Graham was the daughter of a son of the testator born before his marriage, and she had always resided with and been maintained by the testator, who had, as the Court held, clearly placed himself *in loco parentis* towards her.

Under these circumstances, the Plaintiffs insisted that the legacy of £2500 was satisfied and adeemed to the extent of the £1000 £3 per cents., and the other payments made by the testator to Sarah Watson Graham.

[575] Mr. Selwyn and Mr. Rudge, for the Plaintiff.

Mr. Hobhouse and Mr. G. L. Russell, for the Defendants.

Powys v. Mansfield (3 Myl. & Cr. 359); *Pym v. Lockyer* (5 Myl. & Cr. 29); *Ex parte Pye* (18 Ves. 140); *Powel v. Cleaver* (2 Bro. C. C. 499); *Ravenscroft v. Jones* (32 Beav. 669, and affirmed 33 L. J. (Ch.) 482) were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. As to the principal point, I am in the Plaintiff's favour; but as to little payments of sums of money, I am clear that they are never to be treated as a satisfaction or ademption of a legacy. They are only meant as presents, as in the case of New Year's gifts, birthday presents, Christmas boxes, and such small sums.

I concur in the remark that the rule of satisfaction in cases of parent and child is technical, and one not to be extended, and that it more often defeats the intention than gives effect to it. But my province is to administer the existing law, and nothing but an Act of Parliament can change a principle of law which has been long sanctioned and followed by the greatest Judges. The rule applies not only to parent and child, but also, although that relation does not naturally exist, to every person choosing to create that relation between [576] himself and a child, and to take upon himself the duties of a father.

The only question here is, whether the testator has created that relation? I quite concur in this: that it must exist at the making of the will. But if the testator did not place himself *in loco parentis* in this case, I am at a loss to conceive in what case such a relation could arise. [His Honor here examined the evidence, and came to the conclusion that the testator had clearly placed himself *in loco parentis*.]

It is probable that, when this lady married, the testator never thought of the legacy, and never intended to diminish it, yet the rule of law applies, and it requires distinct evidence to rebut it and to prevent its application.

I am of opinion that this legacy was satisfied to the extent of the value of the £1000 stock, which must be deducted from the legacy. The value of the stock must be ascertained at the date of the settlement, for it is the same thing as if the testator had, at that time, given a sum of money which was then laid out in £3 per cent. stock.

[577] SHEPHERD v. ALLEN. April 29, 30, 1864.

[See *Unsworth v. Jordan* [1896], W. N. 2 (5).]

A partnership at will held dissolved as from the date of the filing of a bill which prayed for its dissolution.

In 1848 the Plaintiff and the Defendant entered into partnership, and, by the partnership articles, it was agreed that the agreement should continue in force as long as Shepherd might think proper, and done away with when he should think proper.

On the 15th of August 1863 the Plaintiff instituted this suit praying a dissolution and account. A question was raised whether there was still an existing partnership; and, secondly, from what period it ought to be dissolved.

Mr. Selwyn, and Mr. C. Browne, for the Plaintiff.

Mr. Baggallay and Mr. Shea, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly] held that there was a partnership at will, and that it ought to be dissolved as from the 15th of August 1863, the date of filing the bill. (Reg. Lib. 1864, B. Fol. 2842.)

[578] MOET v. COUSTON. May 2, 3, 1864.

[S. C. 10 L. T. 395; 4 N. R. 86; 10 Jur. (N. S.) 1012.]

A person innocently selling goods bearing the spurious trade mark of another person is not, in equity, liable to account for the profits made thereby, but the owner of the trade mark is entitled to an injunction.

A Plaintiff who was only entitled to an injunction and costs, insisted also on an account. The Defendant offered to submit to the injunction without costs. The Plaintiff having brought his cause to a hearing, the Court held both parties in the wrong, and gave no costs to either side.

The Plaintiffs were the producers of a wine well known as "Moet's Champagne."

The Defendants were wine merchants, and between March 1862 and April 1863, they had innocently purchased and sold in England 105 dozens of champagne, which was marked and branded as "Moet's Champagne," but was in fact spurious. The Defendants, however, had no knowledge that the wine was not the genuine produce of the Plaintiffs.

In July 1863 the Plaintiffs instituted this suit against the Defendants, praying for an injunction and the recovery of the profits made by the Defendants by the sale of the spurious wine and for an account.

After the answer had been filed, the Plaintiffs proposed to stay all proceedings on payment of the profits and costs. The Defendants would not accede to this, but offered to submit to a perpetual injunction on each party paying his own costs. This was not accepted, and consequently the Plaintiffs brought the cause on for hearing.

Mr. Selwyn and Mr. W. D. Gardiner, for the Plaintiffs. The Defendants are liable to account for the profits; *Cartier v. Carlile* (31 Beav. 292). They have not offered to submit to such a decree as the Plaintiffs are entitled to, and [579] they have compelled them to bring the cause to a hearing. The Defendants ought, therefore, to pay the costs of suit, even though the account should not be granted; *Burgess v. Hills* (26 Beav. 244); *Burgess v. Hatley* (26 Beav. 249).

Sir H. Cairns and Mr. B. B. Rogers, *contra*. The Defendants have acted innocently and in ignorance of the Plaintiffs' rights; they have themselves been deceived, and therefore are not liable to account for profits. In *Edelsten v. Edelsten* (1 De Gex, J. & S. 185) the Lord Chancellor held that, where a trade mark of A. B. is used in ignorance by another person, A. B. is entitled neither to an account or compensation, except in respect of any user after he became aware of the prior ownership.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. The case stands thus: it appears that, in the early part of the year 1862 and throughout that year, the Defendants bought from an agent in London a quantity of champagne, apparently "Moet's," but which turned out to be spurious. The bill was filed in July 1863, and the question is, whether the Plaintiffs are entitled to an account of the profits made by the Defendants by the sale of the spurious champagne, and whether the Plaintiffs are entitled to the costs of this suit.

I have always held that where the Plaintiff is entitled to an injunction, that right carries with it the right to the costs of the suit. I have held in several cases, particularly in *Burgess v. Hills* (26 Beav. 244), that this was the [580] right of a Plaintiff. The course usually adopted by a Defendant, when he finds he cannot resist the injunction, is to pay the costs and submit to the injunction, and then the matter is at an end.

But the case here is very different, for here the Plaintiffs never limited their demand to the costs and the injunction, but they asked and insisted on an account

of the profits. If they had merely asked for the injunction, and costs, they would have been entitled to have a decree in their favor with costs; but they have asked for something more than they are entitled to, and the case therefore is different.

On authority and principle it is clear that if a man manufactures goods and knowingly marks them with the trade mark of another person, he is accountable for the profits so made. Thus, if a man brews porter, and puts the name and mark of Guinness upon it, knowing he has no right to that mark, and sells his own manufacture as the manufacture of another person he is liable to account. Even if he did not at first know that there were such persons as Guinness & Co., still, if when he has that knowledge he continues the sale, it makes him accountable to them for the profits obtained by the use of their name.

But if a person, who is not a brewer, applies to an agent for Guinness's porter, and that agent sends him a spurious article under that name, such person is in no default until he is told that the porter he is selling is not that of Guinness; and though Guinness is entitled to an injunction to restrain the future sale of the spurious article, he is not entitled to an account of the profits. In such a case, the Defendant ought to pay the costs and submit, saying, "I have been misled by another [581] person, and I cannot compel you to pay the costs of protecting your property."

This principle has been laid down in many cases, as in *Millington v. Fox* (3 Myl. & Cr. 338). There the Defendants were using the Plaintiffs' trade mark, the profits made were only £6, 10s., and the Defendants submitted to the injunction: after this, the cause was brought to a hearing, and the account was abandoned. Lord Cottenham held that the Plaintiffs were entitled to an injunction, but not to costs.

In *Edelsten v. Edelsten* (1 De Gex, J. & S. 185), the Lord Chancellor laid it down distinctly that "although it is well founded in reason, and also settled by decision, that if A. has acquired property in a trade mark, which is afterwards adopted and used by B., in ignorance of A.'s right, A. is entitled to an injunction, yet he is not entitled to any account of profits or compensation, except in respect of any user by B. after he became aware of the prior ownership."

On looking at the evidence in this case, I find that the Plaintiffs fail in establishing any such knowledge on the part of the Defendants.

Both parties are, therefore, in the wrong. If the Defendants had offered to submit to the injunction and to pay the costs, and the Plaintiffs had afterwards brought the case to a hearing, I should have given the Defendants their costs subsequent to that offer.

I can only grant the injunction, and I can give no costs and no account.

[582] LEARY v. SHOUT. May 27, 1864.

A partnership for ten years dissolved by decree of the Court at the end of three years, the relations between the partners being such that it could not be continued with advantage to either party.

In 1860 the Plaintiff and Defendant entered into partnership as brokers for ten years from January 1861. In March 1863 the Plaintiff made complaints as to the partnership accounts being in arrear, and he threatened, through his solicitors, to take steps to obtain a dissolution.

A violent outbreak took place on the 16th of May 1863, when the Defendant expressed himself towards the Plaintiff in very violent language. The consequence was that no communication had ever since taken place between them except in writing, and the Defendant had refused to resume personal communication with the Plaintiff. Two days after (18th May 1863) the Defendant's solicitor wrote to the Plaintiff's solicitors, stating that, after the angry words on the 16th, it would be unadvisable to attempt to continue the partnership, and proposing a dissolution. The Plaintiff was willing to have a dissolution, but the parties not having been able to agree upon the terms, this bill was filed in September 1863 for a dissolution, and to have the accounts taken. The grounds on which the Plaintiff rested his case were, the quarrel and the refusal of the Defendant to resume personal communication,

and several other acts of the Defendant, the principal of which were as follows:—The Plaintiff, while absent on business, had written instructions to his clerk as to an allowance of £2½ per cent. on some contract. The Defendant cut out this part of the instructions, and wrote opposite it, “an honest broker would at once [583] and is bound, to allow it [the £2½ per cent.] to his employer, and not to a man who has nothing to do with the transaction. I trust no such irregular transaction will be placed before me again.”

The Defendant, also in July 1863, disclosed the contents of one of the Plaintiff's books used by him prior to the partnership, in which he found a sum of £11 carried to profit and loss account. This he suggested belonged to Mr. P., and he informed a mutual friend (Mr. Bateman) of the fact, and instigated him to recover it from the Plaintiff.

The Defendant attributed the quarrel to the Plaintiff, and said that after the filing of the bill, he had, in December 1863, verbally offered to resume personal communication with the Plaintiff, to which the Plaintiff made no reply.

Mr. Selwyn and Mr. Beavan, for the Plaintiff, argued that under the present altered state of circumstances, and the state of feelings and conduct of the parties, it was impossible that the business could be conducted in a mode essential to its success, and that any attempt to make the partners act together for the remainder of the term would be productive of irreparable injury to both. That the partnership ought therefore to be dissolved; *Loscombe v. Russell* (4 Sim. 11); *Smith v. Jeyes* (4 Beav. 503); *Harrison v. Tennant* (21 Beav. 482); *Walney v. Wells* (30 Beav. 56); *Essell v. Hayward* (*Ib.* 158).

Mr. Baggallay and Mr. Rasch, for the Defendant, attributed the altered state of circumstances to the [584] conduct and demeanor of the Plaintiff, and they argued “that no party was entitled to act improperly, and then to say the conduct of the partners, and their feelings towards each other, were such that the partnership could no longer be continued, and that the Court would not allow any person so to act, and thus to take advantage of his own wrong;” *Harrison v. Tennant* (21 Beav. 493).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this partnership must be dissolved.

It is not necessary to go into or seek for an explanation of the reasons which induced these quarrels between the partners; the real fact seems to be (to use the expression of the Defendant's witness, Mr. Bateman) that the Defendant, on the 16th of May, did “turn and tell the Plaintiff his mind,” and that this was done in an extremely offensive manner. He has also imputed dishonesty and made other charges, the impropriety of which he seems to admit, and which the Plaintiff felt acutely. After this discussion both the Plaintiff and the Defendant were convinced that the partnership could not go on, and that it must be dissolved. The Defendant's solicitor wrote to that effect two days after, and this bill was filed in September, only because the parties could not agree on the terms of dissolution.

When I find that this violent species of attack has been made by the Defendant on his partner; that the Defendant has cut out the Plaintiff's instruction to his clerk, and writes against it the statement, that an honest broker would act in a manner opposed to the instructions; and when in addition, I find that the Defendant has communicated to a friend the fact of a balance of £11 having been carried to the profit and loss account, and has asked him to recover it, instead of applying to his partner for an explanation, I think it clear that, in this state of circumstances, the partnership cannot go on with advantage to either party, and that as all the cases cited shew, there must be a dissolution. As it stands, there is a breach between the partners, which is irreparable, and that, in my opinion, was occasioned not by the Plaintiff but by the Defendant, and therefore the passage cited from my judgment in *Harrison v. Tennant* does not apply.

All that I can do is to dissolve the partnership from this day, and to direct the accounts to be taken on the footing of the partnership articles.

[585] LONG v. BOWRING. *June 24, 25, 1864.*

[S. C. 10 L. T. 683; 10 Jur. (N. S.) 668; 12 W. R. 972.]

The Defendant contracted to grant the Plaintiffs an under-lease of property held by him under the C. company, and he covenanted that if the C. company refused to grant a licence for that purpose, he would pay the Plaintiffs £1000 by way of liquidated damages. Held, that the Defendant could not escape a specific performance by refusing to apply for a licence and by paying to the Plaintiffs the £1000.

A. agreed to grant B. a lease, but before he had done so, he mortgaged the property to C. with notice, who in no way contested A.'s right to the lease. Held, that C. was not a proper party to a suit for specific performance.

In January 1862 the Clothworkers' Company agreed to grant a building lease of some property in the City of London for a term of ninety-nine years, when the houses agreed to be built thereon had been erected. The benefit of this agreement was vested in the Defendant Bowring.

Bowring, being desirous of obtaining immediate pos-[586]-session from the tenant, who had still a short unexpired term therein, entered into an agreement, dated the 19th of May 1862, by which it was agreed that the tenant should give up possession to Bowring and surrender his lease; and Bowring (amongst other things) covenanted that he would grant to the Plaintiffs John Pollock Long and Thomas Wilson Long an under-lease of a portion of the premises, when rebuilt (which was to be prior to the 25th of March 1863) for a term of thirty years.

And Bowring covenanted with the Plaintiffs John Pollock Long and Thomas Wilson Long, that if the Clothworkers' Company should refuse to grant a licence to him to under-let the said premises to the Plaintiffs, John Pollock Long and Thomas Wilson Long, "or in case such licence should not be obtained on or before the 24th June 1864, then and in either of such cases," Bowring would, on or before the 24th of July 1864, pay to the Plaintiffs John Pollock Long and Thomas Wilson Long the sum of £1000, "which sum it was thereby mutually agreed between Bowring and John Pollock Long and Thomas Wilson Long should be the damages ascertained and fixed by them for not obtaining such licence, such sum to become a just debt, and to be recoverable in any of Her Majesty's Courts of law, and that Bowring should not have power to dispute such amount, but should be estopped by the agreement from so doing; but, on such payment, John Pollock Long and Thomas Wilson Long, their executors or administrators, were to give up possession, paying a proportionate part of the stipulated rent, "and if not in possession, they should not, after payment of such £1000, require possession of any lease of the said premises in any case."

The tenants surrendered their lease, and gave up pos-[587]-session, and Bowring obtained his lease from the Clothworkers' Company, which, on the 12th of August 1863, he mortgaged by under-lease to Tasker and others for £9000. The mortgagees took with notice of the Plaintiffs' right, and, according to their answer, they "did not claim and never had claimed any right or interest in the premises in priority or opposition to any right, interest or equity which the Plaintiffs had prior to the 12th of August 1863." They said they "were perfectly ready and willing and had always been ready and willing to give effect to" the Plaintiffs' rights against Bowring under the agreement.

The Clothworkers' Company, according to their usual practice, were accustomed to grant a licence to under-let, if applied to for that purpose, but Bowring refused to make any such application, and he insisted that he had a right to refuse to make any such application, and, in lieu thereof, to pay the Plaintiff the penalty of £1000, according to the agreement.

The Plaintiffs filed this bill against Bowring and the mortgagees, praying a specific performance of the agreement of the 19th of May 1862, and that the Defendants might be ordered to make a proper application for a licence to under-let to the Plaintiffs. The bill also prayed an injunction to restrain the Defendants from applying for a licence to under-let in favor of any other person.

Mr. Baggallay and Mr. W. Pearson, for the Plaintiffs.

Mr. Selwyn and Mr. Chitty, for Bowring.

Mr. A. E. Miller, for the mortgagees.

THE MASTER OF THE ROLLS [Sir John Romilly]. On the construction of the agreement and of the [588] clause in it, which has been so much referred to, I am of opinion that, although the lease has not been obtained, the Plaintiffs have a right to a specific performance of the contract. Bowring entered into an agreement with the Longs to grant them an under-lease. If Bowring had so intended, he might have introduced into the agreement a clause to this effect:—"I shall be at liberty to discharge myself from the obligation of the agreement upon payment to the Plaintiff of a sum of £1000." If that had been the meaning of the parties, it would have been easy to express it. But I think that the real meaning of the clause is, not to give Bowring this option, but to give to Long the option whether they would have the agreement specifically enforced, or, in lieu thereof, accept a sum of £1000. Every covenant is to be taken most strongly against the covenantor, in the same way as every grant against the grantor, and accordingly, the clause of this agreement on the part of Bowring is for the benefit of Long. Consider what the rights of the parties would be if this clause were struck out, and Bowring did not apply for a licence. The Plaintiffs might then either apply for the specific performance of the agreement, or might bring an action for damages, but they could not adopt both proceedings. If they proceeded by action at law, the amount of damages to be recovered would be uncertain; but this covenant settles the amount of damages, if the Plaintiff should proceed at law. Nothing is said to the effect that Bowring should not be bound specifically to perform his contract, nor is there anything to disentitle the Plaintiffs to specific performance, unless they choose to accept the £1000. There is no contract on their part that they will accept it, nor is there anything which prevents their insisting on having specific performance of the contract. All that is fixed by this clause is, that if they bring an action for damages the [589] amount to be recovered is £1000, and neither more nor less.

With this explanation let us examine the terms of this covenant. It is a covenant for the benefit of the Plaintiffs, and Bowring is entitled to nothing under it. If the Clothworkers' Company refuse to grant a licence, Bowring covenants to pay the Plaintiffs £1000. The contract then proceeds to say, that on such payment the Plaintiffs are to give up possession. This does not mean that they shall be compelled to receive the £1000, but that if they do, they shall give up possession. It leaves it optional with the Plaintiffs whether they will insist on a specific performance or require damages, and in the latter case they are to have £1000.

I am clearly of opinion that the Plaintiffs are entitled to a decree for specific performance with costs.

Mr. Miller asked for the costs of the mortgagees, observing that the contracting parties ought alone to be made parties to a bill for specific performance; *Tasker v. Small* (3 Myl. & Cr. 63); and that the mortgagees had always been willing to give full effect to the Plaintiffs' rights.

June 25. THE MASTER OF THE ROLLS. I think the mortgagees, not being parties to the contract, are not proper parties to the suit. The statement in their answer shews that the Plaintiffs were not justified in making them Defendants, it was for Bowring to have [590] obtained their concurrence. They make no claim against the Plaintiffs and do not resist their right, and, their mortgage being safe, they are willing to act as the Court may direct. The Plaintiffs must, therefore, pay the mortgagees' costs, and are entitled to have them over against Bowring.

I do not propose to dismiss the bill against the mortgagees, but only to stay all further proceedings against them, they undertaking, at the costs of the parties applying, to execute all proper deeds to give effect to the Plaintiffs' rights.

[590] MEYMOTT v. MEYMOTT (No. 2). June 9, 21, 1864.

The scale of charges allowed by the General Order in bankruptcy for an accountant, and his clerks adopted in taking accounts in Chambers.

The Plaintiff and Defendant had, for seventeen years, carried on the business of solicitors in partnership together, but in 1860 the partnership was dissolved by decree, and the usual partnership accounts were directed to be taken. (See 31 Beav. 445.)

The Chief Clerk, under the 15 & 16 Vict. c. 80, s. 42, appointed an accountant nominated by the parties themselves, to take the accounts, and his charges became liable to taxation by the Taxing Master under the 43d section of that Act.

The accountant accordingly took the accounts, and he carried in a claim for £726, 4s. for his services. This was made up in the following way:—He charged four [591] guineas *per diem* for himself, one and a half guinea for his chief clerk, and one guinea *per diem* for his junior clerk.

The Taxing Master allowed the accountant only three guineas *per diem*, and he reduced the bill accordingly.

The case now came on upon cross-motions to vary the certificate. The evidence as to the usual charges of accountants varied considerably; but the General Order in Bankruptcy of the 19th of May 1855 (24 L. J. Bankruptcy App. xv.), directs that the bills of costs of accountants, &c., shall be taxed according to the schedule, which is as follows:—

Accountants' charges.

For preparing balance-sheet, investigating accounts, &c.,
principal's time per day of eight hours, including
necessary affidavit

Chief clerk's time

Other clerk's time per day of eight hours

£2	2	0
1	1	0
0	10	6
	to	
0	15	0

Mr. Baggallay and Mr. Bagshawe, for the accountant

Mr. Southgate and Mr. W. Forster, for the Defendant.

Mr. Wickens, for the Plaintiff.

Mr. Baggallay, in reply.

June 21. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on this motion is, what is proper to be [592] allowed to an accountant employed in Chambers to take the account between the parties.

The Plaintiff and the Defendant for many years carried on the business of solicitors in partnership. They kept their books of account with regularity, but they never settled any account. A decree was made for the dissolution of partnership, and a gentleman, selected by the parties themselves, was employed to take the partnership accounts. When the Chief Clerk appoints an accountant, he always previously makes an arrangement with him as to the amount of his remuneration; but when the accountant is employed by the parties themselves, the Chief Clerk never interferes, but allows them to make their own terms. In this case the accountant was, in August 1860, instructed to take accounts. He made his first report in April 1861, his second report in November 1861, and his third subsequently, and he has brought in his charges, amounting to £726, 4s., and these and the costs of the order have been taxed by the Master at £731, 18s. 10d. To this finding objections have been taken on both sides.

The accountant objects that £42, 2s. have been taxed off by the Master, who has allowed him £3, 3s. instead of £4, 4s. per day; and he also claims to be allowed interest to the amount of £57, 16s.

On the other hand the Defendant objects to the amount allowed by the Master on several grounds: First, he says that the charges allowed are too great, for that in bankruptcy £2, 2s. a day are allowed to the accountant himself, £1, 1s. a day

for his first clerk, and 15s. a day for the other clerks. These charges are settled by an order of the Lord Chancellor in Bankruptcy, and although they are not settled by any order [593] of the Court of Chancery, I think it is a scale which, by analogy, ought to be followed.

Secondly. The Defendant objects that the work was unnecessary; that the accountant has gone into accounts which were never asked for or desired; that he proceeded at first on an erroneous principle, and when he found it to be erroneous, he commenced again on another system; that he has divided the matter into seventeen different accounts, which division was useless; that he has made out the accounts for each year, which was also useless; that he has examined into the accuracy of bills of costs long since settled and paid by the clients; that, in short, he has made work for himself, which was of no use to the parties, but for which he now claims to be entitled to charge. It is also argued that it could not require thirteen days of the time of the accountant, 134 days of that of his chief clerk, and 428 days of his junior clerk, to take the common accounts of a firm of solicitors which had existed seventeen years, and whose books have been regularly kept.

The difficulty which I felt at the hearing of these motions, and which I still feel, is this:—That it is impossible for me to decide this point without going into the accounts themselves, and that if I were induced to believe what is alleged by the Defendant, it would be impossible for me to determine the extent of overcharge without going through the accounts again, which could only be perfectly done by employing another accountant to go through the books, and this is what neither party would desire. I am, therefore, compelled to disallow these objections.

With respect to the amount of remuneration: I am of opinion that it is proper that the Court of Chancery [594] should follow the rule in bankruptcy, and that the accountant's charges must be moderated. Accordingly, I must allow £2, 2s. per day to the accountant for the thirteen days during which he was himself employed, £1, 1s. per day to his chief clerk for 134 days, and 15s. per day to his junior clerk for 428 days.

I do not, however, intend to apply this rule in the case of official managers and liquidators employed in winding up companies.

As to the interest, it cannot be allowed; each party will pay his own costs.

NOTE.—See *Re Page*, 32 Beav. 487, which is distinguishable.

[595] GREGORY, on behalf, &c., v. PATCHETT. June 10, 11, 13, July 26, 1864.

Shareholders in a company cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company, watching the results: and if it be favourable and profitable to themselves, to abide by it and insist on its validity; but if it prove unfavourable and disastrous, then to institute proceedings to set it aside. Therefore, where shareholders complained of acts *ultra vires*, which they had acquiesced in for six years, relief was refused.

In matters strictly relating to the internal management of a company this Court, though it should come to the conclusion that the course adopted is not warranted by the terms of the instrument, will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of.

But if the measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, then the Court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so whether an appeal has or has not been made by the minority to the shareholders generally.

The Court will interfere to prevent the directors of a railway company, not having powers so to do, from embarking the funds of the company in carrying on a brewery or a steamboat company, and from speculating in the purchase or sale of stock, and from transferring their business to another company. But it will not interfere to prevent a call not required, or stop a dividend not justified by the

pecuniary condition of the company, though it will prevent the illegal apportionment of the dividends amongst the shareholders.

Where the Court interferes by injunction to prevent the performance, by the directors of a company, of an act *ultra vires*, it will also, to the extent of its power, redress the act performed and give relief to the persons injured thereby, although it is not called upon to dissolve the company or wind up its affairs.

The only available property of a company was transferred to two shareholders in lieu of their shares, and the company was thereby practically put an end to, and the debts were thrown on the remaining shareholders. This was sanctioned by a majority of the shareholders at a general meeting. Held, that the majority could not bind the minority in such a transaction, and it was set aside.

A company held, under the circumstances, not a necessary party to a suit to impeach acts of its directors.

The object of this suit and the facts of this case are fully stated in the judgment of the Court. The case was argued at the hearing by

THE ATTORNEY-GENERAL (Sir R. Palmer), Mr. Southgate and Mr. Osborne Morgan, for the Plaintiffs, and by

[596] Mr. Selwyn, Mr. Kay, Mr. Burnie and Mr. Casson, for the Defendants.

The following authorities were referred to:—*Foss v. Harbottle* (2 Hare, 461); *Mozley v. Alston* (1 Phillips, 790); *Lord v. The Copper Miners' Company* (1 Hall & Twells, 85); *Hodgkinson v. The National, &c., Company* (26 Beav. 473); *Clegg v. Edmondson* (3 Jur. (N. S.) 299); *Edwards v. Shrewsbury Railway Company* (2 De G. & S. 537); *Bailey v. Birkenhead, &c., Railway Company* (12 Beav. 433); *Kent v. Jackson* (14 Beav. 367; 2 De G. M. & G. 49); *Re Era Insurance Company* (1 De G. J. & S. 29); *Graham v. Birkenhead, &c., Railway Company* (2 Mac. & G. 146, and 12 Beav. 460); *Norway v. Rowe* (19 Ves. 144); *Prendergast v. Turton* (1 Y. & C. C. C. 98); *Hoare's case* (30 Beav. 225); 7 & 8 Vict. c. 110, s. 25, r. 1, 2, 3; *The Exeter, &c., Railway Company v. Buller* (5 Railw. Cas. 211); *Troup's case* (29 Beav. 355); *Ernest v. Nicholls* (6 H. of L. Cas. 401); *Morgan's case* (1 Mac. & G. 225); *Bennett's case* (18 Beav. 339; 5 De G. M. & G. 284); *Aberdeen Railway Company v. Blaikie* (1 Macq. 461); *Bentley v. Craven* (18 Beav. 75); *Benson v. Heathorne* (1 Y. & C. C. C. 326, and 2 Coll. 309); *Evans v. Coventry* (8 De G. M. & G. 835); *Stanhope's case* (3 De G. & S. 198); *Re South Essex Gas Company* (Johns. 480); *Ex parte Baker* (1 Drew. & S. 55); *Teversham v. Cameron Company* (3 De G. & S. 296); *Foster v. Oxford, &c., Railway Company* (13 Com. B. 300); *Ritchie v. Couper* (28 Beav. 344); *Ex parte Hill* (32 L. J. (Ch.) 154); *Richmond's Executors' case* (3 De G. & S. 96); *Re Phoenix Life Insurance Company* (2 Johns. & H. 441); Lindley on [597] Partnership (pp. 754, 755, 763); *Stupart v. Arrowsmith* (3 Smale & G. 176); *Clements v. Bowes* (1 Drew. 684); *Inderwick v. Snell* (2 Mac. & G. 216).

July 26. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit to annul certain proceedings of a company intituled the "North Devon Shipping Company," on the ground that they were in excess of the powers contained in their deed of incorporation, so that the majority of the shareholders could not bind the minority, and, if necessary for that purpose, to dissolve and wind up the company.

The suit is instituted by the Plaintiffs "on behalf of themselves and all others the shareholders of the North Devon Shipping Company, except such of the shareholders therein as are Defendants," against the directors and the representatives of two deceased directors, praying that the directors and the estates of the deceased directors may be liable to replace the funds of the company lost by reason of the acts complained of, and that all proper and necessary directions may be given for this purpose.

The defence is that the matters in question are such as belong to the internal management of the company, which concern the shareholders alone, and that these were, in fact, sanctioned by the general body of the shareholders, at meetings duly convened for that purpose, and that consequently, upon the principle of *Foss v. Harbottle* (2 Hare, 461), and of that class of cases, the bill must be dismissed.

[598] The transactions may be divided into two sets, those which occurred in 1855, and those which took place in 1860 and 1861. The former relates to the purchase of 198 shares by the company, and the latter relate to the sale of three ships

of the company. In order to explain this, a short outline of the facts becomes necessary.

The company was established at Barnstaple in August 1852, and the deed of settlement was executed on the 31st of that month. The object of the company was, "the building and equipping of ships or vessels adapted for and to be employed by the company in the foreign or coasting trade, in the import, export and carrying of goods, wares and merchandize, either as general or chartered ships and vessels, or otherwise, or to be sold either before or after having been so employed." The company had been provisionally registered, and it was, after the date of the deed, duly and completely registered under the Act of 1844 (7 & 8 Vict. c. 110). The office and place of business was at Barnstaple, and the affairs of the company were there conducted, and the meetings of the company were there held.

The first transaction complained of began in the year 1854. By the 17th clause of the deed of settlement the directors had authority to borrow any sum not exceeding £10,000, provided this were sanctioned by two meetings of the company, which had been done by meetings in April and May 1853. In the beginning of October 1854 the company were in this position:—They had borrowed £10,000, and they were the owners of three ships, which they had caused to be built, the names of which were, the "Lady Elrington," the "Sea Snake" and the "John Norman." John Norman, after whom the last-mentioned ship was named, was a shipowner [590] residing in Yorkshire, he was a partner in a firm at Liverpool, and was the manager of this company.

At a meeting of this company, duly convened and held on the 19th October 1854, the first Defendant, John Patchett, who was a director, read to the shareholders a statement signed by the four other directors, which, after referring to the understanding that the directory should be established in North Devon, while the management of all practical affairs connected with building and sailing vessels would be vested in the manager (Mr. Norman), who was resident in Liverpool, proceeded thus: "It has however been thought, for some time past, by Mr. Norman, and he has frequently conveyed to us the opinion of the shareholders of the north of England, that the business of a company such as this cannot be carried on successfully while the manager and board of directors are resident so far apart, and he had therefore strongly urged the removal of the governing board to Liverpool. In accomplishing this change, it may be anticipated that many shareholders, who have taken an interest in the company on the condition referred to, would not be willing to retain their shares. To meet such cases, Mr. Norman offers to purchase the shares of every proprietor resident in North Devon who may be desirous of selling at the amount paid up, and £15 per cent. interest per annum on the various payments calculated from the dates when the respective calls were due. As it appears that the removal of the directors is considered a desirable object by the majority of the shareholders, we should be sorry to throw obstacles to the general benefit. We therefore propose to resign our office immediately, and to avail ourselves of the offer referred to, by disposing of our interest to the company. On the completion of the [600] arrangement we have entered into with Mr. Norman, you will again be convened to elect your directors."

This statement was printed and circulated amongst the shareholders, and the meeting was adjourned till the 11th November 1854, when the proposal was adopted and the business transferred to Liverpool. Under this arrangement, 223 shares were sold by retiring shareholders, 198 to Mr. John Norman, 15 to Mr. Samuel Smith, and 10 to Mr. Thomas Richard Dawson. Of these shares, 198 were bought by the directors for and on behalf of the company. The shares were not taken, as according to the articles of the deed of settlement they ought to have been, at the price at which they could be bought in the market, but at an estimated value, calculated on the basis of the sum actually paid by the shareholders in respect of them. And in order to pay for them, the company being then in debt to the full extent of £10,000, they obtained the money by this device:—Norman drew a bill for £3000 on the Defendants Patchett and Gardener, which was accepted by them; the bill was then discounted, and the proceeds applied in payment of the 198 shares bought by the company through the instrumentality of Mr. Norman in this manner.

This transaction is complained of as being *ultra vires* of the company, and it is contended that, according to the 97th rule of the articles of incorporation, the transfer of shares must be not only according to the form provided by the directors and the Joint Stock Companies Act, but that it was coupled with this proviso:—that no sale should take place, except after an offer to the board of directors “at the current market value thereof at the time of such offer,” and that the directors were to have [601] the option to purchase “at the market price for the time.”

The Plaintiffs complain, not only that the 198 shares were irregularly bought up on behalf of the company, at more than their real value or their market price, but they say that the real transaction was, by arrangement, to effect a transfer of the business to Liverpool, and that accordingly, on the 11th November 1854, the Liverpool directors were elected and the old directors retired, in consideration of which their shares were agreed to be taken at an estimate far exceeding the real price or market value of the shares, which was nominal, and that the shares were paid for by means of £3000 borrowed from the bankers of the company by discounting the bill I have mentioned, drawn by Norman on Patchett and Gardener, which bill, after repeated renewals, was finally paid out of the assets of the company. This, it is contended, is only another mode of borrowing £3000, while, at this time, the company had already borrowed £10,000, and that, therefore, they had no power to exceed that amount, and that on these grounds the purchase of the 198 shares must be set aside, and that the directors who then retired must repay the money received by them for their shares, and also pay all the subsequent calls, and be subject to the existing liabilities of the company.

I think it unnecessary to examine so minutely into the details and character of this transaction as I must have done had the matter been recent, because I am satisfied, on a perusal of the evidence, that the whole matter was disclosed to the shareholders in the first place by the letter of the 11th of October 1854, from the four directors, Avery, King, Edgar and Gilbert, to the shareholders, before it was carried into effect, and [602] that it was afterwards sanctioned by them. The balance-sheet of 29th of September 1855 was circulated amongst the shareholders; it contained a distinct entry of the purchase of the 198 shares explanatory of the transaction, and this was read to the general meeting of the 10th of October 1855. Even on the assumption that this transaction was *ultra vires* of the company, and that it could have been impeached by the minority of the shareholders dissenting therefrom, if they had come in reasonable time, I am of opinion that as it was known to the shareholders and acquiesced in by them at that time, it cannot now, after six years have elapsed, be contested by the Plaintiffs, who acquiesced in that arrangement.

Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result: if it be favorable and profitable to themselves to abide by it and insist on its validity; but if it prove unfavorable and disastrous, then to institute proceedings to set it aside.

The evidence satisfies me that the Plaintiffs knew of, and assented to, the arrangement in question, or at least that they did not dissent from it, and I cannot allow them now to contest its validity. Besides this, it may be observed that the 25 remaining shares, of the 223 shares then sold, were taken by *bond fide* holders at the same price as that given by the company for the 198.

There is a minor matter complained of, which is, I think, covered by the observation I have just made. The Plaintiffs complain of the purchase of a ship called the “Norwood.” They say that the object of the company was to build and equip ships, and not to buy ships [603] already built and equipped, and that in this case the “Norwood,” which was an American ship, was bought for £10,000 from a person of the name of Webb, the payment for which was effected, in the first place, by a deposit of £500 drawn from the balance at the bankers, and by three other bills drawn by the directors and two others accepted by them. I consider it unnecessary to discuss the question argued on the construction of the deed of settlement, and whether the directors could properly, under an authority to “build and equip ships,” buy a vessel already built, because I think that this transaction was also fully disclosed by the balance-sheet of the 29th September 1855, and that it was confirmed by the general

meeting of the 10th October 1855. In addition to which, at this meeting, three of the Plaintiffs were present, either in person or represented by proxy, and that as they have taken no step since then till the filing of the bill to contest this transaction, they cannot be allowed to do so now. In truth, it is obvious, that they never intended to contest it, and that had it not been for the proceedings and transaction of 1860 and 1861 this bill would never have been filed.

These transactions were shortly as follows:—In August 1860 a circular-letter was issued calling a meeting for the 29th August 1860, by which Mr. Norman proposed to concentrate all his shares in the ship "John Norman," he taking one-half of her, and the other half to remain in the company. Upon intimation of this, a meeting of the Barnstaple shareholders was convened for 24th August 1860, at which they came to two resolutions—first, that the proposal contained in Mr. Norman's circular-letter should be refused; and, secondly, that it would be advisable to divide the interests of the proprietors, by resolving the shares of the company into parts or shares of vessels, and allocating one or more [604] ships to the Barnstaple proprietors, and two or more ships to the Liverpool proprietors, or the like, as might be consistent with the valuation of the property.

Those resolutions were communicated to and read at the meeting of the company held on the 29th August 1860, at the company's offices at Liverpool, when, notwithstanding the dissent of the Barnstaple shareholders, the following resolution was adopted by the shareholders then present:—"That this meeting agrees that the ship "John Norman" be valued, and that Mr. Norman finding a person to take a half, he be allowed to have the other half transferred to him, he paying his proportion of the debts of the company relative to the whole of the vessels, so far as shares are concerned, provided this arrangement be completed in ten days on Mr. Norman's part." Upon this a valuation was made of the ship "John Norman," which was valued at £4200, and the ship was transferred by the directors to Mr. Norman, who was allowed the price of 125 shares held by him as part of the purchase-money, not the price they would have brought in the market, but the full cost that he had paid to the company in respect of these shares. This transfer took place on the 30th of September 1860. On the 27th December 1860 a meeting of the company was held at the requisition of the directors to consider the proposal of Mr. Patchett to a similar effect, which is termed "a concentration of his shares in the ships the 'Sea Snake' and the 'Lady Elrington.'" Finally, at a subsequent general meeting of the company, held on the 14th February 1861, a resolution approving the transaction was passed, and early in March following the transfer was made, and Mr. Patchett has since taken possession of the ships and employed them in his own business and as his own property.

[605] The effect of these transactions was, as far as I can judge from the evidence before me, to hand over all the property of the company, which, in truth, consists of nothing but these three ships, to Mr. Norman and Mr. Patchett, and in addition to this, to relieve them from all further liability in respect of the company. The consequences were soon apparent; the company had got rid of its property but not of its debts, and in April 1861 a call of £14 per share was made on the remaining shareholders, and thereupon, in August 1861, this bill was filed.

The question I have to consider is, whether this is a case in which the majority can bind the minority. On the part of the Defendants it is contended that this was a matter fully within the scope and power of the company, but that even if it were not it is only a matter which can be complained of or a remedy sought in respect of it in the company itself, or, at least, only after recourse had been had to the shareholders by bringing the matter before the consideration of a general meeting. A distinction also is taken between a proceeding to impeach such a transaction under a winding-up order or a decree for dissolution, and a suit which is confined to seeking relief in respect of the transaction complained of. I think it unnecessary to consider the extent and validity of the last-mentioned objection, because, in truth, this bill prays a dissolution of the company, and this relief is sought at the Bar, if necessary for this purpose, and if the circumstances of the case warrant the Court in making such a decree.

I delayed my judgment that I might have an opportunity of examining the

various cases on this subject, which are very numerous. I think the result of them may be expressed something to this effect, but as [606] much depends on the proper construction of the instrument under which the parties act, and the provisions by which they are bound, coupled with the facts of each particular case, it is scarcely possible to lay down any definite rule, or to reduce the propositions to precise and exact limits:—In matters strictly relating to the internal management of a company, even though the Court should come to the conclusion that the course adopted is not warranted by the terms of the instrument, this Court will not interfere, even though the minority should have summoned a meeting of all the shareholders, and the majority should have persisted in the course complained of. But if the measures adopted are plainly beyond the powers of the company, and are inconsistent with the objects for which the company was constituted, then the Court will, at the instance of the minority, interpose to prevent the performance of the act complained of, and it will do so, whether an appeal has or has not been made by the minority to the shareholders generally.

The difficulty in this case is, to define the limits of deviation which will justify the interference of this Court. It is very easy to point out many cases in which the right to interfere is unquestionable, as if the director of a railway company should embark the funds of the company in carrying on a brewery or a steamboat company, or speculate in the purchase or sale of stock, or where, as in *Beman v. Rufford* (1 Sim. (N. S.) 550), the directors proposed to transfer the whole business to another company. But, on the other hand, the Court would not interfere to prevent a call not required, or stop a dividend not justified by the pecuniary condition of the company. But so close are limits of the jurisdiction exercised by the Court that it will, as in the case of *Henry v. The Great [607] Northern Railway Company* (4 Kay & Johns. 1), step in to prevent the illegal apportionment of dividends amongst the shareholders of the company. Each case must in truth depend upon the powers under which the directors act, and the peculiar facts proved by the evidence.

I think also that is established, both by principle and authority, that when the Court interferes by injunction to prevent the performance of the acts, it will also, to the extent of its power, redress the act performed and give relief to the persons injured thereby, although it be not called upon to dissolve the company or wind up its affairs.

In this case, a careful examination of the evidence before me satisfies me that this transaction, relating to the sale of three ships, is one so foreign to the objects of the company, so far exceeding the powers intrusted to the directors, that it falls within that class of cases which justify and require the intervention of this Court. I think, on the evidence before me, that the transaction complained of was practically putting an end to the company and giving the little available property of which the company was possessed to some of its shareholders and throwing the debts of the company on the remainder; and this was accomplished by a narrow majority, composed in a great measure of the persons who were themselves interested in the decision. I am of opinion that the transaction was *ultra vires* of the company, and that it was a matter in which the majority could not bind the minority.

Having come to this conclusion it is not necessary for me to consider a matter which was discussed at [608] some length before me, whether the alteration of the rules of the company in 1856 was valid, on the validity of which depends whether the meeting of the company, which passed the resolution of which the Defendants claim the benefit, was properly summoned and duly constituted.

It is necessary, however, to advert to an objection taken to the frame of the suit. It was much insisted on in argument that this was an incorporated company under the Act in force when it was registered, and that it was not represented on this occasion, for that the company, as such, was not made a party and did not appear; nay more, that this act, if an injury at all, was an injury done to the company, and that the company alone, in its corporate character, could institute a suit to impeach it. This objection does not appear to me to have any weight. In the proper and usual sense of the term this company is not a corporation, though for certain purposes, by virtue of the Act of 1844, it is so, and if I were to allow this objection to prevail, it would follow that a majority could inflict any amount of wrong upon the minority,

who could never obtain the sanction of the shareholders to institute a suit in the name of the company; and if it be confined to the fact that the name of the company is not added as a Defendant, it is a mere technical objection, which, if acceded to, would only delay the decree for a short time, and allow the present Defendants to set up the same defence under a different title. The company is, in fact, put an end to by the act of the directors, practically it is in the course of winding up, and the only thing that remains to be done is, the collection from the persons liable the money necessary for payment of the debts due.

The result is that, in my opinion, the sale of the three [609] ships was void, and that the value thereof must be made good to the company by Norman or his estate and by Patchett.

I am also of opinion that the proper decree to make is this:—To declare the company to be dissolved, and to direct the affairs of it to be wound up in the ordinary manner. Under that decree, various other matters complained of by the bill may be investigated, which would not properly, if they stood alone, justify the interference of this Court: that is, whether any one director was entitled to derive a personal advantage to himself, by supplying the ships and deriving a profit for so doing, and also for a commission on contracts and the like. Respecting these, I express no opinion whether they would have been entitled so to do under the terms of the deed, but respecting which it appears to me that it was known to all the shareholders from the beginning, and acquiesced in by them. I shall give no costs of the suit, for as to the earliest transaction, I am of opinion that the suit fails; I give relief only on the second branch, and set off the one against the other. I will make a decree declaring the company dissolved, and an order to wind up the company in the usual way, and I will also make a declaration that the sale of the three ships was void, and that the estates of Norman and the Defendant Patchett are liable to make good to the company the value of the ships respectively taken by them, and also direct the accounts necessary for the purpose of carrying that into effect.

[610] WOOD v. DREW. June 25, 1864.

A testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children. And after the expiration of any of the leases, he directed his trustees to convey to his daughter and her children one or more of his five freehold houses of equal annual value, or as near as could be, to the expired leasehold. Held, that the devise was neither invalid for remoteness or uncertainty.

The testator possessed five leasehold and five freehold public-houses besides other property. By his will, dated in 1806, he bequeathed the five leasehold public-houses in trust for his daughter Mary Wood for life, and after her decease, for her children equally, during the residue of the term therein.

And from and after the expiration of any or either and of every the lease and leases whereby the five public-houses last mentioned were held by the testator, then he thereby directed his trustees, *at the request*, costs and charges of his daughter Mary Wood or her children, to convey, limit and assure unto his daughter for her life, with remainder to her children and their heirs, equally as tenants in common, one or more of his five freehold public-houses, being part of the residue of the testator's estate intended to be thereafter devised for the purposes of that his will, so that the house or houses, so to be limited, should be of equal amount or annual value, as near as could be, but not exceeding the annual rent or value, of any such leasehold public-house the term in which should be so expired, and that in case the annual value of such public-house or houses proposed to be limited to the testator's daughter or her children should exceed the annual value of any such leasehold public-house so expired, then that the difference in value should be paid by his daughter or her children to his trustees, to be applied in discharge or part discharge of the annuities thereafter mentioned, or secured by way of rent-charge to his trustees and [611] their heirs upon the trusts of his will thereafter mentioned.

The testator afterwards devised the residue of his real and personal estate to trustees, upon trust to pay certain annuities, "and upon further trust, that they should stand possessed of his five freehold public-houses, with the cottages thereinbefore mentioned, upon trust to limit and convey the same, or such of them as might be necessary, unto his daughter Mary Wood and her children, at the time or respective times thereinbefore mentioned for that purpose and thereinbefore stated, and that, discharged from the said annuities, or any or either of them, and in the meantime and until such conveyance or limitations so made, to stand possessed of the five public-houses with the cottages, and of all other his real and personal estates and effects, for the sole use of his son William Martin Carter, his heirs, &c., subject nevertheless as thereinbefore mentioned."

The testator died in 1808.

In 1812 the lease of one of the five leasehold public-houses expired, and thereupon the trustees conveyed one of the freehold public-houses to Mary Wood and her children.

Mary Wood died in 1851, and in 1862 the lease of the other four leasehold public-houses expired. This suit was instituted in 1862 by the children of Mary Wood against the representatives of the trustee and of William Martin Carter, to compel a conveyance of some of the freehold public-houses of a value equal to or greater than the four leasehold public-houses of which the lease had lately expired.

[612] THE ATTORNEY-GENERAL (Sir R. Palmer), Mr. Selwyn and Mr. Jessel, for the Plaintiffs. First, this gift is not void for remoteness; for remoteness is where the persons entitled are not ascertained within legal limits of time, or where the estate cannot, within that period, be freely disposed of. Neither of these exist here; the gift is to the daughter, with remainder to her children, and the estate is, in substance, limited to A. for fifty-four years, with remainder to B., which is a perfectly good limitation. The postponement of the substitution for so many years forms no objection to the devise. *Walsh v. The Secretary of State of India* (30 Beav. 312, and 10 H. of L. Cas. 367) was a much stronger case, for there the covenant might not have been broken for centuries, and yet it was held valid. Secondly, as to the uncertainty, the value of the substituted freehold must be ascertained, and the excess over the value of the expired leasehold will become a charge upon the property until paid by the children. If there be any doubt as to which of the freeholds are to be taken, the children have a right of election. (Rolles Ab. (Election).)

Mr. Bovill and Mr. Parke, in the same interest, cited *Hobson v. Blackburn* (1 Myl. & K. 571).

Mr. Baggallay and Mr. Druce, for the heir at law of the surviving trustee and of the residuary devisee, and Mr. Hobhouse, in the same interest. The devise of the freeholds is void both for remoteness and uncertainty. The rule of law is clearly laid down by Lord Langdale in *Curtis v. Lukin* (5 Beav. 147): "A gift is too remote unless, according to the intention of the testator, some person must necessarily be in existence, with legal power to dispose of the property within the period limited by the rules of law;" and "a gift must not only vest within the [613] time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, otherwise the gift will be void." Neither of these requirements exists in the present case.

Here the persons are ascertained, but the ownership of the property cannot be determined until the expiration of the leases, which may be beyond the period allowed by the rule against perpetuities. It is evident that, until the expiration of the lease, no one can tell which of the freeholds are to be conveyed to the sister and her children, and which belong to the residuary legatee; and until then no one can deal with these freeholds. Again, the conveyance is only to be made at the "request" of the daughter and children; this is a condition precedent, and they might all have been dead at the expiration of the leases; *Greenwood v. Roberts* (15 Beav. 92); *Storrs v. Benbow* (3 De G. M. & G. 390); *Oddie v. Brown* (4 De G. & J. 186, 197).

As to uncertainty: it does not appear what the interests of the parties are, or whether the value is to be ascertained at the death of the testator or in 1862, or to which of the freehold houses the clause for shifting the estate is to apply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this is a perfectly good devise.

The objection is that the gift is too remote: The persons however who are to take are all ascertained, they are Mary Wood and her children, and therefore are persons who were all either living at the testator's [614] death, or who would be ascertained at the death of the tenant for life. Then it is said that if you cannot ascertain accurately the interests of the parties in the subject-matter within a life or lives in being and twenty-one years afterwards, the whole gift fails, and *Curtis v. Lukin* (5 Beav. 147) is cited for the purpose of shewing this. But the error in this reasoning lies in this: that it is not a question of remoteness at all, but a question of uncertainty; it amounts to this, that if you cannot ascertain the amount of a gift, you cannot carry it into effect, though persons to take are ascertained and are *in esse*. It is necessary to distinguish between remoteness and uncertainty.

If there be any objection to this bequest, it arises from uncertainty, and this objection I proceed to consider:—First. It is argued that the daughter and children must make the request, and that this is a condition precedent. I do not think it is; it certainly is not so in terms: the direction is, to convey “at the request, costs and charges of the testator’s daughter Mary Wood or her children.” The request to convey is no more a condition precedent than the payment of the costs. It merely means this, that the trustees are not to be guilty of a breach of trust if they do not convey without being asked.

Then it is said that it is uncertain, because the trustees are to convey “one or more” of the freehold houses of nearly equal value, and the difference is to be paid by the daughter and children. But there is no more uncertainty in this than in the case of a partition or exchange, where the lots are unequal in value; the difference, which is called “owelty of partition,” or of exchange, is a charge on the more valuable [615] lot in favour of that of less value. I see no difficulty in ascertaining the amount. If the testator had directed that property producing a certain sum a year should be conveyed to his daughter for life, with remainder to her children in fee-simple there would be no difficulty. It is a mere question of the value of the estate, and it comes strictly within the rule that that is certain which can be rendered certain. Here the annual value of the leaseholds is to be ascertained at end of the lease, and freeholds of equal value are to be conveyed. There is no more difficulty than if a testator, who had entered into a covenant which might become broken at the end of sixty years, devised a farm to make good that covenant.

I am of opinion this is a good devise and one which must be carried into effect.

I am of opinion, on the form of this will, that it lies in the discretion and power of the trustee to carry into effect this trust in the manner most for the interests of all parties, and that they may select the freehold houses to be conveyed. If the parties do not agree, the Court must do it.

A question arose as to how the annual rent or value was to be estimated.

June 24. THE MASTER OF THE ROLLS. I think that the annual value of the leasehold public-houses means the amount of rent paid for them by the tenants at rack rent, and consequently that the ground-rent paid to the landlord, freeholder or original lessor is not to be deducted.

[616] FOWLER v. FOWLER. June 24, 1864.

[S. C. 33 L. J. Ch. 674; 10 L. T. 682; 10 Jur. (N. S.) 648. Followed, *In re Rigley's Trusts*, 1866, 36 L. J. Ch. 149. See *In re Williams*, 1877, 5 Ch. D. 737.]

Bequest of £500, upon the permanent trust to appropriate the income in the maintenance of the testator’s family graves, and to pay the “surplus” to the Rector of B. for the time being. Held, that the first trust was void as a perpetuity, and that the second was void for uncertainty.

The Rev. William Fowler died in 1862. By his will, he directed his executors to invest the sum of £500 sterling in Government securities, “upon the permanent trust of appropriating the income in or towards the maintenance in good order of the graves and gravestones, with the iron railing then inclosing the graves, in Baldock church-

yard, and of his late dear wife, her parents Mr. and Mrs. Merry, and her uncle Mr. Trustram, and also the graves of his grandmother Mary Fowler, of her father Mr. Ellis, and her daughter, and then to pay the surplus of such yearly income to the Rector of Baldock for the time being for his own use." The testator bequeathed the residue of his personal estate to the Plaintiff Jane Fowler for her life with remainder over.

Jane Fowler and another instituted this suit against the executors and the Rector of Baldock, stating that they were advised that the trusts declared of the £500 for the maintenance of the graves were void, and that the trusts for the benefit of the rector failed. The bill prayed that the rights of the parties might be declared.

Mr. C. S. Perceval, for the Plaintiffs. The trust for the maintenance of the graves is not a charitable trust; *Lloyd v. Lloyd* (2 Sim. (N. S.) 264). It is a perpetuity, and therefore void; *Richard v. Robson* (31 Beav. 244). Secondly, the trust of the surplus is void for uncertainty, for it is impossible to [617] ascertain what portion would be necessary for the first purpose, and therefore equally impossible to determine what is the surplus. In *Chapman v. Brown* (6 Ves. 404) there was a trust in a will for building a chapel, which was void, and the "overplus" was given to valid charitable uses; it was held that the latter gift failed, as being too vague and indefinite. This was followed in *The Attorney-General v. Hinzman* (2 Jac. & W. 270), where there was a void gift to a school, and the residue to the poor. So in *Limbrey v. Gurr* (6 Madd. 151), it was held that where a residue is given to a valid purpose, it will fail with the prior void purpose, if not capable of being ascertained except by the actual execution of that purpose. So in *Cramp v. Playfoot* (4 Kay & J. 479).

Mr. Roberts, in the same interest, argued that the gift to the rector for all time was void as a perpetuity, not being a charitable gift.

Mr. Tudor, for the Rector of Baldock, admitted that the first trust was void; but he distinguished this from the cases cited, arguing that it was easy to ascertain for what annual sum the tombs might be kept in proper repair. He relied on *Mitford v. Reynolds* (16 Sim. 105, and 1 Phil. 185), in which a testator directed the purchase of a piece of land, and the erection of a monument thereon; and he gave "the remainder of his property" to the Government of Bengal for charity. It was held that, if the first gift was void, still that the second would be valid, as the sum necessary for the first was capable of being ascertained; and it was referred to the Master to inquire what sum would be reasonably required for the purpose of carrying into effect the directions of the testator. [618] He argued that the same might be done in the present case.

Mr. Perceval, in reply.

June 24. THE MASTER OF THE ROLLS [Sir John Romilly]. It is contended that this bequest is altogether void; and the cases which were referred to on the subject seem to establish this proposition:—That if a sum of money be given, a part of which is to be employed for one purpose and the remainder for another, and the first cannot be ascertained, the whole fails. It might originally have been supposed that the residue of a particular specified sum might have been put on the same principle as the residue of an estate; where what is not, or cannot be, applied for the primary object, goes to augment the secondary object, that is, the particular residue subsequently disposed of. But the contrary seems to be quite settled by *Chapman v. Brown* (6 Ves. 404), determined by Sir William Grant, and followed by *Attorney-General v. Hinzman* (2 Jac. & Cr. 270); *Cramp v. Playfoot* (4 K. & J. 479), and *Limbrey v. Gurr* (6 Madd. 151).

The case cited on the opposite side is *Mitford v. Reynolds* (16 Sim. 105 and 1 Phil. 185), where Lord Lyndhurst directed an inquiry as to the necessary sum, and the Master having found a specific sum, it was referred back again to the Master; but Lord Lyndhurst thereby intimated his opinion that he would have acted on the Master's report if the amount could have been ascertained. The [619] Master found that the owner of the land would not sell it, and that it was impossible to ascertain what amount was necessary; thereupon Sir L. Shadwell determined that it fell into the general residue. That case therefore does not, in its ultimate decision, mitigate against the other decisions, and Lord Lyndhurst's was not acted on.

I think I am bound by the cases to hold that the gift for repairing the tombs

for ever is void, being a perpetuity ; and I do not know how to ascertain what would be required for that purpose. I must, therefore, contrary to my first impression, hold that the whole gift is void, and that the £500 falls into the general residue of the estate.

[619] AMIS v. WITT. Nov. 16, 1863.

[See *Hewitt v. Kaye*, 1868, L. R. 6 Eq. 200. Followed, *Moore v. Moore*, 1874, L. R. 18 Eq. 474. See *In re Farman*, 1887, 57 L. J. Ch. 638. Held, unsatisfactory for want of details, *In re Dillon*, 1890, 44 Ch. D. 79. For previous proceedings, see S. C. 1 B. & S. 109 ; 30 L. J. Q. B. 318 ; 7 Jur. (N. S.) 499 ; 4 L. T. 283 ; 9 W. R. 691.]

Money due on a policy and on a banker's deposit note held to pass as *donationes mortis causæ* by the delivery of the policy and note.

The Plaintiff David Amis claimed, as against the Defendant Stephen Witt, the administrator of Prisciller Floyd, a policy of assurance of the Kent Mutual Assurance Society for £1000 on her own life, and a deposit note for £400 of the National Provincial Bank of England, which he alleged the intestate had, on her death-bed, delivered to him, the Plaintiff, by way of *donatio mortis causæ*.

Upon the trial of an action at law the jury gave a verdict for Amis, affirming the donation. The Judge reserved the point whether a policy of assurance and a bank deposit note could be the subject of a *donatio mortis causæ*, and upon a motion for a new trial the [620] Court of Queen's Bench held they could, and refused to disturb the verdict. (1 Best & Smith, 109.)

The cause now came on for hearing.

Mr. Selwyn and Mr. Beavan, for the Plaintiff, argued that the trial at law had determined that the policy and deposit note might be the subject of a *donatio mortis causæ*, and had also settled the fact of the gift.

Mr. Bagshawe argued that the verdict had only determined the right to the papers, and not to the money secured by them, and that the right to the money on such instruments, which were not transferable, could not pass as a *donatio mortis causæ*. *Duffield v. Elwes* (1 Bl. (N. S.) 497) ; *Veal v. Veal* (27 Beav. 303) ; *Barton v. Gainer* (3 Hurl. & N. 307) ; *Moore v. Darton* (4 De G. & Sm. 517), were cited.

THE MASTER OF THE ROLLS [Sir John Romilly] held that the Plaintiff was entitled to the policy and deposit note, and to the money paid in respect of them, as *donationes mortis causæ*.

[621] ATTORNEY-GENERAL v. DAUGARS. Jan. 25, 26, 1864.

A scheme directed for regulating the French Protestant Church in London and the charities connected therewith.

In a suit for a scheme for a charity, the Court declined going into questions as to the validity of the appointment of existing officers of the charity, against whom there was no personal imputation, or to remove them.

In a suit relating to the validity of the removal of a pastor, the trustees were ordered to pay the costs. They paid them out of the charity funds ; but, upon an information by the Attorney-General, they were ordered to replace the amount.

This information related to "the French Protestant Church of London" and the charities connected therewith. The origin and particulars relating to this church will be found stated in *Daugars v. Rivaz* (28 Beav. 233). Property to a large amount had been devised and bequeathed for the support of the church, the relief of the poor members, for French Protestants, and for the maintenance of schools for the children of such members.

In *Daugars v. Rivaz* (*Ibid.*) the Plaintiff Mr. Daugars, who had been appointed pastor in 1842, had been removed by the elders and deacons in 1857, and he

instituted that suit for a declaration that he had not been lawfully discharged from his office of pastor. By the decree, it was declared that the Plaintiff had not been lawfully dismissed from his office, and it was ordered that the Defendants, the surviving elders and deacons, should pay the Plaintiff his costs of the suit when taxed.

These costs, which amounted to £2876, were raised and paid by the elders out of the funds of the charity.

This information, filed by the Attorney-General *ex officio*, complained of this appropriation of the funds; it prayed an account against the Defendants of the charity property, and that, in taking it, the costs of the [622] former suit might be disallowed. It prayed also for a scheme for the future administration of the funds and property of the charity.

The Defendants admitted the payment of the costs, but they said that they made it under the belief that, according to the true intent and meaning of the decree, the costs were not to be paid by them personally, but out of the property of the church, the annual income of which was about £1660.

The Defendants Daugars and Leaky, by their answer, insisted that two of the Defendants, Gordon and White, had not been duly appointed elders, and that Mr. Marzials had not been duly constituted a minister of the church, in conformity with the requirements of the discipline and constitution of the church in several particulars which they enumerated.

THE ATTORNEY-GENERAL, Mr. Hobhouse and Mr. T. H. Terrell, for the information, asked for the repayment of the £2876, and for a scheme; but they did not question the appointments of officers hitherto made.

Mr. Selwyn and Mr. Ware, for Mr. Marzials, argued that the validity of his appointment had been already decided in the case of *Daugars v. Rivaz*, in which the bill had been dismissed, so far as it prayed a declaration that Marzials had not been duly appointed and was not a pastor of the church and to restrain him from discharging the duties of that office. Secondly. That the Court would not remove persons if *bonâ fide*, though irregularly, appointed to their office; *Attorney-General v. Hartley* (2 Jac. & W. 353); *Re Storie's University Gift* (2 De G. F. & J. 529).

[623] Mr. Wickens and Mr. R. O. Turner, for Mr. Daugars and Mr. Leaky, pressed for a decision that Mr. Marzials and the two elders had been irregularly appointed, and for their removal.

[THE MASTER OF THE ROLLS said that it was an unusual course for a Defendant to ask for a decree against Co-defendants, which the Plaintiff did not require, and he refused to remove any of the officers of the charity church. He said he would not look back into former appointments, but leave them in their present positions exactly as they stood.]

Mr. Baggallay and Mr. Dickinson, for the elders, argued that the order for payment of costs had been made against the Defendants in their character of trustees, and that it was intended that they should be paid by them, in that character, out of the trust funds and not personally. They argued that as the suit of *Daugars v. Rivaz* was not one to administer the charity, the Court had not the power to order the costs to be paid out of the funds, and therefore gave no direction to that effect.

THE MASTER OF THE ROLLS [Sir John Romilly]. The decree which I pronounced in *Daugars v. Rivaz* was an ordinary decree directing the Defendants to pay the costs personally. If the form of that decree was wrong, the proper course for the Defendants to pursue was to take the opinion of the Superior Court, or they might have applied to this Court for leave to take these costs out of the charity funds. If I had adopted the view taken in the argument, that the Court had no jurisdiction to order such payment in that suit, but that it might be done in a suit for the administration of the [624] charity, I might easily have said so. But it is clear that the Defendants knew perfectly well what I meant, and that it would have been idle to have asked me to allow those costs to be paid out of the charity funds. The result then is this:—That these gentlemen, having incurred a debt of £2959, which the Court of Chancery says they are liable to pay personally, think fit to pay that sum out of the charity funds. It is obvious that, in the former suit, these gentlemen thought that they were subject to no control at all, and that provided they acted

conscientiously and not for their own personal benefit, they were entitled to deal with the charity exactly as they thought fit. I dissented from that view, I thought that the Court had authority over them and could compel them to conform to certain regulations or *règlements*, and that, if they did not think fit to do so, the cost of compelling them to do so must fall upon themselves. After a period of four years these gentlemen are now called upon to repay this money. I see no reason whatever for removing them from their office, but they have taken a mistaken view of their powers respecting this matter; and I am of opinion that they must make good the funds which they have taken with interest at £4 per cent.

I am then told that some of them have since died. They are however jointly and severally liable, and I can only make those who are before me make good the money, and they must obtain such relief as they are entitled to against the representatives of those persons who ought to contribute towards the repayment of the fund. In my opinion, no case whatever is made out for the removal of Mr. Marzials from the office of pastor to which he has been appointed.

In other respects, I think that the decree must be [625] in the terms which the Attorney-General asks, viz., a scheme in the most general terms for the purpose of regulating the future affairs of the charity; and I think that the costs of all parties on this information ought to be paid out of the funds of the charity; and as the Attorney-General informs the Court that the part of the suit which relates to the getting back from the trustees that portion of these trust funds which has been misapplied by them in the payment of their costs is very small, I think that it is not desirable to make any distinction on this account. I readily accede to this view, because I am very desirous, so far as possible, to create a good feeling amongst all the governors of this charity, and I shall endeavour to make such rules as shall provide against the recurrence of similar disputes for the future.

[625] LEWIS v. TEMPLER. May 25, 26, 28, 1864.

[S. C. 10 L. T. 638; 12 W. R. 928.]

A testator, who died in 1811, was entitled to the reversion of an estate expectant on the death of his son, without issue living at his death. By his will, after reciting that he was entitled to the reversion on the death of his son without issue generally, he devised it to trustees to sell upon the death of his son, without issue generally, and divide the produce. Held, that the trust was not void for remoteness.

A testator who was entitled to a reversion expectant on the death of A. and B. without issue living at their death, devised it in trust to sell and divide the produce between his six daughters, or such of them as should be then living, and the children of such of them as should be dead, the children taking their parents' share. But if only one daughter survived A. and B. she was to take the whole, and the heir at law was to take if no daughter or child of a daughter should be living at the death of A. and B. Held, that the shares of the children of the daughters vested, not at their mother's death, but at the death of the survivor of A. and B.

In 1790 Robert Gummer the younger married Betty Bradford, and on the occasion a settlement was executed, dated the 28th of July 1790, whereby Robert Gummer his father conveyed some freehold estates at Allington to Robert Gummer the younger for life, with [626] remainder to Betty Gummer for life, with remainder to the children of the marriage as they or their survivor should appoint; and subject thereto, to the use of all the children of the marriage "that should be living at the death of the survivor of them Robert Gummer the younger and Betty" his wife, equally "and of the child or children of such child or children of the said Robert Gummer the younger and Betty Bradford as should be then dead leaving child or children, share and share alike, but the child or children of such of them as should be dead not to exceed his her or their father or mother's original share or shares thereof; and in case there should be living, at the death of the survivor of them the

said Robert Gummer the younger and Betty Bradford his then intended wife, only one child of their two bodies lawfully begotten, and no child should be then dead leaving child or children, then to the use and behoof of such only child and his or her heirs or assigns; and for and in default of all such issue, then to the use of the said Robert Gummer the elder, his heirs and assigns for ever."

Robert Gummer the elder died in 1811, having by his will, dated in 1810, expressed himself to the following effect:—

"Whereas I am entitled, in reversion in fee, after the death of my said son Robert Gummer and Betty his wife *without issue*, of and in the property at Allington, which I have conveyed to or to the use of my said son Robert Gummer and Betty his wife for their respective lives and their issue, and in default of such issue, to the use of myself, my heirs and assigns for ever." He then devised this property "to the reversion in fee he was entitled as aforesaid" to trustees, upon trust, "as soon after the several deceases of his son Robert Gummer and Betty his wife *without issue*" as conveniently might be, to sell and to pay the produce unto and amongst his six daughters (naming them), "or such of them as shall be then living and the child or children of any or either of them my said daughters who shall be then dead leaving issue, in equal shares and proportions; but the child or children of such one or more of my said daughters as shall then happen to be dead leaving issue shall have or be entitled to no larger or greater share or shares than his or their mother or mothers would have been entitled to if living; and in case only one of my said daughters, or (they my said daughters being all dead) only one child of all or any of my said daughters shall be living at the time of the death of the survivor of my said son Robert and Betty his wife (they leaving no lawful issue), then the trustees were to pay the residue "unto such my only surviving daughter, or such my only grandchild by any or either of my said daughters, as the case may happen to be, to and for her own or his use and benefit; but in case there shall not be living at the time of the decease of the survivor of them my said son Robert and Betty his wife (they leaving no issue as aforesaid), any one of them my said daughters, or any child or issue of any one of my said daughters, then he devised the property to his heir at law.

Betty Gummer survived her husband, and died in April 1854. The limitations to the children failed by their predeceasing their parents, and by the non-execution of the power of appointment in their favor, so that the reversion in fee then became subject to the trusts of the will of the father.

The six daughters of the father all died in the life of Betty Gummer, and two only of them (Jane and Matilda) left children. Jane had six children, four of [628] whom died in the life of Betty Gummer; and Matilda had three children, one of whom died in the life of Betty Gummer.

This suit was instituted by a daughter of a child of Jane, who had died in the life of Betty Gummer, to have the rights of the parties ascertained.

The first point raised was whether the devise and trust for sale were void for remoteness, they being to take effect upon a general failure of issue. The second was whether the children of the daughters who died in the life of Betty Gummer were entitled to participate in the produce of the estate.

Mr. Baggallay and Mr. Roget, for the Plaintiff, cited *Ashling v. Knowles* (3 Drew. 593); *Loring v. Thomas* (1 Drew. & S. 497); *Re Pell's Trusts* (3 De G. F. & J. 291); *Penny v. Clarke* (1 De G. F. & J. 425); *Wildman's Trusts* (1 John. & H. 299); *Templeman v. Warrington* (13 Sim. 269).

Mr. A. Smith cited *Ware v. Polhill* (11 Ves. 257).

Mr. Potter, for the representatives of Daniel Fowler, the son of Jane Fowler, who died before Betty Gummer.

Mr. Selwyn and Mr. Batten, for the Defendant Templer, cited *Turner v. Sargent* (17 Beav. 515).

Mr. Jolliffe, for the heir at law of the testator, contended that the devise was void, being one to take effect only on a general failure of issue of Robert and his wife. He cited *Bankes v. Holme* (1 Russ. 394, n.); *Morse v. Lord Ormonde* (1b. 382); Sugden's Law of Property (p. 351); *Bristow v. Bouthby* (2 Sim. & St. 465).

[629] Mr. Baggallay, in reply, referred to *Templeman v. Warrington* (13 Sim. 267); *Locker v. Bradley* (5 Beav. 593).

THE MASTER OF THE ROLLS was of opinion, on the first point, that the trust for sale was not too remote, as the reference in the will to the settlement so incorporated the limitation that the trust for sale must be held to arise on the death of Robert Gummer the younger and his wife and the failure of their issue living at the death of the survivor, which brought the case within the limits allowed by the rules against perpetuity. He said that the case of *Banks v. Holme* (1 Russ. 394, n.) had been considered "a very strong decision" (*per* Lord Eldon, 1 Russ. 405, and see Sugd. Law of Property, 355), and by some that it was not "likely that the decision would be followed" (2 Jarm. on Wills, p. 419 (2d edit.)), and that he thought that no Court would now go beyond it. He reserved the second point.

May 28. THE MASTER OF THE ROLLS [Sir John Romilly]. The question on the construction of the will of Robert Gummer is, whether the share vested in the children who survived their parents but died before the period of distribution.

The ordinary rule is that children, if they survive their parents, are entitled to vested interests. It is a question of intention to be discovered from the terms of the will, and I think that, in this case, the testator has expressed his own meaning to be that those only who survive the period of distribution are to take. The testator directs the purchase-money to be divided amongst [630] his six daughters or such of them as should be then living, that is, at the period of distribution, and the children of such of them as should be dead, the children to take only their mothers' shares. It appears that all the daughters died before Betty Gummer, and that two only of them left children. I am of opinion that if the matter stood there, then, on the true construction of the will, the shares of the daughters vested in their children who survived them. But I think that cannot be the meaning of the testator, he must have intended the same class to take in all events, yet subsequently he says, in case one of his daughters only, or (they being all dead) only one child of his daughters, should be living at the death of the survivor of his son Robert and his wife, then such surviving daughter or the only surviving grandchild shall take the residue. It was well observed that here the testator did not seem to have followed the language of the former part of his will, and that if there had been one surviving daughter and a number of children of the other daughters such only daughter would have taken to the exclusion of the children. But this is quite clear that here he meant those only who survived Robert Gummer and his wife should take in the particular event which he mentions. Then he proceeds to give the premises over to his heir, if no daughter and no child of a daughter should be living at the death of Robert Gummer and Betty his wife.

The argument in favour of the daughters' children who predeceased Betty Gummer would, if sustained, produce this singular result:—Supposing all the daughters to die before Betty, and that some of them left children, then, if one child survived the period of distribution, the residue is to be divided amongst all these children, but if no one survived the period of distribution then the residue is to go to the testator's heir at law. So that the rights [631] of the children who predeceased Betty would depend on one of the grandchildren of the testator surviving the period of distribution.

I do not think that is the proper construction of this will; and I am of opinion that the class is to be ascertained when the fund is to be distributed, viz., on the death of the survivor of the testator's son and his wife Betty, and that, upon the whole scope and the true construction of this will, the testator did not make the produce vest until the death of the survivor of these two persons.

[631] SLANEY v. SLANEY. June 21, 1864.

Devise to A. for life, with remainder to B. in fee; but if B. should die, leaving issue, then to his children. B. survived A. and died, leaving children: Held, that the gift to his children did not take effect.

This case came on upon general demurrer to a bill, which stated that the testator by his will, dated in 1830, devised eight copyhold houses "unto his wife Mary Slaney, for and during the term of her natural life, and from and immediately after the

decease of his wife, he thereby gave and bequeathed all his eight copyhold messuages or tenements, with the appurtenances, unto his son Richard Slaney (since deceased), his heirs and assigns for ever. And in case (as did not happen) his said son should depart this life without leaving lawful issue, then he disposed of the said hereditaments in manner therein mentioned, but in case (as happened) his said son *Richard Slaney should depart this life leaving lawful issue*, then he gave and bequeathed all his eight copyhold messuages or dwelling-houses (subject to the payment of £20 yearly to Margaret Slaney, wife of his son Richard Slaney, during the term of her natural life) unto all and every the child and children of his son Richard Slaney and the child [632] or children of which the said Margaret Slaney might be *eniente* and born in due time after his said son's decease as should be then living, the same to be divided equally amongst them, share and share alike, as soon as the youngest child should attain the age of twenty-one years, and the rents, issues and profits arising therefrom to go to and be paid, laid out and expended in the maintenance, clothing and education of such the child or children of his son, so long as they should respectively be minors and under the age of twenty-one years, and so soon as the youngest child should attain that age, then he directed that the eight copyhold messuages or tenements should be equally divided amongst the children of his son and the survivor or survivors of them, as near as circumstances would permit, as tenants in common."

The testator republished his will in August 1838, and he died in 1840. His widow died in 1845, and his son Richard Slaney died in 1862, leaving five children.

This suit was instituted by three of the children against the other two for a partition of the property.

The Defendants demurred for want of equity.

Mr. Selwyn and Mr. Kay, in support of the demurrer.

Mr. Baggeallay and Mr. I. J. H. Humphreys, in support of the bill.

Edwards v. Edwards (15 Beav. 357); *Smith v. Spencer* (6 De G. M. & G. 631), and *Blake v. Peters* (1 De G. J. & Smith, 345) were cited; and see 1 Vict. c. 26, s. 29.

[633] THE MASTER OF THE ROLLS [Sir John Romilly]. I think this demurrer must be allowed. I entertain no doubt on the question of construction of the will. I think that the rule stated in *Edwards v. Edwards* (15 Beav. 357), is to be gathered from all the decided cases on the subject. I have had occasion to reconsider that decision, and I have always come to the same conclusion. The Lord Chancellor did not, in *Smith v. Spencer* (6 De G. M. & G. 631), dispute the rule, but he said that the words of the testator were distinct in that case, and that the cases did not apply. *Edwards v. Edwards* did not lay down that a testator might not direct otherwise.

If a testator gives real or personal estate to A. for life, and afterwards to B. absolutely, and then goes on to say that if B. should die without leaving issue, the property is to go over to another, then the contingency has reference to the period of distribution or to the time of coming into possession of the property, which must be at the death of the tenant for life. Consequently, if B. should die in the life of the tenant for life, leaving issue, it would go over, but not if he survived her.

I am of opinion that the rule is the same both as to real and personal estate, and that this demurrer must be allowed.

[634] SOMERSET v. COX. March 8, 10, 1865.

[S. C. 33 L. J. Ch. 490; 10 L. T. 181; 10 Jur. (N. S.) 351; 12 W. R. 590. See *Roxburghe v. Cox*, 1881, 17 Ch. D. 527; *In re Cousins*, 1886, 31 Ch. D. 675; *In re Dallas* [1904], 2 Ch. 394.]

Notice of a charge on a fund given to one before the fund comes into his possession is wholly ineffectual.

An officer, on his marriage, covenanted to settle the produce of his commission when he sold out. He subsequently charged the proceeds in favour of his army agents. Afterwards, and before the receipt of the proceeds by the army agents, the trustees of the settlement gave them notice of the covenants: Held, that the agents had the first charge on the proceeds.

Upon the marriage of Lieutenant Lyon, of the Royal Scots Greys, a settlement was executed, dated the 21st of July 1852, whereby he covenanted with the trustees (the Plaintiffs), that any money, which at any time should be received or realized by or from the sale of his then commission or any future commission which he might thereafter obtain, or for or in respect of any difference in price or value upon exchanging into some other regiment, or retiring upon half-pay in case of his selling out, exchanging or retiring, should be paid to and be received by the trustees, and should be held upon the trusts therein declared. These trusts were for the parents and children successively.

Lieutenant Lyon afterwards changed his regiment, and became a captain in the Second Life Guards, of which regiment the Defendants Messrs. Cox were the army agents.

Captain Lyon became considerably indebted to the Defendants Messrs. Cox; and by an agreement dated the 9th of May 1861, after reciting the debt, and that Captain Lyon, being unable to pay it, had offered and proposed to Messrs. Cox that he would apply to the proper military authorities for leave to sell his commission in such regiment, with a view to the repayment to them of the debt so due to them out of the proceeds of such commission; and further reciting that Captain Lyon had, in accordance with his offer, placed in the [635] hands of the said Messrs. Cox, as the regimental agents of the regiment, the application to the commanding officer of the said regiment for leave to sell his said commission, the Defendants then agreed to abstain for six months from forwarding the application to sell the commission, and Captain Lyon pledged himself to Messrs. Cox not to do any act, &c., that could, in any way, prejudice them in their right to recover and be repaid the debt of £3300 and interest out of the proceeds of the commission, if and when the same should be sold. And he agreed to execute all necessary legal instruments for more effectually enabling Messrs. Cox to recover and receive their debt and interest out of such proceeds; and so far as the law would allow, he did thereby charge such proceeds to and with payment thereof accordingly.

After this, and on the 17th of June 1861, the Plaintiffs, the trustees of the marriage settlement, served Messrs. Cox with a notice, stating Captain Lyon's covenant and requiring them not to part with any moneys which might come into their hands from the sale of his commission in the Second Life Guards; but to retain and pay all such moneys to the Plaintiffs. The Plaintiffs also applied to Messrs. Cox to give them an assurance that they would pay them the proceeds of the sale; but Messrs. Cox "declined giving any undertaking, or doing any act, the effect of which might alter their legal position as regarded the money, whenever it might reach their hands."

On the 29th of June 1861 Captain Lyon applied for leave to retire by sale of his commission, which was granted; and on the 6th of September 1861 he was gazetted out of the regiment by sale, and £3500, [636] the regulated price of the commission, minus some regimental deductions of £115 and £287, 2s. 4d., came in due course into the hands of the Defendants as army agents, together with a further sum of £1435 paid beyond the regulated price.

Under these circumstances, a question arose as to the priorities of the Plaintiffs and Defendants on the produce of the sale of the commission, which it was the object of this suit to determine.

Mr. Selwyn and Mr. Wickens, for the Plaintiffs. The covenant contained in the settlement of 1852 created a valid equitable charge on the produce of the commission when sold at any future period; *Lyde v. Mynn* (1 Myl. & K. 683); *Burn v. Carvalho* (4 Myl. & Cr. 690). The covenant itself is perfectly valid, for although an officer cannot pledge or mortgage his commission; *Collyer v. Fallon* (Turn. & R. 459); still he may charge the moneys to arise from the sale of it; *Webster v. Webster* (31 Beav. 393); *Buller v. Plunkett* (1 John. & H. 441).

[Sir Hugh Cairns. I assume after the decisions of the Master of the Rolls and Vice-Chancellor Wood that the covenant is valid.

THE MASTER OF THE ROLLS. I have no doubt as to the validity of the covenant.]

But the Defendants' charge is void, for it gave them the power to enforce Captain Lyon's retirement from the Queen's service, and made his remaining in the Army dependent on the will and pleasure of Messrs. Cox.

[637] In regard to the question of priorities, the Plaintiffs' equitable charge is long prior in date to the Defendants', and *prima facie* it has priority, unless displaced by some superior equity. It will be argued that the Plaintiffs' notice cannot affect the fund until it came into the Defendants' hands, and that if such notice be immaterial the priority in date must prevail. But if notice after the receipt of the fund is alone effectual, then the Defendants had such notice both of their own and of the Plaintiffs' charge at the same time, viz., the very instant that they received the money. Such concurrent notice is ineffectual to change the priorities, and therefore the two charges must rank according to their dates. When the Defendants received the money they knew it was affected with the trusts of the marriage settlement, and they had no right to apply it in discharge of the private debt of Captain Lyon; *Pannell v. Hurley* (2 Coll. 241). As assignees of a chose in action they took no more than the interest of the assignor.

Sir Hugh Cairns, Mr. Baggallay and Mr. J. W. Chitty, for Messrs. Cox & Co. This is an attempt to open a point of law distinctly settled by two recent cases, that notice to a party before the fund comes under his control is wholly ineffectual; *Webster v. Webster* (31 Beav. 393); *Buller v. Plunkett* (1 John. & H. 441). If army agents are to be affected by notice, so as to bind all moneys thereafter to be received by them, they must keep a register of the incumbrances of all the officers in the Army. But the principle is this:—that you cannot go to a stranger and say, "If you at any time hereafter should receive any money for A. B., take notice that I have a charge on it." Such a notice may be wholly disregarded. [638] It is void altogether, and not, as the Plaintiffs say, void for one purpose but valid for another. The Defendants' debt and security are prior to the Plaintiffs' notice to them, and their equities and rights of set-off, as existing prior to the notice, could not be affected thereby; *Stephens v. Venables* No. 1 (30 Beav. 628); besides, a great part of the Defendants' debt was incurred in the purchase of the commission, the produce of which is now claimed by the Plaintiffs. The Defendants as bankers have a general lien, and nothing has been done to prejudice it; *Jones v. Peppercombe* (1 John. 430). If the Plaintiffs seek to charge the money beyond the regulation price, it makes their security void under the 49 Geo. 3, c. 126, s. 8, and they cannot maintain this suit; *Thomson v. Thomson* (7 Ves. 470).

Mr. Jolliffe, for another incumbrancer.

Mr. Wickens, in reply, argued that if the notice were ineffectual to fix the priorities, still that it was notice to the Defendants of the trust affecting the money, which they were bound to regard as soon as the trust fund came to their hands.

THE MASTER OF THE ROLLS [Sir John Romilly]. I entertain a strong opinion against the Plaintiffs. The case depends entirely on the question as to the effect of a notice given before the money was received by the Defendants. If I understand the cases correctly, a notice given before the money is received is an invalid notice, and if the notice be of no value, how can I give it this species of *quasi* validity, by saying that it gave [639] Messrs. Cox & Co. information which they were bound to act on. This is too thin a distinction for this Court to act upon. The notice is either good or not good, and if it be not good, then what necessity does it impose upon the person who so received it to act on the knowledge he acquired from it. It was argued that the doctrine of notice is very peculiar, and that probably this Court would not extend it, for that it creates great difficulties. But, on the other hand, it is to be remarked, that by means of it money may safely be lent on security of trust funds, on ascertaining that the trustee has no notice of any prior incumbrance. The rule, it is true, often enables a subsequent incumbrancer to obtain priority over a prior incumbrancer; but how much more serious would the consequence be, if the Court were not only to go into the question whether notice had been given, but also into the question whether the trustee had knowledge of the fact of a previous assignment, either by an invalid notice or in some other way. The Court would, by such a doctrine, be involved in the greatest difficulties. In *Buller v. Plunkett* and *Webster v. Webster* it was decided that notice given before the money was received was a mere nullity, and therefore that the notice first given had no effect, and that the trustees were bound to consider the priorities in regard to time. If that be the proper view of the case, the notice given here amounted to nothing. I will, however, consider the case.

March 10. THE MASTER OF THE ROLLS. The more consideration I have given this case, the more I am confirmed in the view which I expressed yesterday. It was argued in reply that when a person knows that a fund belongs to another person he cannot [640] part with it except at his own peril, and that if he has had notice of the charge at any time he must have knowledge that the fund belongs to another. It is important to consider what is meant by that expression "knowledge," which is the foundation of the whole of the argument for the Plaintiffs. When, in an affidavit in the Court of Chancery, a person swears he knows a thing, we ask him how he knows it? If he was not an eye-witness of the fact, his answer is that he has been informed of it by some trustworthy person, whom he either believes or ought to believe, and that this is the extent of his knowledge. The fact must, however, be ascertained by the best evidence the Court can obtain, direct testimony if possible, if not, the best secondary evidence that can be procured; but this is because the Court has to distribute the fund. The holder of a fund which ostensibly belongs to another is not bound to ascertain the truth of information given to him as to charges on that fund, but is entitled to the protection of the Court if he assumes it to be true and acts upon it, provided it be not given by a mere stranger. But it is true the holder of the fund may receive information as to the character of it at the time when he receives it, or after it has got into his possession, which will make him liable to replace it if he deal with it for his own benefit. Thus, notice by a third person to a banker that the balance of one of his customers was composed of trust funds which he was dealing with as his own, would not justify the banker in refusing to honour the cheques of his customer; but if at the time when the money was paid in the customer informed the banker that it was a trust fund the case is varied. An instance of this occurs in the case of *Pannell v. Hurley* (2 Coll. 241). Bankers, knowing that the fund was a trust fund, thought fit to allow it to be applied [641] in payment of their own debt, and thereupon they were held bound to repay it. The reason of that was this:—Davy, one of three trustees, had opened two accounts with the bankers, one in conjunction with his co-trustee in respect of the trust fund, and the other his own private and separate account. The bankers accepted the fund as a trust fund and consented to deal with it as a trust fund, and when Davy became the sole surviving trustee they knew, having accepted it as a trust fund, that it could not be applied in paying his private debts. They nevertheless applied part of the trust fund in discharge of the balance due to themselves from Davy on his private account, and they were, therefore, held bound to make good the fund, not on the doctrine of notice by a third person interested in the fund, but on account of their having accepted a fund in a particular character.

In this case, assuming the notice given before the fund was received to be worth nothing, yet if, as soon as it was sent to the Defendants Messrs. Cox & Co., they had thought fit to say, "We undertake to hold the fund in trust for you," then they could not afterwards have said that this was not a sufficient notice. I am of opinion that there is no intermediate stage between complete notice, which binds a person not to part with a fund, and information which amounts to nothing; and that when it amounts to complete notice, it has all the attributes and consequences of legal notice, and involves the right to priority as well as the other questions connected with that subject. There was no information received by the Defendants that the fund belonged to the Plaintiffs, except by the notice of the 17th of June, and the letter of the Plaintiffs' solicitor on the 17th of July following, and the question is, does that amount to notice or not? The case of *Buller v. Plunkett*, followed by me in *Webster v. Webster*, deter-[642]-mines that it is not notice, to this extent at least, that it is not sufficient to disturb the order of priorities, but if it had been given after the fund had come into the hands of the Defendants, then the notice might have disturbed the order of priorities. I am of opinion that there is no authority for this doctrine that there are two sorts of notices, namely, a notice given to a person who may hereafter become a trustee before the fund comes into his hands, which is sufficient to prevent him from parting with it, and yet not sufficient to disturb the order of priority.

I am of opinion that whether notices prior to the receipt of the fund be considered effectual or not, still that the Defendants are entitled to priority. If they are effectual,

then the first notice received by the Defendants was of their own charge, which was in May 1861, while the notice given by the Plaintiffs was not till June 1861. But if not, then the notice of the Plaintiffs was ineffectual and was inoperative *in toto*. So that in whatever way I look at it, I am of opinion that the Defendants are entitled to retain what is due to them out of the fund in their hands, and that the residue, if any, will be payable to the Plaintiffs.

[642] PONSARDIN v. PETO. *Ex parte* UZIELLI. Dec. 10, 1863.

[33 L. J. Ch. 371; 9 L. T. 567; 3 N. R. 237; 10 Jur. (N. S.) 6; 12 W. R. 198.]

Wine marked with a counterfeit of the Plaintiffs' brand had been imported into this country, and A. B. had made *bond fide* advances on the security of the dock warrants. An injunction having been granted to restrain the dock company parting with it, the Court, on the application of A. B., ordered the wine to be delivered to him, on the counterfeit brand being removed, but made A. B. pay the costs of the application. The Court held that the priority of charges on the wine were, first, the expenses of the dock company; secondly, A. B.'s claim; and, thirdly, the Plaintiffs' costs of suit.

The Plaintiffs, Veuve Clicquot, Ponsardin & Co., discovered that a quantity of champagne had been imported into this country from France having the [643] counterfeit brand of their firm on the corks, and that it was deposited in the Victoria Docks. Not knowing who were the holders of the dock warrants, the Plaintiffs instituted this suit against the Victoria Dock Company alone, and on the 18th of February 1863 obtained an *ex parte* injunction to restrain the dock company from parting with the wine.

It afterwards appeared that Mr. Uzielli had, on the 23d of January 1863, without notice of the fraud, advanced £826 to a Mr. Clybonne, on the security of the dock warrants for 149 cases of what was represented to be Veuve Clicquot's champagne.

Subsequently, on applying to the dock company for the delivery of the champagne, he became aware of the existence of the injunction. He thereupon proposed to the Plaintiffs' solicitor to withdraw the counterfeit corks and substitute others; but this was declined, except on his paying the costs of the suit.

Mr. Hobhouse and Mr. Lovell now moved that, notwithstanding the order of the 18th of February 1863, the dock company might permit Mr. Uzielli to withdraw the corks and recork the wine with corks not bearing the Plaintiffs' trade mark, and that, thereupon, the dock company might be at liberty to deliver over the 149 cases of champagne to Mr. Uzielli as the holder, by endorsement and for value of the warrants, saving the rights of the company for warehousing or otherwise.

Mr. Selwyn and Mr. Gardiner, for the Plaintiffs, insisted that the applicant must pay the costs of the suit; *Burgess v. Hill* (26 Beav. 244).

Mr. Bagshawe, for the company.

[644] THE MASTER OF THE ROLLS [Sir John Romilly] was of opinion that Mr. Uzielli had advanced the money on the wine, without any notice of the fraud, and that, although the Court would prevent his selling it with the counterfeit brand, when that was removed, he had a lien on the wine itself for the amount of his advances in priority to the Plaintiffs' claim for costs of suit. But that the costs of this motion must be paid by Mr. Uzielli, as he had been permitted to intervene for his own benefit. Consequently the dock company would have the first charge on the wine for their expenses, Mr. Uzielli the second for his advances and his costs, and the Plaintiffs the third for their costs of suit. He directed the wine to be delivered over to Mr. Uzielli upon the counterfeit brands being removed and destroyed.

[644] PULLING v. THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY.

April 22, 25, 1864.

[S. C. affirmed on appeal, 3 De G. J. & S. 661; 46 E. R. 793; 33 L. J. Ch. 505; 10 L. T. 741; 10 Jur. (N. S.) 665; 12 W. R. 969. See *Barnes v. Southsea Railway Company*, 1884, 27 Ch. D. 543; *Kerford v. Seacombe, Hoylake and Deeside Railway Company*, 1888, 57 L. J. Ch. 273; *Finck v. London and South-Western Railway Company*, 1890, 44 Ch. D. 349.

Where a railway company takes lands forming part of a "house" within the 92d section of 8 & 9 Vict. c. 18, the owner can compel the company to take the whole of the other property comprised in the word "house," but not a portion only of it.

Under a lease dated in 1853, the Plaintiff was lessee of a house and premises at Battersea, with the grounds and premises attached thereto, together with a piece of land adjoining, called the Shoulder of Mutton Field, which contained about two and a half acres.

Under another lease, dated in 1857, he was lessee of another adjoining field called Bank's Field, containing about seven acres. The Plaintiff grubbed up the hedge separating these fields and made various alterations in the premises, which it is unnecessary to state.

The Defendants, the railway company, made a railway across both fields, having paid into Court £50 for [645] the part taken. The Plaintiff required them to take the whole of the property, as forming part of the "house" within the 8 & 9 Vict. c. 18, s. 92, which they refused to do.

This suit was instituted to compel the Defendants to take, not the whole, but only the house, garden and Shoulder of Mutton Field.

Mr. Selwyn and Mr. Mayhew, for the Plaintiff, argued that the Shoulder of Mutton Field formed part of the "house" within the meaning of the above section, and that the Defendants were bound to take it. In the alternative, they asked that the company might be compelled to take the whole of the property; though that case was not made by the bill. They relied on 8 & 9 Vict. c. 18, s. 92; *Lord Robert Grosvenor v. The Hampstead, &c., Railway Company* (1 De G. & J. 446); *Cole v. The West London Railway Company* (27 Beav. 242); *King v. The Wycombe Railway Company* (28 Beav. 104); *Fergusson v. The London, Brighton, &c., Railway Company* (23 Beav. 103); *Smith v. Martin* (2 Saund. 400); *Jacob's Law Dict.* (tit. "Curtilage").

[THE MASTER OF THE ROLLS. I am of opinion that I cannot separate Bank's Field from the Shoulder of Mutton Field. I wish the Defendants to consider whether the Plaintiff can compel them to take one without the other.]

Mr. Baggallay and Mr. Kekewich, for the Defendants, said that the bill only sought to compel the company to take one property; and that if the bill had been framed differently, the Defendants would have made a [646] different case, and have produced additional evidence. They argued that the company was not now bound to meet or argue a different case, and insisted that they could only be compelled to take the portion of the land required for the railway.

THE MASTER OF THE ROLLS directed the cause to stand over.

April 25. THE MASTER OF THE ROLLS [Sir John Romilly]. I have felt considerable embarrassment about this case; but, on consideration, I am of opinion that I cannot disturb the company in the possession of the property, which they have entered upon fairly and according to the statute, after making the proper deposit in Court.

I am also of opinion that the Plaintiff asks for relief which this Court has no authority to give him, namely, to declare that the Defendants are bound to purchase the interest of the Plaintiff in the premises described in his bill; for when I come to examine what it is they ask me to compel the Defendants to take, I find that the Plaintiff is enjoying Bank's Field in conjunction with the Shoulder of Mutton Field, without any fence between them, the whole forming one uninterrupted field, with a pathway leading from the grounds round the house to the coachman's cottage in

Bank's Field, and which path he does not ask to be taken. In addition, there are poultry yards, piggeries and the like, which are enjoyed with the house, and which the Plaintiff does not ask the company to take.

[647] I am of opinion that, upon the construction of this clause, which has been construed very liberally, the railway company was bound, if the Plaintiff required it, to take the whole of the house and the whole of both fields, in fact, the whole of this curtilage, which is surrounded by one entire fence, but that they are not to be compelled to take the portion specified in the bill.

To the alternative relief asked at the Bar, that the Defendants may be compelled to take the whole, the Defendants say that is not the case they came to meet, for by the bill they were not asked to purchase Bank's Field; in which case they would have made a different defence from what they have done. I think the company is right in that.

There is, however, this difficulty in the case:—The Defendants have no conveyance, and have got no title to the land. If I dismiss the bill I must give leave to the Plaintiff to bring an action of ejectment, and if he obtains judgment in it, he will recover this portion of his land. On the other hand, if I retain my present opinion, and the company should come for an injunction to restrain the action of ejectment, I should refuse it. So that it appears to me that ultimately, after a good deal of litigation and expense, the company would be bound to take and pay for the whole.

Taking that view of the case, I should have been very glad if the parties had consented to allow the Plaintiff to amend his bill, and to pray either in the alternative, either that the company should take the whole or a portion. If they do not assent to that course, I must dismiss the bill without costs, and without prejudice to [648] the Plaintiff bringing such action at law for the recovery of the land as he may be advised.

NOTE.—Upon appeal to the Lords Justices, Lord Justice Turner considered that the land actually taken did not form part of the "house" within the 92d section, but he said he was by no means disposed to differ from the opinion of the Master of the Rolls as to compelling the company to take part. The appeal was dismissed without costs, Vice-Chancellor Knight Bruce saying he entertained some doubt on the matter.

[648] BLUNDELL v. CHAPMAN. *March 2, 4, 1864.*

[S. C. 33 L. J. Ch. 660; 10 L. T. 152; 10 Jur. (N. S.) 332; 12 W. R. 540.]

Under a devise of real and personal estate to the widow for life, and afterwards to the testator's four children "or" their children, share and share alike; and if any of such children should die without leaving a child, his share was to be divided between "the survivor or survivors" of them "or" their children: Held that "or" could not be read as "and," nor "survivors" as "others," and that the effect of the gift was to substitute children for their parents who died in the life of the tenant for life. One child died in the life of the tenant for life without issue, and at the death of the latter the three other children and several grandchildren were living. Held that the three children took exclusively as tenants in common.

This was a special case, which stated as follows:—

The testator, by his will dated in January 1839, gave all his real and personal estate to his wife Harriet Chapman for her life, or until she should marry again. He proceeded as follows:—"And my will and meaning is that, immediately after the decease or day of marriage of my said wife as aforesaid, I do hereby order and direct that all the real and personal estate which my said wife shall then be possessed of (her funeral expenses being first paid thereout) shall be equally and fairly divided between my three sons and one daughter (that is to say), William Chapman, Henry Chapman, George Chapman and Harriet Chapman, or their child or children, share

and share alike for ever ; but in case any or either of my said sons or daughter shall happen to decease without leaving a lawful child or children, that then, in such case, his, her or their share or shares of my estates as aforesaid shall be equally divided be-[649]-tween the survivor or survivors of him, her or them, or his, her or their child or children, share and share alike for ever."

The testator died in April 1839.

Harriet Chapman, the daughter, died in May 1856, without having been married.

The testator's widow died in February 1861, without having married again.

William Chapman, the son, had six children (the Plaintiffs), all of whom were born in the lifetime of the testator's widow.

George Chapman had three children, one born in the lifetime of the testator's widow, and two others born since her death.

The testator's other son, Henry Chapman, had never been married.

Under these circumstances, a question had arisen whether, upon the true construction of the testator's will, his real and personal estate became divisible, upon the death of his widow, amongst his three children who survived her in equal shares, or became divisible equally amongst them and their children born in the lifetime of the widow.

Mr. C. C. Barber, for the Plaintiffs, contended that, according to the true construction of the will, the word "or" following the words "Harriet Chapman" in the gift, and the word "or" interposed between the words "him, her or them," and the words "his, her or their child or children" in the subsequent part of the gift [650] were respectively to be read "and;" that consequently the gift took effect in favor of the testator's surviving children William, Henry and George, and the respective children of the testator's sons William and George born in the lifetime of the widow in equal shares as tenants in common. He cited *Eccard v. Brooke* (2 Cox, 213); *Richardson v. Spraag* (1 Peere Wms. 434).

Mr. Bristowe, for the Defendants, on the other hand, contended that the word "or" was substitutionary in each case, and that the words "survivor or survivors" were to be read as "other or others," and that upon the whole, the testator's intention was to substitute the children of any of his four children who might die in the lifetime of his widow for such children so dying, and to vest in such children of deceased children, in equal shares as tenants in common, the share which such children so dying would have taken had they survived the tenant for life; that consequently, inasmuch as none of the four children died in the lifetime of the tenant for life leaving children, the testator's three children were entitled, under the terms of the original gift, to three-fourths of the testator's real and personal estate, and, under the survivorship clause, to the remaining fourth as tenants in common. He cited *Richardson v. Spraag* (note) (2 Eq. Ca. Ab. 368); *Crooke v. De Vandes* (9 Ves. 197); *Montagu v. Nucella* (1 Russ. 165); *Salisbury v. Petty* (3 Hare, 86); *Price v. Lockley* (6 Beav. 180); *Whitcher v. Penley* (9 Beav. 477); *Penley v. Penley* (12 Beav. 547); *Sparks v. Restal* (24 Beav. 218); *Timins v. Stackhouse* (27 Beav. 434).

Mr. C. C. Barker, in reply.

[651] THE MASTER OF THE ROLLS [Sir John Romilly]. I will look into the cases, but my general impression on the construction of the will is that I must treat these two gifts as separate and distinct, and not construe one by the other.

I cannot alter "and" into "or" in this devise. I am of opinion that the gift to the children is substitutionary, and this accords with the recent decisions. The testator directs his property to be divided between his own children or their children, that is, the children are to take in the place of their parents if deceased. If *Eccard v. Brooke* had been followed by every other case, I should be bound to follow it, as I think it better to adhere to decided cases and not to unsettle the law.

The modern tendency is to construe the words as you find them, and I am clear that I cannot change the word "survivors" into "others," which would be making a mere arbitrary change in the words. It is clear that the testator intended that, if one of his children died childless before the period of distribution, his share of the property should be divided amongst the survivors, that is, amongst those who survived the tenant for life. I think that the testator, when he gave over the shares to the

survivor or survivors or *their children*, had not present to his mind the fact that these words could have no application if the gift was substitutionary. My present impression is that it is proper to read the words as they stand, and in doing so to treat the words or *their children* as inofficious.

[652] *March 4.* THE MASTER OF THE ROLLS said he had looked at all the cases on the subject, but that they had afforded him very little assistance; that he was of opinion that he must read the words as they stood, and that he could neither change "or" into "and" or "survivors" into "others." That in the first gift the plain meaning was to substitute grandchildren in the place of their parents who predeceased the tenant for life, and that, in the gift over, the testator had overlooked the effect of the words indicative of substitution, when none could take place if the surviving children were to take the shares given over. That he was of opinion that the property must be divided among the children who survived the tenant for life and the children of any predeceased child leaving children, such children being substituted for their parent; that therefore, on the death of the widow, and in the events which had happened, the testator's three surviving children took the property equally as tenants in common.

[653] DAVIDSON v. CHALMERS. PERRY v. CHALMERS. *March 4, 16, 1864.*

[S. C. 33 L. J. Ch. 622; 10 L. T. 217; 10 Jur. (N. S.) 910; 12 W. R. 592.

See *Hensley v. Wells*, 1867, 16 L. T. 582.]

Interests given to an uncertificated bankrupt, contingently on his obtaining his certificate: Held to pass to his assignees on the happening of that event.

A testatrix provided that in case her nephew, who was an uncertificated bankrupt, should obtain his certificate, so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment and benefit, free from the control of any other person, the income of her residue should be paid to him for life. On his subsequent discharge, under the Bankrupt Act: Held, that his life interest passed to his assignees as a contingent interest then coming into possession.

The Plaintiff Daniel Mitchell Davidson, the nephew of the testatrix Sophia Forbes, had been adjudicated bankrupt in June 1854, and had not obtained his certificate at the death of the testatrix.

By her will, dated the 8th of April 1856, Sophia Forbes gave her residuary real and personal estate to trustees, upon trust to realise and invest, and to stand possessed of the securities upon trust, during the life of her nephew Daniel Mitchell Davidson, at their own free will and uncontrolled discretion, to pay and apply the whole or any part of the income, dividends and annual produce of the said real and personal estate and securities, which should or might accrue due thereon during his life, to or for the benefit of Daniel Mitchell Davidson, or of his wife or child or children or any or either of them, at such time or times and in such manner as the executors and trustees should, in their uncontrolled discretion, think proper, and so nevertheless and to the intent, and the said testatrix did thereby expressly declare her will to be that her nephew Daniel Mitchell Davidson, or his wife or child or children during his life, should not be entitled to or have any right, either in law or equity, to claim, demand or recover any part or proportion of the income, dividends or annual produce of the said real and personal estate and securities, or be [654] entitled thereto, unless at and by the free, spontaneous and uncontrolled will of her said executors, and as to such part and so much of the income, dividends and annual produce as should accrue due and be received during the life of Daniel Mitchell Davidson, and which should not be paid to him, or applied for his own use and benefit, or the use and benefit of his wife or children as aforesaid, upon trust from time to time to invest the same as therein mentioned. After the decease of Daniel Mitchell Davidson, the property was given upon certain trusts for his widow and children, and in default, to other persons.

Provided nevertheless, and the said testatrix thereby declared her will to be, that in case her nephew Daniel Mitchell Davidson, who had recently been made and was then a bankrupt and had not obtained his certificate, should at any time obtain his certificate, so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment and benefit, then and in such case she directed and declared that thereupon and thenceforth during his life, and so long as he should by law be entitled to and enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment and benefit, and free from the control or right of any and every person, being or claiming to be a creditor of him her nephew, the whole of the interest, dividends and annual income of all the trust estate, moneys and premises and trust funds, which should accrue due and payable during the time aforesaid, should be paid by her executors to her nephew Daniel Mitchell Davidson for his own use and benefit.

The testatrix died on the 8th of April 1857, and her residue amounted to £27,730 £3 per cents.

[655] At the date of the testatrix's will and of her decease, Daniel Mitchell Davidson was a bankrupt, and had not obtained his certificate of conformity under the Bankruptcy Acts then in force. On the 23d of March 1863 he applied to the Court of Bankruptcy in London for his discharge under the Bankruptcy Act, 1861. Such application was heard before one of the Commissioners of the Court, and the Court adjudged that he was entitled to such discharge unconditionally, and an order to that effect was signed by the Commissioner on the 23d of March 1863, and the order of discharge was subsequently drawn up and signed by the Commissioner on the 23d day of April 1863.

Prior to his discharge, the trustees had made payments to him amounting to £1870.

Daniell Mitchell Davidson had never been married.

The first suit was instituted in June 1863 by Daniel Mitchell Davidson against the four trustees and executors, praying a declaration that he was entitled to the income already received and to the future income of the residue.

The suit of *Perry v. Chalmers* was instituted by persons interested in the residue, subject to the prior interests of Daniel Mitchell Davidson and his wife and children, for the administration of the estate, and contesting the propriety of the payment of £1870 to the bankrupt.

Mr. Selwyn and Mr. T. H. Terrell, for Daniel Mitchell Davidson. The first discretionary trust is perfectly valid; *Holmes v. Perry* (3 Kay & John. 90); *Kearsley v. Wood* [656]-*cock* (3 Hare, 185); *Page v. Way* (3 Beav. 20); and the payments before the discharge were proper, having regard to the wide discretion vested in the trustees. If the trustees had thought fit to provide a dinner, or to enter into a contract for finding food and clothing, for Davidson, the benefit would not pass to his assignees. The non-execution of the trust cannot disappoint the Plaintiff, *Brown v. Higgs* (8 Ves. 561), who is the only existing object of the discretion. As to the £1870, the payment was proper, and there is no right of recouping in the case of voluntary payments, and the Plaintiff is entitled to the whole of the income prior to his obtaining his order of discharge.

But the second trust, which was to arise on his obtaining his certificate, is free from all objection. Though he could not have created such a trust in his own favor, still a stranger might do so, and had a clear right to regulate the application of his own property for the benefit of another person. The Plaintiff is therefore entitled to the income which accrued since the order of discharge was pronounced; *Re Laforest* (9 Jur. 866).

Mr. Southgate and Mr. Bristowe, for Perry and the parties presumptively entitled, subject to the interests of Davidson, his wife and children.

Mr. J. H. Palmer and Mr. E. F. Smith, for the assignees. This is an attempt to attach to the property incidents which are quite inconsistent with the ownership, and to give to the nephew this property discharged of the rights accruing on his bankruptcy. The bankrupt is the only existing object of the discretion, and this is a [657] trust in his favor alone. Whatever interest the Plaintiff took, and the benefit of the discretion, to whatever extent it could be exercised in his favor,

passed to his assignees; *Snowdon v. Dale* (6 Sim. 524); *Lord v. Bunn* (2 Y. & Col. (C. C.) 98); *Younghusband v. Gisborne* (1 Col. 400); *Wallace v. Anderson* (16 Beav. 533).

The trust to arise on the Plaintiff's obtaining his certificate was a future contingent interest which passed to his assignees; *Higden v. Williamson* (3 Peere Wms. 132).

As to the £1870, the trustees having exercised their discretion, and made it the property of the Plaintiff and his assignees, it ought to be repaid by the trustees, or made good out of any future interest of the Plaintiff; *Priddy v. Rose* (3 Mer. 86); *Woodgate v. Gresley* (8 Sim. 180).

Mr. C. Browne, for the assignee of a legacy, did not object to the common decree for an account.

Mr. Baggallay and Mr. Shebbeare, for the executors, argued that the point between the Co-defendants, as to the £1870, could not be now determined.

Mr. T. H. Terrell, in reply. The proviso is "so as to be enabled to hold and enjoy real and personal estate." This contemplates the personal enjoyment by the Plaintiff of the very property, and his assignees can make no claim by virtue of this clause.

[658] *March 16. THE MASTER OF THE ROLLS* [Sir John Romilly]. All that the Plaintiff asks in the first suit of *Davidson v. Chalmers* is a declaration that he is entitled to the income of the fund given by the will of the testatrix, which accrued after his discharge. The clause of the will relating to this is to the effect that, in case Daniel Mitchell Davidson "shall at any time obtain his certificate, so as to be enabled to hold and enjoy real and personal estate for his own absolute personal use, enjoyment and benefit," thereupon and thenceforth during his life the income is to be paid to him. He has, in substance, obtained his certificate or his discharge under the Bankrupt Act, and he is enabled to hold and enjoy real and personal estate, for if anyone were now to leave him a legacy or to give him a sum of money, he could hold and enjoy it free from the control of anyone. He has, therefore, in terms, complied with the condition.

The question is, what is the effect of these words, giving him the income of the residue during his life? Several cases were cited to me, but I did not require any authority for the proposition that the contingent interests of a bankrupt pass to his assignees, and that where there is a gift to a man on the happening of a contingency, and he becomes bankrupt, his contingent interest may be disposed of by his assignees. The contingency referred to in this will is similar to any other contingency, such as if the interest had been given to him on a person coming from Rome: it is therefore a contingent interest which might be disposed of.

Mr. Terrell, feeling this difficulty, argued that this meant "when he should by law be entitled to and enabled to hold and enjoy" this particular property free [659] from the control of any other person; but I do not think that this is the true construction of the will—if it were, the answer is, that that time will never arrive, for it is not permitted by law to give property in that manner. It is simply an attempt to give a life interest in property to a man in such a manner as not to be subject to his debts, control, or engagements, and to apply to a man those fetters which are creatures of equity, and can only be applied to a married woman. The law does not permit that to be done. I can make no order in the first suit.

In the second suit I do not mean to express any opinion as to the money applied by the executors for the benefit of the bankrupt when he was under that disability of acquiring property which attaches to an uncertificated bankrupt. I will simply make a decree, in the second suit, for the administration of the estate, and direct an inquiry what moneys have been paid to Daniel Mitchell Davidson during the period I have referred to, and under what circumstances.

[660] **BERMINGHAM v. SHERIDAN.** *Re WATERLOO LIFE, &C., ASSURANCE COMPANY*
(No. 4). *March 16, 1864.*

[S. C. 33 L. J. Ch. 571; 10 L. T. 256; 10 Jur. (N. S.) 415; 12 W. R. 658.
See *Evans v. Wood*, 1867, L. R. 5 Eq. 14; *Paine v. Hutchinson*, 1868, L. R. 3 Ch. 393.]

The Defendant agreed to purchase from the Plaintiff some shares in a company, and he paid the price, but the directors (having the power) refused to assent, so that the purchaser's name could not be placed on the register. The Court refused to compel the assent, and also refused to decree the specific performance of the contract.

In July 1862 the Plaintiff, Mr. Bermingham, being the registered owner of 1000 £5 shares in the above company, on which 5s. only per share had been paid, verbally agreed to sell them to Mr. Sheridan for £250, and Mr. Sheridan agreed to purchase them on those terms. The purchase-money was paid, but before any legal transfer had been executed, the company was, on the 6th of December 1862 ordered to be wound up.

Subsequently to the order to wind up, a transfer of the shares was executed by both parties, but the official liquidator refused to register or recognize it, and Mr. Bermingham was thereupon put on the list of contributories, and steps were being taken to compel him to pay a call of 7s. per share.

On the 7th of November 1863 Mr. Sheridan commenced an action at law against Mr. Bermingham to recover back the £250 as upon a failure of consideration.

In November 1863 Mr. Bermingham filed his bill for specific performance against Mr. Sheridan, submitting that he, the Plaintiff, was a trustee for the Defendant, and as such entitled to be indemnified against the call and all claims and demands in respect of the shares. The bill prayed that the agreement might be specifically performed, and that the Defendant Sheridan might pay to the official liquidator of the company the sum of [661] £350 in satisfaction of the call on the 1000 shares, or, in the event of the Plaintiff paying the same, that the Defendant might repay that sum to the Plaintiff with interest, and that the Defendant Sheridan might be restrained by injunction from prosecuting the action at law for recovering the £250.

Mr. Bermingham also, in January 1864, presented a petition in the winding up against the official liquidator and Mr. Sheridan detailing the circumstances, insisting that the transfer, being made in pursuance of a contract for purchase or sale which, at the commencement of the winding up of the company was binding both at law and in equity, ought to be registered and recognized by this Court in the winding up, and that, if needful, Mr. Sheridan should be approved by this Court as a fit person to become the proprietor of the said shares. It alleged that Mr. Sheridan was a solvent person and in all respects suitable and fit to be approved as the transferee of the shares in the place of the Petitioner. The petition prayed that the transfer of the 1000 shares from Mr. Bermingham to Mr. Sheridan might be registered.

The portions of the deed of settlement of the company, dated the 11th of November 1851, which related to this matter, provided as follows:—

225. That every shareholder, &c., "may procure some other person or persons to become a proprietor in respect of all or any of the shares held by him, her, or them in the capital of the company, or sell the same to the board of directors."

226. That whenever any such shareholder or shareholders should have procured some other person to become a proprietor in respect of the shares held by [662] him, he "shall give notice in writing at the office of the company, and shall describe in the same notice the name and residence of the proposed proprietor," and the number of the share in respect of which he shall have procured such person to become a proprietor.

234. That when and so often as any person, not a purchaser from the board of directors, shall have been approved of by the board of directors as a fit person to become a proprietor of any share or shares in the capital of the company, and such

entry, erasure, or other alteration in respect of such share or shares shall have been made by the board of directors in the share register book as hereinbefore is required, the proprietor of such share or shares and all persons claiming by, from, or under him or her, except the person approved of as a proprietor, shall (subject to the provisions of the Act 7 & 8 Vict. c. 110) from the time of such entry, erasure, or other alteration, and on payment of any further instalment or instalments which may then have been previously called for on such share or shares, be for ever acquitted and discharged from all further liabilities, and other obligations in respect of such share or shares, and from all further claims and demands on account of the same. And the certificate of such entry, erasure, or other alteration, to be given by the board of directors as hereinbefore required, shall at all times be evidence of such acquittance and discharge as aforesaid in respect of such share or shares.

The cause and petition now came on for hearing.

Mr. Selwyn and Mr. Fry, for Mr. Bermingham, argued that the contract was one which this Court would specifically enforce; *Duncuft v. Albrecht* (10 Sim. 189); and that the [663] Plaintiff was now a mere trustee for the Defendant, and was therefore bound to indemnify him against all future calls and liabilities; *Lindley on Partnership* (p. 608).

Mr. Hobhouse and Mr. W. W. Cooper, for Mr. Sheridan, argued that the contract was conditional on the approval of the directors, and that if the Plaintiff was not in a position to give a complete transfer of the shares, the contract could not be enforced.

Mr. Baggallay and Mr. Swanston, for the official liquidator.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. That there was an agreement in this case nobody can doubt; but the question is, first, what were the terms of the agreement; and, secondly, whether it is one which can be carried into execution by a decree of the Court for specific performance. The agreement was that the Plaintiff should sell and the Defendant should buy 1000 shares in the company for £250; a deed of transfer has been executed by both parties, the one selling and the other accepting the shares. The first question is, whether that, without anything further, constitutes Mr. Sheridan a shareholder in the company; no doubt it would if he had been admitted on the register.

It was a contract conditional on the company accepting the Defendant as a shareholder. Whether it was so stated at the time of the contract is not of very much [664] importance, because that must necessarily be implied in every contract for the sale of shares. The sale of shares can only take place provided it is in conformity with the rules and regulations of the company. Here the 225th and 234th articles provide that the directors shall have power to reject a person from becoming a shareholder, and they make the approval of the directors necessary to constitute a complete and valid sale of shares from a shareholder in the company to a stranger. Consequently, no contract for the sale of shares by a shareholder in this company will be valid, nor can it be carried into execution, unless the directors can be compelled to admit the purchaser as a shareholder. Directors might wantonly or for some idle and foolish reason reject a person, and this Court might, in such a case, have power to compel them to admit him as a shareholder. But it is obvious that they must have a very large discretion in such matters, or else it would be easy for shareholders, when they thought the company was getting into difficulties, to get rid of their shares by putting a mere nominal shareholder on the register, the effect of which might be, to render it impossible for the creditors of the company to get paid their debts, and would, at all events, throw the burden of the debts on those shareholders who remained. Now it is established in this case that the company, through their official liquidator, who alone is competent to act for them, has thought it right to refuse to register the Defendant as a shareholder, and accordingly I stopped the counsel for the official liquidator on that point, and I said that I saw nothing in the deed of settlement of the company or in the evidence which would enable me to compel the directors to admit Mr. Sheridan as a shareholder of the company. Then, if that be so, and the Court has not the power to put him on the register of shares, the question is, what follows. The passage [665] read from Mr. Lindley's book states what is established

in a great number of cases, and merely amounts to this:—That in all cases where shares are sold by a shareholder to another person, the duty of providing for all the future calls and liabilities falls upon the purchaser from the date of the contract. But that proposition assumes that the contract is duly carried into execution by the ultimate introduction of the purchaser's name upon the list of shareholders. In that case, the liabilities of the vendor with respect to the shares ceases, and they attach to the purchaser from the date of the contract, as soon as the name of the purchaser has been entered in the register, when, as between them, it has reference back to the date of the contract. But unless the contract for sale can be carried into effect, that liability cannot, in the absence of an express stipulation, attach, because the person who agrees to purchase the shares is not the purchaser in the proper sense of the word, for he is not allowed to become a shareholder. I can well conceive that a contract of this nature might exist:—A purchaser might say to a vendor, "I will buy your 1000 shares in this company; if the directors do not choose to assent to my being put on the list of shareholders, we cannot compel them to do so; nevertheless, as between ourselves, there shall be this contract:—We will act exactly as if the shares had been sold to me, and I had been accepted as a shareholder. You shall pay me all the future dividends and I will pay every future call and indemnify you from every future liability." That might be a perfectly good contract as between the contracting parties, though it would affect no one else, and I at one time thought it might have been the case here, but, on referring to the evidence, I do not find anything which indicates such a contract.

[666] In this state of circumstances, I am of opinion that if the company chooses to accept this gentleman as a shareholder, they will then ratify the whole transaction, and it will bind the parties to the contract from the time it was entered into. But if they do not, I am of opinion that the contract between these parties cannot be enforced, and that I must, therefore, dismiss both the bill and the petition.

[666] NEVE v. FLOOD. *May 31, 1864.*

[S. C. 34 L. J. Ch. 89; 10 L. T. 520; 4 N. R. 207; 10 Jur. (N. S.) 607; 12 W. R. 897.]

In 1848 A.'s judgment was obtained and registered in Yorkshire.

In 1850 B.'s judgment was obtained and registered both in Yorkshire and in the Common Pleas. After this, A. for the first time registered his judgment in the Common Pleas. Held, that A.'s judgment had priority over B.'s as to lands in Yorkshire.

The decree in this case directed an inquiry as to what charges and incumbrances affected certain fee-simple estates situated in the West Riding of Yorkshire.

Under this inquiry, a question arose as to the priority of two judgments obtained against Mr. Hirst, the owner of the estate.

The first judgment in date was one obtained by Mr. Lane in the Queen's Bench, on the 31st of October 1848. This had been registered in the local registry in Yorkshire in 1848 (under the 5 Ann. c. 18), but had not been registered in the Common Pleas until 1856.

The second judgment in date was one obtained by the Plaintiff, Mr. Neve, in 1850, and had been registered in Yorkshire and the Common Pleas in the same year.

So that the first judgment had been registered in the Common Pleas after the registration there of the second judgment.

[667] The Chief Clerk decided that Mr. Lane's judgment was prior in charge upon the Yorkshire estates; and the Plaintiff took out a summons to vary the certificate.

The question depended upon the following two statutes:—

By the 5th section of the 5 Ann. c. 18, it is enacted that no judgment "shall affect or bind any manors, lands or tenements" situate in the West Riding, "but

only from the time that a memorial of such judgment" shall be entered "at the said register office" [at Wakefield].

By the 1 & 2 Vict. c. 110, s. 11, the sheriff may now make and deliver execution of *all* the lands of the judgment debtor. By the 13th section, a judgment is to operate as a charge upon *all* the lands of the debtor. And by the 19th section, no judgment shall, by virtue of that Act, affect any land, as to purchasers, mortgagees or executors, unless and until a memorandum shall be left with the Master of the Common Pleas.

Mr. Selwyn and Mr. Wickens, for the Plaintiff. The first perfect and complete judgment must have priority. The two Acts must be read together in construing them, the general and subsequent Act must be the governing one. The statute of Victoria says that a judgment is not to operate until it is registered in the Common Pleas; Lane's judgment was not therefore complete until 1856, while the Plaintiff's was perfect in 1850.

But prior to the statute of Victoria, a moiety only of the lands could be taken under an *elegit*, which therefore limited the charge obtained by a judgment. By the latter Act, all the lands of the debtor became charged; [668] and it says expressly that no judgment shall, *by virtue of that Act*, affect any land until the registration in London. Therefore, as the judgment can only affect the second moiety, "by virtue of that Act," it is clear that, as to that portion of the estate, the Plaintiff has priority over Lane.

The cases of *Westbrooke v. Blythe* (3 Ell. & B. 737); *Hughes v. Lumley* (4 Ell. & B. 274), were the converse of the present and the property was leasehold. They also referred to *Benham v. Keane* (1 John. & H. 685); *Beavan v. The Earl of Oxford* (6 De G. Sm. & G. 492, and 31 L. J. (Ch.) 129); and see *Johnson v. Holdsworth* (1 Sim. (N. S.) 106).

Mr. Southgate, Mr. Kingdon, Mr. Baggallay, Mr. Mackeson, Mr. Phear and Mr. Miller appeared for other parties, but were not heard on this point.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will not trouble the Respondent, for I think that this case is settled by authority, and that the point is determined by former decisions. The statute of the 1 & 2 Vict. c. 110 says nothing about priorities, but the Acts relating to the registry in Yorkshire speak distinctly of priority. Now all the decisions say that these two Acts must be read together, and if the statute of Anne fixes the priorities, Mr. Lane has that priority under the registration in Yorkshire. I should be repealing the statute of Anne if I were to say that the 1 & 2 Vict. c. 110, an Act which says nothing about it, gave priority. The argument of Mr. Selwyn cannot be supported with respect to the point that one-half only of the land could be taken under an *elegit*. It is clear [669] that that is not so; all that the Registry Act does is to fix the priorities, and the statute of Victoria constitutes the extent of the charge acquired by the judgment.

The case of *Westbrooke v. Blythe* (3 Ell. & B. 737) determines that the priorities of judgments as to lands in Middlesex is to be settled by the dates of their registry in Middlesex. *Hughes v. Lumley* (4 Ell. & B. 274) determines that the priorities of judgments are fixed by the priority of their registration in Middlesex; and *Benham v. Keane* (1 John. & H. 685) confirms those cases in the strongest possible manner, that the Acts are to be read together, and that judgments are no charge until registered in Middlesex under the Act.

Here Lane's judgment was registered in Yorkshire in 1848, and the Plaintiff's judgment was not registered there until 1850. Unless I repeal the first Act, Lane's judgment must have priority. I am of opinion that the Chief Clerk is right, and that the summons must be dismissed, with costs.

[670] BROCK v. BRADLEY. July 14, 22, 1864.

[S. C. 11 L. T. 16; 4 N. R. 529; 10 Jur. (N. S.) 815; 12 W. R. 1136.]

Bequest to A. B., an unmarried lady, for life, for her separate use, with remainder to her children, and in default to her absolutely if she survived her husband, but

if she should die in his lifetime, then as she should appoint by will, and in default for her next of kin. A. B. died without ever having married. Held, that in the events which had happened A. B. took an absolute interest, and that her executors were entitled to the legacy.

The testatrix directed her trustee to invest the sum of £1500 and hold the same for the separate use of her niece Agnes E. Butler for her life, and after her decease, upon trust for her children as she should appoint, and in default of appointment, upon trust for her sons who should attain twenty-one, and daughters who should attain that age or marry, equally. She then proceeded as follows:—"And in case there shall be no child of the said Agnes Emma Butler who shall live to attain such vested interest as aforesaid, then upon trust for the said Agnes Emma Butler, her executors, administrators and assigns absolutely, if she shall survive her husband, but if she shall die in his lifetime, then upon trust for such person or persons and for such intents and purposes, and generally in such manner, as she, by her last will and testament in writing or any codicil thereto, shall, notwithstanding coverture, direct or appoint, and in default of such direction or appointment upon trust for the person or persons who, at the decease of the said Agnes Emma Butler, shall be entitled thereto under the statutes for the distribution of the effects of intestates in case she had died intestate and unmarried."

The testatrix then gave a sum of £1000 to her executors "upon the same or the like trusts for investment, and other trusts, powers and provisions, in favor of my niece Caroline Palmer, her children, appointees and next of kin, as I have hereinbefore declared of and concerning the said sum of £1500 hereinbefore bequeathed [671] in favor of the said Agnes Emma Butler, her children, appointees and next of kin."

She then empowered Agnes Emma Butler and Caroline Palmer by deed or will to appoint all or any part of the dividends of the sums of £1500 and £1000 to any husband with whom she may intermarry, in case he shall survive her, for his life, or for any less period, in such manner as they should think fit.

The testatrix died in 1859, and Caroline Palmer died in 1860 without ever having been married. This bill was filed by the personal representatives of Caroline Palmer against the executors of the testatrix, claiming the legacy of £1000.

To this bill the Defendants demurred for want of equity.

Mr. Wickens, in support of the demurrer. The Plaintiffs are not entitled to this legacy, for Caroline Palmer took a mere life interest in it. The event has not happened on which she was to take it absolutely, for she has neither survived her husband nor died in his lifetime. This is not one of those cases where the testatrix has made an absolute gift in the first instance, which she has ineffectually attempted to cut down; but a simple life interest enlarged on the happening of a particular event which has not occurred; *Lassence v. Tierner* (1 Mac. & G. 561); *Jarman on Wills* (vol. 1, pp. 826, 827 (3d edit.)).

Mr. Lewin and Mr. Speed, in support of the bill. This, in the events which have happened, is an absolute gift to Caroline Palmer, and though not strictly within the [672] words, it is clearly within the substance of them and the meaning of the testatrix. The testatrix has not made marriage a condition of the gift, though particular limitations could only take effect on marriage; she did not mean that marriage should be a condition, but her object was to provide against the effect of marriage, and in that event to provide against the two alternatives of surviving or predeceasing her husband. If the testatrix intended to take the £1000 out of the residue in favor of the next of kin of the niece, *à fortiori* she must have intended to do so in favor of the niece herself.

There are many cases in which the legatee has taken, though the express event has not happened, and where the Court has held that the condition has been substantially fulfilled, as *Jones v. Westcomb* (Prec. Ch. 361); *Tennant v. Heathfield* (21 Beav. 255); *Murray v. Jones* (2 Ves. & B. 313); *Mackinnon v. Sewell* (5 Sim. 78, and 2 Myl. & K. 202); *Hall v. Warren* (2 Kay & J. 614); *Avelyn v. Ward* (1 Ves. sen. 420).

Mr. Wickens, in reply.

July 22. THE MASTER OF THE ROLLS [Sir John Romilly]. The question raised by

this demurrer is the proper construction to be put on the will of Esther Linton, and the question is, whether Catherine Palmer took a life interest only, or an absolute interest, or an absolute power of disposition of a legacy of £1000 given by the testatrix. If she had married, there is no question but that she would have had, in any event, the absolute [673] power of disposal of the whole legacy; but she died unmarried, and this raises the difficulty. The trusts of the legacy are given by reference to those relating to a legacy of £1500 in favor of Agnes Emma Butler, and the trusts are as follows:—To Caroline for life for her separate use, without power of anticipation; after her death, upon trusts for her children as she shall by deed appoint, and in default of appointment, for all the children equally, sons at twenty-one, daughters at that age or marriage—and the will goes on thus, "And in case," &c., [see *ante*, p. 670].

This certainly does not come within the exact words of the will; but I think no one can read this bequest without seeing that the testatrix intended the legatee to take an absolute interest in the bequest, and that the mere circumstance of her never marrying could not have affected the views of the testatrix. Whether this be a case where the Court is bound to follow the exact literal words of the bequest, or whether it may go further and look at the general scope and spirit of the bequest and give effect to this, where the intention is plain, is a matter which depends much on the decided cases.

Here, I think, on the principle on which Sir William Grant decided *Murray v. Jones* (2 Ves. & B. 213), and the Vice-Chancellor Shadwell the case of *Mackinnon v. Sewell* (5 Sim. 78), it must be held that the absolute interest in the legacy passed to Caroline Palmer, although she never had a husband. The words are that she is to take it absolutely if she survives her husband, and to have a power of disposing of it by will if she dies before her husband; but, to adopt the reasoning of Sir William Grant in [674] *Murray v. Jones*, this is clear:—that Caroline Palmer having a husband is no part of the condition on which the supposed consequence is to depend. The words of the bequest relative to the husband are, in fact, introduced in order to guard against his marital rights, and to prevent his taking the legacy from Caroline Palmer; but her interest in the legacy is not made to depend on the fact of her having a husband.

I read it as if the testatrix had said it is for her for life, protected against her husband, and afterwards for her children, but if she survive her husband, or die without a husband, then she may deal with the legacy as she thinks fit. I am of opinion, therefore, that the Plaintiff, who is the legal personal representative of Caroline Palmer, is entitled, and that the demurrer must be overruled. It was a very proper case to raise by demurrer, but as the Plaintiff is entitled to the legacy free from all charges, the demurrer must be overruled in the usual way.

The Authorised Reports of CASES in CHANCERY
ARGUED and DETERMINED in the ROLLS
COURT during the time of the Right Honorable
Sir JOHN ROMILLY, Knight, Master of the
Rolls. 1864, 1865. By CHARLES BEAVAN,
Esqr., M.A., Barrister-at-Law. Vol. XXXIV. 1866.

[1] PARTRIDGE *v.* FOSTER. July 9, 14, 1864.

[S. C. 10 L. T. 808; 10 Jur. (N. S.) 741; 12 W. R. 1127. For subsequent proceedings, see 35 Beav. 545.]

A judgment creditor, who has sued out an *elegit* without effect, is entitled (independently of the statute of 1 & 2 Vict. c. 110) to equitable relief, though the year from entering up the judgment has not expired. But whether he is entitled to relief under the statute as regards the leaseholds of the judgment debtor which are wearing out, *quere*. But the Court will, within the twelve months, interfere and protect the property charged by a judgment from destruction.

This case came on upon demurrer to the bill, which stated that a testator had bequeathed some leasehold property to Goodbody and Spencer in trust to pay the rents, to insure and keep the premises in repair, and pay an annuity of £60 a year to the testator's daughter and her children till 1880, and (in substance and in the events which had happened) to pay the surplus to his son William Foster. The bill stated that William Foster was in possession and received the surplus rents. It then alleged as follows:—

On the 1st of March 1864 the Plaintiff, George Wilson Partridge, commenced an action for slander against the Defendant William Foster in Her Majesty's Court of Queen's Bench, and on the 7th day of June [2] 1864, the Plaintiff recovered judgment in such action for £40 damages and £115 costs of action. On the 11th of June 1864 the Plaintiff caused a memorial of such judgment to be registered in the registry office for the county of Middlesex, pursuant to the statute in that behalf, and the Plaintiff has caused a writ *feri facias*, directed to the sheriff of the county of Middlesex, to be issued against the goods of the Defendant William Foster; but the sheriff has made a return of *nulla bona* to such writ. On the 17th of June 1864 the Plaintiff caused a memorandum or minute of the said judgment and writ of *feri facias* to be duly registered with the senior master of the Court of Common Pleas, in pursuance of the statute in that behalf.

The Plaintiff has also duly sued out a writ *elegit* to recover the amount of his said judgment debt and costs; but the Plaintiff is not able to execute the same, in consequence of the Defendant William Foster not having any hereditaments vested in him at law.

The said judgment debt and costs still remain unpaid, and the Defendant William Foster has refused to pay to the Plaintiff the amount thereof, and the Defendant has threatened, and the Plaintiff believes that he intends, if he can, to assign and dispose

of his interest in the said leasehold estate, in order to deprive the Plaintiff of the benefit of his said judgment.

The Plaintiff has given notice of his said judgment to the Defendants William Goodbody and David Spencer, and has requested them not to permit the Defendant William Foster any longer to receive the rents and profits of the leasehold premises, until the Plaintiff's said judgment debt shall have been fully paid; but the Defendants William Goodbody and David Spencer [3] refuse to interfere, and in fact they intend, unless restrained by injunction, as hereinafter prayed, to permit the Defendant William Foster to continue to receive the said rents and profits and to apply the same to his own use as heretofore.

The bill prayed that the Plaintiff might be declared to have a valid charge upon the estate and interest of the Defendant William Foster in the leaseholds, for the amount of the Plaintiff's judgment debt and interest thereon, and that proper directions might be given for giving effect to such declaration, by impounding the share of the Defendant William Foster of and in the rents and profits of the leasehold premises. That the Defendants William Goodbody and David Spencer might be restrained by injunction from paying to the Defendant William Foster or permitting him to receive, and that the Defendant William Foster might in like manner be restrained from receiving, any rents or profits of the leasehold premises, until after the Plaintiff's judgment debt and interest and the costs of the said writs of *fiery facias* and of *elegit* and of this suit should have been satisfied. It also prayed a receiver.

To this bill the Defendant Foster demurred.

Mr. Swanston, in support of the demurrer. By the 1 & 2 Vict. c. 110 s. 13, the Plaintiff is precluded from proceeding in equity to obtain the benefit of his charge until after the expiration of a year. *Watts v. Jeffreys* (3 Mac. & G. 372) differs from the present case, for there the interest charged was a mere life annuity; so in *Yescombe v. Landor* (28 Beav. 80) a life interest only was charged; but here the Defendant's interest is absolute. In *Smith v. [4] Hurst* (1 Coll. 705) the Vice-Chancellor refused to appoint a receiver within the year. The bill contains no allegation that the Defendants intend to damage the leasehold property.

Mr. Bevir, in support of the bill. Where the interest of the judgment debtor is determinable or wearing out, the Court will protect the property which is charged in the *interim* and until the judgment creditor can obtain the benefit of his equitable charge. That is the effect of the two decisions cited. Besides, the Plaintiff is entitled to a receiver for the protection of the leaseholds from forfeiture by breaches of covenant. The Vice-Chancellor Wigram seems to have thought, in *Bristed v. Wilkins* (3 Hare, 235), that a judgment creditor who had obtained an order charging the interest of his debtor in Government stock might, in a proper case, sustain a suit for the intermediate protection of the interest which he had so acquired, notwithstanding the six months prescribed by the statute 1 & 2 Vict. c. 110, s. 14, had not expired.

Secondly. The judgment creditor, having issued an *elegit*, which has proved ineffectual, by reason of the interest in the trustees and the duties they have to perform, is entitled to come into equity to make his charge effectual.

Mr. Swanston, in reply. There is nothing stated in the bill which prevents the Plaintiff obtaining his remedy at law under his *elegit*.

July 14. THE MASTER OF THE ROLLS [Sir John Romilly]. The question I have to determine on this demurrer is one of considerable importance, as to the effect [5] of the 1 & 2 Vict. c. 110, s. 13. It is, whether, where the property of a judgment debtor is leasehold, the judgment creditor can come to the Court, before the twelve months have expired, for the purpose of charging or protecting the property. By this demurrer this question is very properly and neatly raised.

There is no doubt, I think, that this Court will, in the interval, interfere to prevent the destruction of the property which is subject to a judgment charge, and that if it is found that the judgment debtor is destroying or getting rid of the property charged by the judgment, this Court will interfere to prevent it, notwithstanding the judgment creditor is not enabled to "proceed in equity to obtain the benefit of such charge until the expiration of one year from the time of entering up such judgment."

In addition to this, it was decided by Lord Truro, in *Watts v. Jeffreys* (3 Mac. & G.

372), which was followed by me in *Yescombe v. Landor* (28 Beav. 80), that in all cases in which the judgment debtor's interest is an expiring interest (as it was in *Yescombe v. Landor*, where the property charged by the judgment was the life-estate of a man in advanced years), the creditor can come to this Court in the meantime to prevent the thing charged from being diminished. Accordingly, I held that the thing charged in that case, which was the life-estate of the judgment debtor, consisted of the rents accruing from the moment the judgment was entered up, and that, therefore, the judgment creditor was entitled to come to this Court for its protection, although no substantial relief could be given him "until after the expiration of one year from the time of entering up such judgment."

[6] I followed *Watts v. Jeffreys*, my decision was not appealed from, and the result was, as I am now informed, that the Plaintiff obtained payment of his judgment debt.

The question here is this:—Whether the Plaintiff is not entitled to have the leasehold property protected in the meantime; for if so, then he is entitled to some relief on this bill.

The case of *Smith v. Hurst* (1 Coll. 705) was strongly pressed on me. The marginal note is this:—"Under the stat. 1 & 2 Vict. c. 110, s. 13, which, after enacting that a judgment shall operate as a charge on the debtor's lands, provides that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment, the Court, upon a bill filed by a creditor to enforce his judgment under the statute, declined to appoint a receiver of the real estate of the debtor within the year limited by the statute."

The Vice-Chancellor seems to have thought that the judgment creditor might proceed either under the statute or independently of it, and if so, that the statute had not taken away any existing right; but that this was essential, viz., if you proceed independently of the statute, you must issue an *elegit* to shew that you have no remedy at common law, and then this Court will enable you to reach the property.

As it appears on this bill that an *elegit* has been sued out and has proved ineffectual, and as the Vice-Chancellor has decided that this statute does not take away [7] any existing right, I am of opinion that this demurrer cannot be sustained.

I do not mean to prejudice any question or to express any opinion as to whether the Plaintiff might not be entitled to some relief as regards the leaseholds before the expiration of the twelve months.

NOTE.—See 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, which materially alter the law on this subject.

[7] *BOYD v. BROOKS. July 14, 22, 1864.*

[Affirmed, 34 L. J. Ch. 605; 12 L. T. 38; 13 W. R. 419. See *Lee v. Nuttall*, 1879, 12 Ch. D. 64.]

An executor, being surety for his testator, paid the debt after the testator's death: Held, that he had a right to retain his debt in preference to the other creditors of equal degree.

Thomas Smith had joined his son-in-law David Brooks in some joint and several promissory notes, but he was merely a surety for David Brooks.

David Brooks died in June 1861, having made Thomas Smith one of his executors, and he proved his will and acted. After the testator's death, Thomas Smith paid the amount of the notes out of his own moneys, and he claimed a right of retainer as against the other simple contract creditors. This was a creditors' suit, and the Chief Clerk, in taking the accounts, reserved the point for the consideration of the Court.

Mr. Hobhouse and Mr. Bristowe, for the Plaintiffs. The executor has no right to retain this debt; that right only extends to debts due to executors at the decease of their testators, and not to debts for which the executors are liable as sureties, which

are their own debts. The point has been expressly determined by a case in *Godbolt* (p. 149, pl. 194, and 4 *Leonard*, 237, pl. 362). There "two men were bound jointly on a [8] bond, one is principal, the other is surety; the principal died intestate, the surety took administration of his goods; and the principal having forfeited the bond, the surety made an agreement with the creditor, and took upon him to discharge the debt. In debt brought by another creditor, the question was, upon fully administered pleaded by the administrator, if by shewing of the bond, and that he had contented it with his own proper money, whether he might retain so much of the intestate's estate, and it was adjudged that he might not; for Fleming, Chief Justice, said that by joining in the bond with the principal it became his own debt."

As to *Bathurst v. De la Zouch* (2 Dick. 460), which will be cited on the other side: it appears from the registrar's book (see *post*, p. 9) that it was decided on different grounds.

Mr. Selwyn and Mr. Lindley, for the executor, relied on *Bathurst v. De la Zouch* (*Ibid.*) as in point and *Nunn v. Barlow* (1 Sim. & St. 588); Williams on Executors (vol. 1, p. 894, 903 (4th ed.)). They argued that, when the executor had paid the testator's debt, he was entitled to retain the amount notwithstanding he was surety, for the debt was, in fact, the debt of the principal, and not of the surety.

July 22. THE MASTER OF THE ROLLS [Sir John Romilly]. I think, on principle, that if an executor, who is a surety for the testator, pays the debt, it then becomes a simple contract debt due from the testator to the executor, which he is at liberty to pay himself or retain. That seems to have been decided by the case of *Bathurst v. [9] De la Zouch* (*Ibid.*), as reported in Dickens; but on examining the registrar's book, I find that the real name of the case is *Bathurst v. De Latouche*, (1) and that the point stated

(1) *Bathurst v. De Latouche*. March 26, 1772.

Robert Bathurst (one Executor of John Morrill, and Mary his Wife, Daughter and Residuary Legatee of), Plaintiffs v. Henry Bodsner De Latouche, the other Executor, Defendant.

Petition of Defendant stated will of John Morrill (1 January 1767), appointing Plaintiff and Defendant executors, and containing statement that testator and Defendant had been engaged in transactions with John Dove, by which both great losers, and that testator's representatives might, in consequence, make demands on Defendant, the testator thereby released Defendant from all claims respecting such transactions, and directed all counter securities given by Defendant to testator to be delivered up to be cancelled; and that by codicil testator charged all his real and personal estate with payments of debts, &c. That 1 June 1768 suit instituted, and that Defendant, as executor of his mother Mary Latouche, claimed to retain out of assets £644, 19s. 4d. for balance of debt due to her on joint bond 1 June 1753 of said John Dove, testator and Defendant, for £500 and interest. The bill charged that Defendant had received half the loan, but that testator [10] repaid it in full, and the bond was delivered up to him and found amongst his papers, and that Defendant ought to pay half the amount.

By Answer, Defendant stated testator and Dove were engaged in joint transactions, that Dove was indebted to Mary Latouche in £500, who, through Defendant, pressed for payment, that testator, to relieve such pressure, undertook to satisfy Mary Latouche, and afterwards executed said bond with Dove and required Defendant also to sign, who did so on apprehension of being indemnified by testator and received nothing. That Dove became insolvent, and only paid £125 on account, and that Defendant, as executor of Mary Latouche then dead, claimed payment of amount remaining due on bond out of testator's assets, and had retained the same.

By Order, 21 June 1773, M. R. had declared testator and Defendant liable in moieties. This was Defendant's petition of appeal, and by Order, 29 July 1773, Lord Chancellor reversed M. R.'s Order and declared, that according to true intent and meaning of testator's will the whole due on said bond was debt by specialty against testator's estate, and that, in taking account of personal estate of testator, what should be found due should be allowed to be retained by Defendant, as he is executor of Mary Latouche, in a course of administration.—Reg. Lib. A. 1771, fol. 620.

in Dickens was not determined at all, the question having arisen upon the construction of the testator's will. I do not at all understand the reasoning of the case in Leonard, where it is said that the surety, by joining in the bond with the principal, it became his own debt. That was so as regards the creditor, but not as between the principal and surety, and the moment the surety discharged the debt, it undoubtedly became altogether the debt of the principal.

I think the executor is entitled to retain the debt for which he was surety for the testator as well as the other debts.

Affirmed by Lord Westbury, L. C., 24 January 1865.

[10] KING v. KING. *July 14, 15, 1864.*

[S. C. 34 L. J. Ch. 195; 10 L. T. 832; 10 Jur. (N. S.) 762; 12 W. R. 1095.]

An action by a creditor, whose debt was disputed, being stayed after a decree for the administration of the intestate's estate: Held, that the creditor was not entitled to his costs of the action nor of the motion to stay it until he had first established his debt in Chambers.

Mr. Hoskins had brought an action in the Queen's Bench against the administrator with the will annexed to recover the amount due on a bond dated in 1814.

The debt was disputed by the administrator, on the ground that it was barred by the Statute of Limitations, and the action was defended.

On the 6th of June 1864 a decree had been made for the administration of the estate of the testator.

Mr. F. H. Colt, on behalf of the Plaintiff, now moved to restrain the proceedings in the action.

[11] Mr. Hardy, for the creditor, asked that the administrator might at once pay the costs of the action and of the motion. He relied on *Cole v. Burgess* (1 Kay, App. i.).

Mr. Colt, in reply, resisted the payment of the costs to a creditor whose debt was still contested.

July 15. THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot find that this point has ever been decided, and the case of *Cole v. Burgess* (1 Kay, App. i., and Seton on Decrees, 882, 883 (3d edit.)), to which I was referred, does not apply, for there it is expressly stated that the executor did "not dispute the debt." If the creditor has no ground for bringing the action, he ought not to get his costs of that proceeding. On the other hand, the executor ought not to dispute a debt which cannot be successfully resisted and he ought to pay the costs.

What I shall do is this:—Immediately on the creditor's debt being allowed in Chambers, he shall have his costs of the action and of the motion out of the assets.

NOTE.—The order gave Hoskins liberty to go in and prove his debt, and ordered the taxation of his costs of the action up to the time he had notice of the order for administration, and also his costs of this application. And, on his establishing his claim in Chambers, the administrator was ordered, within one month from the allowance of the claim, to pay such costs out of the assets. Liberty to apply.—Reg. Lib. 1864, A. fol. 2163.

[12] MARKWELL v. MARKWELL. MARKWELL v. BULL. *July 22, 27, 1864.*

[S. C. 34 L. J. Ch. 55; 10 L. T. 834; 10 Jur. (N. S.) 816; 12 W. R. 1095.]

A. B. by deed voluntarily settled some property on trust for himself for life, and after his decease, upon trust to pay all the debts then owing by him and any

legacies or sums of money not exceeding £400 which he by will or writing should direct, and subject thereto, in trust for his son William. Afterwards, in order to defeat the settlement, he gave voluntary bonds to the extent of £3500 in favour of other relatives. Held, that the bonds were effectual and created valid debts, payable out of the trust property.

This was a suit and cross-suit, each instituted by one of two brothers for the purpose of determining the true construction of a deed executed on the 17th of January 1861. The settlor, James Markwell, who executed this deed, died in October 1862, at the advanced age of seventy-six. He seemed to have fluctuated considerably in his disposition towards his two younger sons John and William. From 1847 to 1859 he regarded his son John with great dissatisfaction, and William was his favourite. In 1859 he became reconciled to John, and, ultimately, in January 1861, being then seventy-five years old, he seemed to have entertained the opinion that it was desirable that he should settle his property, so as to bind himself and prevent himself from making any further disposition of it, and accordingly he, in that month, deliberately and advisedly caused three deeds to be prepared, all bearing date the 17th of January 1861.

By the first he conveyed certain landed property to the trustees after mentioned, in trust to pay the rents to himself during his life, and, after his death, upon trust for his eldest son the Rev. James William Markwell absolutely.

By the second deed he gave up his business of a wine merchant and settled it on his son William Robert, on condition of his son taking upon himself the payment [13] of the debts belonging to that business, which he accordingly did and had since discharged.

The third deed was that which was in question in this suit. It was executed by and between the settlor, James Markwell, of the first part, William Robert Markwell, his son, of the second part, and Mr. Bull and Mr. Dunn of the third part. These gentlemen were two personal friends of the settlor, who, on his request, acted as trustees in the matters of the first and third of the deeds. By this indenture, after reciting various descriptions of personal property to which he was entitled, which consisted of a mortgage of £500, a debt of £1000, £10,000 dollars Pennsylvania £5 per cent. stock, 25,000 guilders, secured on Dutch bonds which passed by delivery, and two-thirds of £3000 consols standing in the names of trustees, he assigned these properties, specifying them to the trustees, upon certain trusts, upon the construction of which the question in this case arose.

The trusts were these:—

“Upon trust to pay the two-third parts of the dividends, interest and annual income of all and singular other the said trust moneys and premises, unto James Markwell and his assigns during his life;” and, after his decease, “*upon trust to pay thereout all the debts then owing by James Markwell, and also any legacies or sums of money, not exceeding in the whole the sum of £400 sterling, which James Markwell, by his will or any codicil thereto, or by any writing signed by him, shall give or direct to be paid.* And subject as aforesaid, upon trust for William Robert Markwell, his executors, administrators and assigns, for his and their own absolute use and benefit.”

[14] The settlor covenanted to transfer the property, and, in the meantime, to hold it on the trusts of the settlement.

Shortly after the execution of this deed James Markwell, the settlor, seemed to have become dissatisfied with his son William, in consequence of some dealings by him with a part of his father's property, and a few months after his son John seemed to have become the settlor's favourite. In September 1861 he applied to William to alter the deed, and to allow two sums of £500 each to be given to his two grandchildren, a son and a daughter of his son John. Afterwards he wrote William a letter in these words:—

“October 7, 1861.—My dear William,—Now my dear William the little I ask for I trust, as you have the bulk of my property, you will most cheerfully do and let me depart in peace. Let them have £500 each for the children, John and Emma, endorsed on the deed. Promises are nothing; have it done as my most earnest wish,

and I shall feel my last moments happy. My present power is only £400. Write and say it shall be done.—Yours affectionately,
 “J. MARKWELL.”

This was opposed by William, and thereupon Mr. Markwell consulted his solicitor as to the manner in which he might defeat, wholly or in part, the settlement so executed. The result was that, on the 1st October 1861, he executed a common money bond to secure the payment of £500 to his grandson John Paas Markwell, payable on the 19th of September 1870, on which day he would attain his age of twenty-one years; and, on the same day, he executed a similar bond to secure £500 to his granddaughter Emma M. A. F. Markwell, [15] to be paid on the 14th of January 1872, or her day of marriage, whichever event should happen first.

He also, on the 18th of October 1861, gave a bond to Mary Ann Paas, the maternal grandmother of his grandchildren, to secure £1000, which she advanced to him, and this £1000 he paid to his son John, to be invested on certain trusts for the benefit of his grandchildren; and, finally, on the 14th of November 1861, he executed a bond in favor of his son John, to secure to him the sum of £1500.

The questions in this cause were as to the validity of these instruments.

In the first instance various charges were made on both sides, and some evidence was adduced as to whether all or any of the instruments above mentioned were obtained by undue influence. All those charges were abandoned at the hearing, and the question resolved itself solely into one of construction, upon the effect of the words of trust contained in the indenture of the 17th of January 1861.

The suit of *Markwell v. Markwell* was instituted in January 1863 by Wm. R. Markwell against John Markwell, Mrs. Paas, the trustees and the two children, John and Emma Markwell, and it prayed a declaration that the four bonds did not constitute debts payable out of the estate and effects settled by the indenture dated 17th January 1861, and that the bonds were fraudulent and void, and that they might be delivered up to be cancelled.

Sir H. Cairns and Mr. Swanston, for the Plaintiff William Robert Markwell. The Court will enforce [16] this deed though voluntary; *Cox v. Barnard* (8 Hare, 310). The bonds were a fraud on the settlement, for although the creation of any fair debt would be supported, still a disposition or obligation, not *bona fide* and given for the express purpose of avoiding and defeating the settlement, is invalid; *Jones v. Martin* (6 Bro. P. C. 437, and 5 Ves. 265, n.). These voluntary bonds do not constitute debts, properly speaking, but gifts; they would be postponed to simple contract debts; *Lechmere v. Earl of Carlisle* (3 Peere Wms. 221); *Lomas v. Wright* (2 Myl. & K. 769); and the sums secured by them are not debts but legacies, and, therefore, under the express terms of the power, they are invalid so far as they exceed the limit of £400. Lastly, if the bond to Mrs. Paas be valid as a debt, the Plaintiff is entitled to follow the money into the hands of John Markwell, to whom it was given.

THE MASTER OF THE ROLLS. As to the debt of £1000 to Mrs. Paas, I have no doubt. The settlor has borrowed this money and has disposed of it in his lifetime as he pleased. The money borrowed could not have been followed in the settlor's lifetime, nor can it now.

Mr. Selwyn and Mr. W. W. Cooper, for John Markwell. The settlor reserved to himself the power of creating debts to any extent payable out of this property. He might have borrowed any sum of money and have applied and disposed of it as he pleased; he had, in fact, power to put an end to the deed. The money cannot be followed; for if he had sold a real estate, which he had voluntarily settled, to a purchaser for value, and received the purchase-money, it could not have been followed even in his own hands. These [17] bonds are not testamentary, for they contained no power of revocation; *Fletcher v. Fletcher* (4 Hare, 67); although it would, perhaps, have been more regular to have introduced a power of revocation into the settlement; *Nanney v. Williams* (22 Beav. 452). Though voluntary, they constitute valid debts payable out of the testator's estate; *Garrard v. Lord Dinorben* (5 Hare, 213); *Lewin on Trusts* (p. 62, n. (4th edit.)); *Watson v. Parker* (6 Beav. 283). No question arises with the other creditors; the contest is altogether between volunteers, between whom no preference is ever shewn by this Court. They also referred to *Seton on Decrees* (p. 123 (3d edit.)); *Denig v. Ware* (22 Beav. 184).

Mr. Baggallay and Mr. Dalton, for the trustees.

Mr. Townsend, for Mrs. PaaS.

Sir Hugh Cairns, in reply.

July 27. THE MASTER OF THE ROLLS [Sir John Romilly]. I have already decided that, as to the money borrowed from Mrs. PaaS, it was a transaction that could not be impeached, and that the money paid by her and settled by James Markwell could not be followed or affected with the ulterior trusts of the indenture in favor of William, even in the hands of the settlor, if alive, and much less in the hands of those to whom he has thought fit to give it. I entertained no doubt that the instruments were purely voluntary, but that the Court would not assist a volunteer against the donor to make [18] the gift complete, or the donor to get back any of the property which he might validly have disposed of since. I retain the opinion I then expressed.

As regards the two bonds to the grandchildren and the bond to the son John, the case is very different. The question here is simply whether these are, properly speaking, under the words of this deed "debts then owing by the said James Markwell" the settlor, "or sums of money" given "by a writing signed by him." And upon the best consideration that I can give to the subject, I am of opinion that they are debts owing by James Markwell at his decease. That they are debts at law cannot be contested. That what is a debt at law is also a debt in equity is also, in my opinion, a proposition which cannot be reasonably contested.

It is suggested that they are not properly debts in equity because, in the administration of assets, the rule is, to pay simple contract debts founded on valuable consideration before voluntary bonds; but in truth this does not prevent their being debts, it only illustrates a rule of equity as to the order in which debts are paid, in the administration of assets. In other words, specialty debts contracted for value are paid first; next, the simple contract debts contracted in like manner, and then debts which the testator or intestate created without having any consideration for so doing. It is in fact only a rule of equity, in like manner as it is another rule of equity, that equitable assets are to be applied *pari passu* in the payment of all specialty as well as simple contract debts, in equal shares and proportions. I am, therefore, of opinion that the three bonds are debts.

But they are also sums directed to be paid by "writing signed by him;" are they then to come within [19] the former or the latter class enumerated in the third deed of January 1861? In the former case they will have to be paid in full; in the latter they must be limited to £400. I think they come within the former. The testator has reserved to himself two powers, which derogated from the settlement; one is to diminish his property indefinitely by contracting debts; the other is to diminish it to the extent of £400, "by his will or any codicil thereby, or by any writing signed by him." He has himself determined which of the two he intended to exercise, for he has created debts; he has expressed them to be debts, and, by all the means in his power, shewn that he intended them to come within the former class. I am, therefore, of opinion that the bonds are valid and effectual instruments to the full extent thereof, and that it will be proper to make a declaration to that effect.

[19] PHILLIPS v. PHILLIPS. June 30, July 1, 1864.

Bequest by a father of £7000 in remainder after the death of his widow, in trust for his daughter for life, with remainder to her children of any marriage: Held, adeemed by a subsequent gift in possession of 19,000 rupees Indian stock, made by the father on the marriage of his daughter, and settled on her husband for life, with remainder to herself for life, with remainder to the children of that marriage.

By his will, dated in 1858, the testator directed that his trustees should, during the widowhood of his wife, pay the interest and annual income of the residuary trust estate unto his wife. And he declared that the trustees should, after the death or second marriage of his wife (which event had not happened), set apart £7000, and invest it and stand possessed thereof upon trust for the benefit of his daughter Ellen

(now the wife of the Defendant Edgar Charles Baker) for her life, without power of anticipation, and after her decease, upon trust for all or any of her children as she should by deed or will appoint, and in default of appoint-[20]-ment, for her sons at twenty-one years and daughters at that age or marriage, equally, and if none, then on certain trusts for his other children.

In August 1863 the testator's daughter Ellen married Mr. Baker, on which occasion a settlement was executed, whereby a sum of 19,000 company's rupees stock of the Indian £5 per cent. loan 1856, 1857, which was provided and transferred by the testator into the names of trustees, was settled, upon trust to pay the income during the joint lives of Mr. and Mrs. Baker to Mr. Baker for life, and to the survivor of them for life, with remainder to the issue of the marriage, as they should jointly or as the survivor should appoint, and in default, to the sons at twenty-one and the daughters at twenty-one or marriage equally.

The testator died in September 1863 without altering his will, and the question was, whether the legacy of £7000 given to Ellen Baker, her children and husband was partially adeemed by the provision made on her marriage. There was parol evidence of the testator's intention, and that, in the case of another daughter similarly circumstanced, he had by codicil expressed his intention of adeeming.

Mr. Baggallay and Mr. Druce, for the Plaintiffs, relied on *Schofield v. Heap* (27 Beav. 93); *Hopwood v. Hopwood* (7 H. of L. Cas. 728); *Coventry v. Chichester* (33 Law J. (Ch.) 361, 676).

Mr. Selwyn and Mr. Kay argued, first, that the difference between the provisions, one being in possession and the other reversionary, and the discrepancy between [21] the limitations rendered it impossible to hold that one was a substitute for the other, and that the doctrine itself had been altogether disapproved of; Williams on Executors (p. 1200). Secondly, that it was premature to make any declaration during the life and widowhood of the widow, or until the legacy of £7000 became payable; *Lady Langdale v. Briggs* (8 De G. M. & G. 427).

July 1. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this was an ademption. I think there is nothing in the objections, that the nature of the property and the limitations differ, nor in the circumstance that a prior life interest in the property was, by the will, given to the mother. In addition to this, I think that the parol evidence of the intention of the testator, which is admissible in such cases as these, shews that the testator intended it to be an ademption of the legacy. I will, therefore, make a declaration to that effect.

The value of the rupees must be ascertained as at the date of the settlement.

I am of opinion that the widow is entitled to have the rights declared at this moment.

See *Weall v. Rice*, 2 Russ. & Myl. 257.

[22] *Re JEWITT* (No. 2). July 25, 1864.

[See *In re South Essex Investment, &c., Company*, 1882, 46 L. T. 282; *In re Galland*, 1885, 31 Ch. D. 302.]

A solicitor ordered, pending a taxation of his bill, to deliver over his client's papers, on the client undertaking to produce them and giving security for the amount claimed.

An order had been made on the 14th of April 1864, for the taxation of a solicitor's bill of costs, and delays having occurred in completing the taxation,

Mr. Wickens applied for the delivery, by the solicitor to the client, of his documents, upon securing the amount claimed.

Mr. W. Hull Terrell, *contra*. The order for taxation directs that, upon payment by the client to the solicitor of what may be certified to be due to him, the solicitor shall deliver up, on oath, all deeds, &c., in his custody or power belonging to the

client. This, therefore, is an application, on motion, to vary an existing order, and it cannot be entertained; it is premature.

The solicitor ought not, before payment of his demand, to be deprived of his lien on the papers.

THE MASTER OF THE ROLLS [Sir John Romilly]. The course I adopt in all these cases is this:—Where a sum is claimed by a solicitor to be due to him, and some delay occurs in the taxation, imputable to the fault of no one, I order the papers to be delivered over on the amount being secured, and on an undertaking to produce them as required in the course of the taxation. The case has been before the Court on several occasions.

As the solicitor does not state the amount claimed, [23] so as to enable the applicant to bring the money into Court, I will order the delivery up of the papers, if he will pay into Court £150, and undertake to produce the papers and documents before the Taxing Master, as they may be required in the course of the taxation; but the order is to be without prejudice to the lien, if any, of Mr. Jewitt upon the papers for the costs alleged to be due to him.

NOTE.—Reg. Lib. 1864, A., fol. 1801.

[23] TOWNSEND v. EARLY (No. 2.) July 19, 1864.

[S. C. 10 L. T. 897; 10 Jur. (N. S.) 860; 12 W. R. 1132.]

A. B.'s life interest in a fund in England was liable to forfeiture if A. B. "should alien, sell, assign, encumber or transfer, or in any manner dispose of or anticipate" it. A. B. took the benefit of the Insolvent Act in New South Wales, having presented a petition there, by which he surrendered his estate (omitting this life interest from the schedule). The Judge accepted this surrender of his estate and placed it under sequestration in the hands of the Chief Commissioner of Insolvent Estates. Held, that A. B. had thereby forfeited his life interest.

The testator directed his trustees to invest £4000, and pay the interest equally between his nephews, Henry Townsend and William Townsend, during the term of their respective natural lives:—

"But it was his will, and he did thereby expressly declare and direct that in case his said nephews, or either of them, *should alien, sell, assign, encumber or transfer, or in any manner dispose of or anticipate the said dividend*, interest and annual produce thereof thereby directed to be paid to them, or any part thereof, then and in such case, and from immediately after such alienation, sale, assignment or transfer, the said bequests or bequest, so made thereof as aforesaid, and of which such alienation, sale, assignment or transfer should have been so made, should cease and be void, to all intents and purposes, as if the same had not been mentioned in his will."

[24] The testator died in 1832.

A question was raised by this bill, whether Henry Townsend had forfeited his life interest. The Chief Clerk, by his certificate, found as follows:—

"On the 2d of March 1842 Henry Townsend aliened the dividends, interest and annual produce of the sum of £2000 in the manner and under the circumstances following:—On the said 2d of March 1842 Henry Townsend, being then confined in the debtors' prison at Sydney, in New South Wales, presented his petition in the Supreme Court of New South Wales, setting forth that he was insolvent and desirous of surrendering his estate for the benefit of his creditors, and thereby surrendered his said estate, and prayed that the same might be accepted and placed under sequestration. The surrender of such estate was duly accepted by one of the Judges of the Supreme Court of New South Wales, and by an order under his hand, dated the 3d of March 1842, ordered to be placed under sequestration, in the hands of the Chief Commissioner of Insolvent Estates at Sydney, according to law. Henry Townsend's share of the legacy of £4000, or the dividends, interest and annual

produce thereof were not specified in the schedule of the estate or property of Henry Townsend, annexed to his petition."

"By an order of the Superior Court of New South Wales, dated the 2d of February 1844, and made in the matter of the insolvency of Henry Townsend, it was ordered that the estate of the insolvent be released from sequestration, upon the offer of composition of the insolvent, and the trustee thereof distributing the clear balance of all moneys in his hands among the creditors of the said insolvent *pari passu*."

[25] The Chief Clerk reserved, for the consideration of the Court, the question whether Henry Townsend, by filing his petition of insolvency in the Supreme Court of New South Wales, and the acceptance thereof by the Judge, had aliened, &c., the dividends of the £2000.

By the local Act (5 Vict. No. 17, c. 53) the effect of the order for sequestration vested in the Chief Commissioner all the present and future real and personal estate of the insolvent.

Mr. Baggallay and Mr. Shebbeare, for the Plaintiff, argued that the life interest had been aliened by the proceedings in the colonial insolvency, and that it had thereby become forfeited. They cited *Shee v. Hale* (13 Ves. 404); *Pym v. Lockyer* (12 Sim. 394); *Brandon v. Aston* (2 Y. & C. C. C. 24); *Rochford v. Hackman* (9 Hare, 478); *Joel v. Mills* (3 Kay & J. 458).

Mr. Cole and Mr. Hallett, for Henry Townsend. There has been no forfeiture. The Colonial Insolvent Act has no operation out of the colony, and it could not effectually vest the income of the money in the fund in the Chief Commissioner. Again, the surrender executed by Henry Townsend did not comprise his life interest, for it was not included in the schedule; so that it has not been aliened, assigned or incumbered either by the local Act or by the surrender.

That the colonial proceedings were ineffectual in this country is shewn by the fact that they did not discharge the debts in this country, and that the creditors here might still sue the insolvent in the English Courts; [26] *Bariley v. Hodges* (1 Best & Sm. 375); *Smith v. Buchanan* (1 East, 6); *Lewis v. Owen* (4 Barn. & Ald. 654); *Phillips v. Allan* (8 Barn. & C. 477); *Story's Conflict* (p. 502).

Mr. T. C. J. Millar, for the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiff is entitled. The cases shew that there is a distinction between a proceeding *in invitum* and one voluntarily taken by the insolvent himself. If an Englishman were to go to Australia, and there assign over consols for value, it could not be contested that they would not legally vest in the assignee until they had been transferred here, but still the contract would bind them in equity. So the life interest in these funds is not within the operation of the local Act of Parliament, so as legally to vest them in the Chief Commissioner. But, the case is this:—the legatee, being in prison in New South Wales, applies for the benefit of the Insolvent Act, and the condition for his obtaining it is, that he shall surrender all his property for the benefit of his creditors. If he had inserted this property in the schedule, and described it as the income of a sum of consols in England, and had proposed to give it up on obtaining his release, then no doubt the property, if not forfeited, would have passed, in equity, to the Chief Commissioner.

Does it make any difference that he concealed this property and omitted it from the schedule? I think not, and that a man cannot prevent the operation of a surrender of all his property, under these circumstances, [27] by fraudulently concealing and omitting from the schedule that which he is bound to state. Having obtained the consideration, this Court would act on the surrender.

It is true that the discharge under the insolvency in New South Wales is no bar to an action in this country, and that a creditor would be entitled to sue him here; but the question is, whether the insolvent could obtain the stock in this country after he had assigned or agreed to assign it in New South Wales? I am of opinion he could not, and that the dividends are forfeited.

[27] COOKE v. MIREHOUSE. July 22, 1864.

Devise to A. for life when he attains thirty-one, and after his death to his eldest son in fee. In case A. should not live to that age "or" not have any son, then in trust for B. for life on attaining thirty-one, and after his death to his eldest son in fee, and in case of failure, to the eldest son of the testator's daughter in fee. A. attained thirty-one and died without having had issue, and B. also died without having issue. Held, that "or" could not be read "and," and that the eldest son of the daughter took the estate.

The testator, Mr. Mirehouse, died in 1850, having by his will devised as follows:—

"I will, devise and bequeath all my property, real and personal (except as hereinafter accepted) to my dear wife and my two dear brothers and their heirs for ever, in trust as follows:—first, for my eldest son John when he arrives at and not before the age of thirty-one, for his life, and after his death, to his eldest son and his heirs for ever. In case my son John should not live to that age, or not have any son, then in trust for my second son Evelyn on his arriving at the age of thirty-one for his life, and after his death, to his eldest son and his heirs for ever, and in case of failure, then to the eldest son of my eldest daughter and his heirs for ever, and in case of failure, then to the eldest son of my second, third, [28] fourth or fifth daughters and his heirs for ever in succession."

In 1857 the testator's eldest son John attained thirty-one; he married in 1863, and died in 1864 without having had any issue.

The second son, Evelyn, died in 1863 without having married.

This bill was filed by the creditors of John Mirehouse, the testator's eldest son and heir at law, insisting that John Mirehouse was seised in fee of the devised real estates at his death, and that they thereupon descended on his five sisters, his co-heiresses, and formed assets for payment of his debts.

Richard Levett, the eldest son of the testator's eldest daughter, insisted that, on the death of the testator's sons John and Evelyn without issue, he became seised in fee of the devised estates.

Mr. Selwyn and Mr. H. F. Bristowe, for the Plaintiffs, argued that the testator only intended Evelyn to take in the event of John not attaining thirty-one and of his not having a son; for if the sentence were read disjunctively the gift to Evelyn would fail immediately on John's attaining thirty-one. That consequently "or" must be read "and;" and as the two events had not taken place, the gift over failed. They referred to *Grey v. Pearson* (6 H. of L. Cas. 61); *Seccombe v. Edwards* (28 Beav. 440); *Day v. Day* (16 East, 67); *Hasker v. Sutton* (1 Bing. (O. S.) 501); *Johnson v. Simcock* (6 Hurl. & N. 6, and 7 Hurl. & N. 344).

Mr. Hobhouse, Mr. Bevir and Mr. Southgate, for the [29] co-heiresses in the same interest, cited *Jarman on Wills* (vol. 1, chap. 16); *Wright v. Kemp* (3 Term Rep. 470); *Hasker v. Sutton* (9 Moore Rep. 2, and 1 Bing. 501); and see *Coates v. Hart* (32 Beav. 349).

Mr. Broderick and Mr. Begg, for other Defendants, cited *Fairfield v. Morgan* (2 Bos. & P. (N. R.) 38).

Sir Hugh Cairns, Mr. Baggallay and Mr. Rasch, for Richard Levett, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. It has frequently happened that, in the construction of a will, the word "and" has been read "or," and "or" read "and," for the purpose of giving effect to what appears to be the plain object and intention of the testator, and to prevent an intestacy. Were I to adopt the arguments of the Plaintiffs, this would, I believe, be the first instance in which this had been done for the purpose of defeating the intentions and creating an intestacy.

It is clear that the testator did not intend John to take any interest unless he attained thirty-one; and the words of the will, as they stand, import that, if he died after attaining that age without having had a son, the property is to go to Evelyn for life, and then to the other persons under the subsequent limitations. Then why

is the Court to alter the words of the will for the mere purpose of excluding them? The Court has gone a great way to prevent a son being excluded, but here I am asked to change the words and do violence to the terms of the will, and that for the purpose of excluding the second son and of defeating all the subsequent limitations. I never knew of such a case.

[30] Even if the Court could look at the events which have happened, and modify the words of a will, after ascertaining what the intention of the testator would have been if he had foreseen what would have happened, it is plain that the testator would not have turned "*or*" into "*and*" for the purpose of excluding his son Evelyn and the persons he intended to take under the subsequent limitations.

I am of opinion that the case of the Plaintiffs fails, and that the bill must be dismissed.

[30] EDMONDSON v. CROSTHWAITE. *March 14, 15, 1864.*

For a long series of years the manager of a public company had fraudulently retained large sums, whereby the dividends declared, from time to time, were much less than they otherwise would have been. After his death, a considerable sum was recovered by the company from his estate, in respect of his defalcations, and thereupon the company declared a large bonus. Held, as between the tenant for life and remainder-man of some shares, that the bonus belonged solely to the person entitled to the shares at the time it was declared.

In 1832 a testator bequeathed ten Carron shares to his widow for life, with remainder over. She died in 1847, and in 1854 the executor sold the shares for £10,000 to the manager. After this, large sums were recovered from the estate of a former manager, and thereout, in 1858, a bonus of £470 per share was declared, whereupon the executor insisted on setting aside the sale, and obtained an additional £8000 by way of compromise. A bill by the executor of the widow, claiming to be entitled to participate in the £8000, was dismissed with costs, the Court holding, first, that the widow's interests (if any) were not comprised in the compromise, and secondly, that the whole bonus belonged to the persons entitled to the shares at the time it was declared.

The testator, Thomas Crosthwaite, died in 1832, having, by his will, given his real and personal estate to trustees, upon trust to permit his wife Betty Crosthwaite to have, receive and take the rents, issues and profits thereof for her life, and after her death (subject to certain legacies), as to one moiety, for his nephew John Crosthwaite of Thornthwaite, and the other moiety for his nephew John Crosthwaite of Liverpool.

[31] Betty Crosthwaite, the widow, died in May 1847.

Part of the testator's estate consisted of ten shares in the Carron Company, a company composed of 600 shares of £250 each, which carried on a very extensive and profitable trade in iron.

For fifteen years during her life the widow received the dividends on these shares, which amounted to between £200 and £300 a year.

In 1850 John Crosthwaite of Liverpool and John Crosthwaite of Thornthwaite were the trustees of the will, and in 1853-54 they sold and transferred the ten shares to William Dawson, who was one of the managers of the Carron Company. The price paid was £10,000, which of course was estimated upon the basis of the amount of past dividends.

In 1859 it was discovered that Stainton, the London manager of the Carron Company, had, for a long series of years, fraudulently retained and omitted to divide the profits. By thus keeping down the market value, he had bought up a number of shares at an undervalue. Suits were instituted by the company against the representatives of Mr. Stainton (1) in which the company recovered £220,000 in respect of

(1) See *Stainton v. The Carron Company*, 24 Beav. 346; *Maclaren v. Stainton*, 27 Beav. 460, and 3 De Gex, F. & J. 202; *Lock v. Venables*, 27 Beav. 598.

his defalcations. This was paid in May 1858, and in the same month the Carron Company, out of the produce, declared a bonus of £470 per share.

After this, the surviving trustee of Crosthwaite's [32] will (John Crosthwaite of Liverpool), alleging that Dawson, the manager, had notice of the facts through which the £220,000 had been recovered, required him to rescind the contract for the sale of the ten shares. After some negotiation, it was agreed, that upon William Dawson paying a sum of £8000 in addition to the £10,000 already paid, the sale to him should be confirmed. Accordingly, by a deed made in 1862, between John Crosthwaite of Liverpool, and his assignees in bankruptcy, the executors of John Crosthwaite of Thornthwaite, and William Dawson, the compromise was effected, and the sale affirmed.

This bill was filed in 1863 by the executor of Betty Crosthwaite, the widow, against John Crosthwaite of Liverpool and his assignees, and the executors of John Crosthwaite of Thornthwaite, claiming a part of the £8000 received from William Dawson under the compromise, and insisting that it had been received in full satisfaction of all claims and demands in respect of the ten shares and the arrears of dividends. The bill charged that if the £8000 was not intended as a compensation for the arrears of dividends which accrued due in the lifetime of Betty Crosthwaite, it was part of the ultimate residue of the personal estate of Thomas Crosthwaite, and was the only portion of such residue which now remained undisturbed, and that the Plaintiff was entitled to have all necessary and proper proceedings taken, by or in the name of the Defendant John Crosthwaite (as surviving executor and trustee of the said will) for the purpose of recovering, for the benefit of the Plaintiff, the arrears of the dividends which accrued due in the lifetime of Betty Crosthwaite.

The bill prayed for the administration of Crosthwaite's estate, and that all proper directions might be given for [33] ascertaining and recovering from the Carron Company, or otherwise, and for paying to the Plaintiff, as executor of Betty Crosthwaite, the amount of the arrears of the dividends, in respect of the ten shares, which became due after the death of the testator in the lifetime of the said Betty Crosthwaite; and that it might be ascertained and declared, whether the £8000, or any part thereof, ought to be attributed to and treated as compensation for the last-mentioned arrears of dividends, and, if so, that such part might be paid to the Plaintiff.

Mr. Baggallay and Mr. Kay, for the Plaintiff, argued that a portion of the fund recovered by the trustee under the compromise was attributable to profits fraudulently retained by the manager during the life of the tenant for life, and that an inquiry ought to be directed as to this. Secondly, that the executor ought to institute a suit, at the expense of the estate, to recover the amount lost by the default of the managers; *Jerdein v. Bright* (2 John. & Hem. 333).

Mr. Hobhouse and Mr. Druce, for John Crosthwaite, the trustee, said that he was willing to take any proper proceedings upon being indemnified as to costs.

Mr. Selwyn and Mr. Robinson, Mr. Southgate and Mr. Bardswell, for the assignees of John Crosthwaite, and Mr. Bagshawe, for the executors of John Crosthwaite of Thornthwaite. The question raised by this suit has been, in fact, decided by the Lords Justices in *Maclaren v. Stainton* (3 De G. F. & J. 202). In that case, the Master of the Rolls had apportioned the bonus of £470 a share on some Carron shares specifically bequeathed by the testator, who died in 1851, first, between the residuary [34] and the specific legatees, and secondly, as between the tenants for life and remainder-men of the shares. This was reversed by the Lords Justices, who held that the bonus belonged absolutely to the person entitled to the shares at the time it was declared.

In regard to public companies, the dividends or income can only consist of that which is, from time to time, declared. The fund recovered, in this case, was a mere windfall, attributable to the year in which it was recovered. As an illustration, take the converse case, and suppose the dividends declared had, for a series of years, been twice as great as they ought to have been, and to have been received by the tenant for life, could a suit be afterwards maintained against the tenant for life to recover back the excess? Clearly not. Here the sale was of the shares as they stood in 1854, seven years after the death of the widow, and of the future dividends, and that is the sale which has been confirmed.

The Plaintiff had notice of the compromise and did not interpose ; he has no interest in the fund recovered, and this bill ought to be dismissed.

Mr. Baggallay, in reply. John Crosthwaite was a trustee for the Plaintiff, and he ought to have insisted on setting aside the sale, and have left intact the Plaintiff's remedies against Dawson, Stainton and the company. The Plaintiff's claims ought to have entered into the compromise, and the trustee had no power to make any arrangements which could prejudice the rights of his *cestuis que trust*.

[35] March 15. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion, in this case, that the Plaintiff fails.

Two questions arise, first, whether the compromise included what was due to the Plaintiff's testatrix ; and if it did not, then whether it ought to have included it. The first question depends upon the construction of the deed of compromise. The Plaintiff not being a party to it, and there being nothing in the deed which points to what his testatrix might have been entitled to from Dawson, I think it does not include her claim. Either there was something due from Dawson in respect of the dividends of the Carron shares which accrued between 1832 and 1847, when the widow died, or not. If anything was due, this deed does not affect it, it in no respect deprives the Plaintiff of his rights, but leaves Dawson still liable. It is true that Dawson can only be sued by the executor of the testator, but the Plaintiff may sue in his name on giving him an indemnity, and if he refuses to allow his name to be used, on a proper indemnity being tendered, and obliges the Plaintiff to come to this Court to compel him, I should make the executor pay the costs. But the Defendant John Crosthwaite says he is and has always been ready to allow his name to be used upon being secured against costs.

The Plaintiff cannot maintain this suit to have the £8000 divided between him and the Defendants, unless he can shew that his claim formed a portion of the contract for a compromise. The Defendant John Crosthwaite might be exposed to some difficulty, if it could be established that he knew that the Plaintiff had some claim against Dawson and has made use of it for the purpose of enhancing his own demand, or if he had in-[36]tentionally thrown impediments in the way of the Plaintiff enforcing his claim ; but no such case is here made.

As to the other point, it appears that in *Maclaren v. Stainton* (3 De G. F. & J. 202) the Lords Justices expressly determined the point here raised, and that the Plaintiff has no claim at all in respect to the bonus. The facts of that case are the same as the present, but with different names ; and I cannot, after that decision, say that the Plaintiff is entitled to anything. The Court there decided that the whole of the bonus which arose in consequence of fraudulently withholding of moneys which would have increased the dividends, did not belong to the persons entitled to the shares at the periods at which the retainer took place, but to the persons entitled to dividends when the actual bouses were declared.

I am of opinion that this bill must be dismissed with costs.

[36] D'EYNCOURT v. GREGORY. Feb. 24, 26, 27, 1864.

A. B. who was tenant for life, with remainder to his issue in tail, forfeited his estate before he had any issue. Held, upon the intention apparent on an executory instrument, that the next remainder-man thereupon became entitled to the rents.

A will directed a settlement to be made of the G. estate, which should contain a shifting clause, providing that if any person taking the G. estate should not resettle the De Ligne estate (acquired through another title) to like uses, the G. estate should go to such uses as if the limitation in his favour had not been inserted. It also directed the insertion of a name and arms' shifting clause in a very different form. A. B., a tenant for life with remainder to his children, refused to resettle the De Ligne estate, and he had no issue : Held, thereupon, the next remainder-man was entitled to the rents of the G. estate until A. B died or had issue.

The question, in this cause, was as to the effect of a shifting clause, by which a devised estate was to go over, if the devisee of the testator's estate should not settle other estates, acquired under another instrument to like uses.

R. VIII.—18

The testator, who died in 1854, devised "the Gregory Estate" to trustees and their heirs, upon trust to raise the [37] deficiency of his personal estate to answer the purposes thereafter directed, and upon trust that they "should convey, settle and assure" it to the uses thereafter directed, that is to say, to other trustees for 500 years for securing some rent-charges, and (omitting the limitations which failed by the predecease of the devisees) to the use of George Gregory for life, with remainder to his sons and daughters successively in strict settlement in tail, with remainder to John Sherwin Gregory for life, with remainder to his sons and daughters successively in strict settlement in tail, with remainder to Sir Glynne E. W. Gregory for life, with remainder to his sons and daughters successively in strict settlement in tail, with remainder to the testator's own right heirs for ever.

The will contained two shifting clauses, one relating to the taking and using the testator's name and arms, and the second in relation to the devisees not settling, to similar uses, other estates (called, for distinction, in the argument "the De Ligne Estates") which had been devised by George de Ligne Gregory, the testator's uncle. These shifting clauses were as follows:—

And I hereby declare and direct that in the settlement so to be made as aforesaid there shall be inserted and contained a proviso or declaration, that in case any of the persons hereby made tenants for life or any issue of any such persons shall, by virtue of or under the limitations contained in the will of George de Ligne Gregory deceased, become seised of or beneficially entitled to an estate in tail male in possession, or an estate in tail general in possession, of and in the manors, lands and hereditaments thereby appointed and devised, that then and in that case, the person so becoming seised or entitled shall, within the space of twelve calendar months next after he or she shall so become seised or entitled as aforesaid, if such person shall be then of the age of [38] twenty-one years, and if not, then within the space of twelve calendar months next after such person shall attain the age of twenty-one years, by such effectual assurances in the law as counsel shall advise, settle or procure to be settled as well all and singular the hereditaments comprised in or devised by the will of George de Ligne Gregory, deceased, remaining unsold, as all money, stocks, funds and securities acquired or to be acquired by the sale of timber by virtue of the same will, and all the hereditaments purchased or acquired or to be purchased or acquired with moneys arising or produced by the sale of land and timber as aforesaid, and also the several canal shares and shares in the subscription for the improvement of the navigation of the river Trent, and the moneys to arise by the sale and conversion thereof, and also all and singular the plate and other articles, by the recited will directed to go as heirlooms as aforesaid, so and in such manner as that the same hereditaments, chattels and premises respectively may go and remain and be held to, for and upon such and the same or the like uses, trusts, intents and purposes, as are, by this my will, directed to be limited and declared of and concerning the hereditaments and chattels respectively hereby devised and directed to be settled as aforesaid, except that, in the powers of sale and exchange to be inserted and contained in such settlement, there shall be an exception of Harlaxton Manor House and the ancient mansion-house of Harlaxton Hall out of those powers, and so that the settlement required by such proviso or direction to be made shall not prejudice or affect any interest or charge or estate which, previously to the execution thereof, may have been actually created or made by virtue of any power or proviso contained in the said recited will of George de Ligne Gregory. And I hereby direct, that in the settlement to be made as aforesaid, there shall be [39] inserted a proviso or direction, that in case the person so becoming seised of or beneficially entitled to such estate tail of and in the hereditaments and premises devised by the said will of George de Ligne Gregory, shall not, within the aforesaid space of twelve calendar months, well and effectually settle or procure to be settled all and singular the hereditaments, stocks, funds and securities, canal shares and heirlooms and other the premises devised and bequeathed by the same will, in such manner as is hereinbefore directed and required, then and in such case, all and singular the hereditaments hereby devised and directed to be settled as aforesaid, and the said articles hereby made heirlooms, and all and singular the estates to be purchased with and out of my personal estate hereby directed to be laid out in the purchase of land, shall thenceforth go and remain to such uses and upon and for

such trusts, ends, intents and purposes, as the same would have gone and remained and been held, under and by virtue of the limitations and provisions hereinbefore directed to be contained in the settlement so to be made as aforesaid, *if the limitations hereby directed to be contained in such settlement, as aforesaid, to the use of the person or persons so neglecting or refusing to make such resettlement, as aforesaid, and the powers annexed to the estates conferred by such limitations, respectively, or any of them, had not been inserted therein*, and that, in the settlement hereinbefore by me directed to be made, as aforesaid, there shall also be contained a proviso or declaration, that the operation of the shifting clause, lastly hereinbefore directed, shall not prejudice or affect any lease or leases which, previously to the operation of such shifting clause, may have actually been created or made, by virtue of or under the powers of leasing to be contained in such settlement.

[40] The other shifting clause, which related to the name and arms, and did not come into operation, was as follows:—

The testator thereby also directed that on the settlement so to be made as aforesaid of his estates thereby devised, there should be contained a proviso or declaration, that every person who should, by virtue of the limitations thereinbefore directed to be contained in such settlement, or of this proviso, become entitled to the possession or receipt of the rents and profits, or to the first beneficial estate of freehold of and in the same estates, or any part thereof, who should not then be called by the name or use the arms of "Gregory," should, within the space of one year next after they should respectively become so entitled as aforesaid, and that the respective husbands of such of the persons becoming entitled as aforesaid as should be females should, within one year after their so becoming entitled, or within one year after their respective marriages, in case of their being at that time entitled as aforesaid (as the case might be) *assume and take upon himself, herself or themselves respectively, and use in all deeds, letters, accounts and other writings, wherein or whereto he, she or they respectively should or might be a party or parties, or which they should respectively sign, and upon all other occasions the surname of "Gregory," and assume and take and use the arms of "Gregory" either alone or quartered with his, her or their own respective family arms, and also should, within the said space of one year, apply for and endeavour to obtain an Act of Parliament or a proper licence from the Crown to enable him, her or them respectively, and his, her or their respective issue inheritable under the limitations thereinbefore directed as aforesaid, to take, use and bear the said surname of "Gregory," conformably to the directions in that his will ; and in case any such person or [41] persons, or the husband or husbands, of any such person or persons, should neglect or refuse to take and use such surname and arms, and to take such steps, as aforesaid, for enabling him, her or them so to do, within the said space of one year, conformably to the directions in that his will, or in case any person or persons entitled under that his will to the estates thereinbefore devised in possession, or to the receipt of the rents and profits, or to the first beneficial estates of freehold therein, and using and bearing the name and arms of "Gregory" should, at any time thereafter, discontinue the use of such surname and arms, contrary to that his will or to the proviso or declaration to be contained in the settlement or settlements, thereby directed to be made as aforesaid, then and in every such case the estate and interest of the person or persons who or whose husbands should so neglect or refuse, or should so discontinue, the use of such surname or arms, of and in the said hereditaments thereinbefore directed to be settled as aforesaid, and every part thereof, should cease, determine and become void, and the said hereditaments should immediately thereupon go over to the person or persons next beneficially entitled thereto in remainder under the limitations thereinbefore contained, in such and the same manner as if the person or persons who or whose husbands should so refuse or neglect, or should so discontinue, the use of such surname or arms, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable to his, her or their estate tail, charged nevertheless with and without prejudice to any lease or leases which should have been previously created of and in the said hereditaments and premises thereby directed to be settled as aforesaid, or any part or parts thereof, by any person or persons entitled thereto, pursuant to and by virtue of the powers in that behalf respectively thereafter [42] directed to be*

contained in such settlement or settlements as aforesaid. But his will was that such cesser and determination of the estate for life of such tenant for life as aforesaid, should not operate so as to exclude, defeat or prejudice any of the executory or contingent estates thereinbefore directed to be limited to his, her or their sons and daughters, or any other person or persons; and during the suspense and contingency of such expectant remainder, *the rents and profits of the said hereditaments which would have belonged to such tenant for life, if such cesser and determination had not taken place, should be payable* unto such person or persons, and for such intents and purposes, and in such manner, as the same would have been payable and applicable, for the time being, in case such tenant for life had actually been deceased, so that, immediately from and after such cesser and determination, the issue of such tenant for life might have and be entitled to the rents and profits of the said hereditaments thereby directed to be settled during the life of the parent as if such parent were dead, and that in case and whilst there should not be any such issue in existence *the person or persons next entitled, for the time being, to a vested remainder in the said hereditaments, should and might have and be entitled to the said rents and profits* for his, her or their proper use and benefit respectively, but without any exclusion of or prejudice to the estate, interest or right of any such issue afterwards coming into existence, but only till the time of the birth of such issue respectively.

The testator died in 1854. George Gregory died in 1860 without ever having had any issue, and John Sherwin Gregory, who became entitled to both estates, assumed the name and arms of Gregory, but did not resettle the De Ligne estates; but while he had [43] no issue, he executed a deed-poll, dated the 2d day of February 1861, by which he declared that he elected not to settle, or procure to be settled, and did thereby refuse to settle, or procure to be settled, the hereditaments, &c., devised and bequeathed by the will of George de Ligne Gregory in manner directed and required by the will of the other testator George Gregory, and he thereby renounced and disclaimed all devises and bequests expressed to be made or given to him by the said will and codicils, and all the real and personal estates by the said will devised and bequeathed to or in trust for him.

Under these circumstances the question was, who was entitled to the rents and income of the Gregory estates which might accrue between the forfeiture by John Sherwin Gregory and his death, or until he had issue born who would take under the limitations contained in the testator's will? They were claimed by Sir Glynne E. W. Gregory, the next remainder-man, on the one hand, and by the testator's co-heirs at law on the other.

Mr. J. Hinde Palmer and Mr. Knox Wigram, for the trustees, stated the case.

Mr. Southgate, Mr. Bedwell, Mr. Giffard and Mr. Bagshawe, for the co-heirs of the testator, and Mr. Hobhouse and Mr. Millers, for the next of kin. *Egerton v. Earl Brownlow* (4 H. of L. Cas. 1); *Stanley v. Stanley* (16 Ves. 491); *Trevor v. Trevor* (1 H. of L. Cas. 239); *Lambarde v. Peach* (4 Drew. 555); *Turton v. Lambarde* (1 De G. F. & J. 495); *Morrice v. Langham* (11 Sim. 260; 8 Mee. & Wels. 194, and 11 Cl. & Fin. 667); *Carrick v. Erring-[44]-ton* (2 Peere Wms. 361, and 1 Ald. 597); *Earl of Scarborough v. Savile* (3 Adol. & E. 897); *Hopkins v. Hopkins* (1 Atk. 580; 1 Ves. sen. 268, and 4 Bro. C. C. 389, n.); *Carr v. Lord Erroll* (6 East, 58); *Tregonerell v. Sydenham* (3 Dow. 294); *Duffield v. Duffield* (3 Bligh (N. S.), 260); *Wills v. Wills* (1 Dr. & War. 439).

THE ATTORNEY-GENERAL (Sir R. Palmer), Mr. Jessel, Sir Hugh Cairns and Mr. Welby, for Sir Glynne Gregory and his children. *Byng v. Byng* (10 H. of L. Cas. 171); *Lainson v. Lainson* (18 Beav. 1, and 5 De G. M. & G. 754); *Sidney v. Wilmer* (25 Beav. 260, and 9 Law T. 737); *Lewis Bowles's case* (11 Co. Rep. 79 b.); *Garth v. Cotton* (1 Dickens, 183).

Mr. Selwyn and Mr. Bird, for John Sherwin Gregory.

Feb. 27. THE MASTER OF THE ROLLS (Sir John Romilly). I have come to the conclusion that there is no intestacy, and that Sir Glynne Gregory is entitled to the rents of the Gregory estate until a son is born to John Sherwin Gregory. The question arises upon the construction of the shifting clause contained in the will of Gregory Gregory, and, in my opinion, is one of construction to be ascertained from the words of the testator. The question is, whether this question has power to carry

that meaning into effect and execute the intention of the testator. It is to be observed that this is an executory instrument, and in all such cases, whether the instrument by which a trustee is directed to settle property be a deed or a will, the Court looks at the [45] meaning of the settlor, and carries it into execution, unless some rule of law or equity renders it impossible. I have, therefore, only to look at what the meaning of the testator was, and see if there is any rule which renders it impossible to carry it into execution. I will first read the shifting clause [see *ante*, p. 37]. What is meant by saying if the devisee does not resettle the property, all the limitations shall be taken out of the will, and the property shall go as if the limitations in his favour had not been inserted therein. To my mind it does not mean that the heir at law shall take any property as if it was undisposed of, but that the person who comes immediately after him shall take the estate, or if not *in esse*, the person next in succession who is *in esse* shall take. That is plain and obvious, and I see nothing in this will which indicates any desire to create an intestacy. I find that in a previous part of the will, where the testator intended to make a shifting clause on not taking his name and arms, he provides for that very thing which appears to me to be implied in this shifting clause. And, referring to the other clauses of the will, I see nothing but what shews throughout his will that he anticipates in no place any intestacy.

Then is the Court powerless to carry that into effect? Is there any rule of law or equity which prevents that from being done? If he had said, "insert in here a proper shifting clause for the purpose of carrying my intention into effect, or a proper shifting clause to prevent persons from refusing to resettle the estate," then the Court would have introduced a shifting clause which would have carried this intention into effect. The Court is told that it is to be left as it is. There are certain cases in which a man is his own conveyancer, and though the instrument be executory, it is not in the power of the Court to mould or alter those limita-[46]-tions, though they create an intestacy, which it is obvious the testator did not intend. That requires a little consideration as to the effect and meaning of these words. It is argued thus: If he had said, "let a proper and sufficient shifting clause be inserted," the Court would have done it, but not if he has been his own conveyancer. This, I confess, appears to me to be a species of technical jargon. It is in effect this, that because the testator has been his own conveyancer, the Court will think fit to punish him for his presumption, and will not allow itself to go out of the precise words which he has used. I must say that, unless I find myself bound by fixed and settled rules, by decisions which it is impossible to gloss over, I should be reluctant to give way to a mere technical device to defeat the intention of the testator, and the due administration of justice. There is no rule of law which prevents me; it is not like the case of perpetuities, where the policy of the law which the Court enforces does not allow a man to tie up his estate beyond a certain period. Here there is nothing to prevent my carrying his intention into effect, unless there be some decision that makes that impossible.

The cases to which I have been referred appear to me not to justify the Court in refusing to carry into effect the testator's intention. *Carrick v. Errington* (2 Peere Wms. 361) was the case of a deed, and where the life-estate failed, by reason of an event not anticipated by the settlor, in consequence of the effect of a penal statute against Roman Catholics.

Hopkins v. Hopkins (1 Atk. 580) was not a case of an executory instrument, and originally, it all depended upon [47] an executory devise, upon which all the limitations afterwards were fixed, though possibly, in the course of them, the estate became vested. It is obvious that this distinction is a very thin and technical one. But I repeat what I have heard from many eminent Judges, and to which I fully assent, that the principal utility of technical knowledge is to prevent technical objections from defeating the due administration of justice; and if I were, in this case, to give way to the principle, that the testator was his own conveyancer, I should be allowing a technical objection to defeat the intention of the testator. Now observe the consequences that would occur if this were to take place. The testator has inserted two shifting clauses in this will, one relates to the not taking or abandoning the use of his name and arms. If that clause were to take effect, there would be no

intestacy, because the shifting clause provides that the next person *in esse* shall take until some issue then unborn of a previous tenant for life, who had lost his estate, shall arise into existence, whereupon the estate shall go to him. If I hold that provision does not apply, but that the estate is undisposed of, and goes to the heir at law in the meantime, then this result must follow:—Suppose both the events took place on the same day, and that a person who had not the name and arms of Gregory took the De Ligne estates and held them for a year, without settling the estates, and without taking the name and arms of Gregory: it is not till the last moment of the year the other forfeiture takes place. Then the question arises, which forfeiture is to take effect? Is the heir at law to take the estate under the second shifting clause, or the next tenant for life in remainder *in esse* under the first shifting clause? Well might the Attorney-General say that this is an insoluble problem. But what would be the result? Would there be an intestacy by reason of the uncertainty, or how [48] could the difficulty be got rid of? Then take the other case, and suppose the devisee determined neither to take the name and arms of Gregory, nor to settle the De Ligne estates, is the tenant in tail of the De Ligne estates to determine whether the heir at law or Sir Glynne Gregory is to take the rents during the intermediate period? Mr. John Sherwin Gregory became tenant for life on the death of George Gregory. He will not settle the De Ligne estates, he has determined to avoid that, and if he thinks fit not to do so, and nothing more takes place, then the second shifting clause takes effect. But if he thinks it desirable to make Sir Glynne Gregory the owner of the estate, then he may discontinue to use the name and arms of Gregory, and thereupon the first shifting clause takes effect. When that was suggested to Mr. Hobhouse in argument, he obviously felt the difficulty, and he said that when one shifting clause took effect no other shifting clause could afterwards have effect.

Stanley v. Stanley (16 Ves. 491) was a distinct case. There the estate was given to trustees during the minority of the tenant in tail, and it was not to vest in him until he attained his majority. But the question was, to whom the rents in the meantime belonged.

I find no case of this description which prevents the Court, where it sees what the intention of the testator is, from carrying into effect that intention.

I have read with very great satisfaction the case of *Turton v. Lambarde* (1 De G. F. & J. 495), which was a very similar case to the present. There the Lords Justices, when they [49] discovered that although there was no express declaration as to what was to become of the intermediate rents, yet that an intention was to be implied from the will sufficient to prevent them from resulting to the heir, they so construed the will as to carry that intention into execution. I think the present case stronger, because if you refer to the clause relating to the heirlooms, it is impossible that it could have been his intention that the next of kin should have the heirlooms fixed to the mansion and the enjoyment of them for a very limited time, which could not be severed from the estate without very serious detriment. The clause for maintenance, which was relied upon in *Turton v. Lambarde*, also assists the case of Sir Glynne Gregory on the present occasion.

I regard this case in this way: I find two principles which are conflicting and cannot co-exist, one of which is a broad principle of commonsense, founded on justice and carrying the intention of the testator into effect, and the other a narrow view depending on arbitrary rules, unintelligible except to persons who have devoted their lives to the accurate and minute study of that particular branch of the law. In such a case, I follow the rule which I believe to be founded upon commonsense, and which will carry into effect the real wishes of the testator. I think that is the case here, and accordingly my opinion is that Sir Glynne Gregory is entitled to the rents for life, or until issue is born to Mr. John Sherwin Gregory. I will make a declaration accordingly.

[50] THOMAS v. RAWLINGS (No. 3). July 9, 1864.

[Affirmed, 11 L. T. 721; 10 Jur. (N. S.) 1192; 13 W. R. 248. For previous proceedings, see 27 Beav. 140, 375. See *In re Hoghton*, 1874, L. R. 18 Eq. 577.]

A petition for leave to file a bill of review, on newly discovered evidence, cannot be sustained, if supported merely by an affidavit of the Petitioner upon his information and belief.

Liberty given to file a bill of review, after a former petition for the same object had been refused on the ground of a deficiency of evidence.

Upon an application to file a bill of review on the discovery of new evidence, the question is, whether the new evidence would have induced the Court to make a different decree; and, secondly, if the application is made with due diligence after the discovery.

This was a petition praying for liberty to exhibit a bill of review upon facts discovered since the decree. The following are the circumstances under which it was presented:—

Rawlings, being entitled to a lease of some premises, made an equitable mortgage of it to the Plaintiff Thomas.

In February 1859 Thomas filed his bill against Rawlings and against Stubbs, Rawlings' solicitor, who claimed a lien on the lease, contesting Stubbs' claim, and seeking to have a conveyance and delivery of the lease.

Stubbs, after much prevarication, set up an equitable charge on the property, by virtue of a memorandum dated the 10th of August 1854, for securing £200 and further advances.

The cause was heard by the Master of the Rolls, when, by reason of the memorandum of the 10th of August 1854, His Honor, by his decree pronounced in January 1861, declared that Stubbs' equitable mortgage had priority over that of Thomas.

The Plaintiff afterwards presented a petition for liberty to exhibit a bill of review, on the discovery of new evidence; but the petition, being supported by mere hearsay evidence, was dismissed with costs on the 14th of March 1863.

[51] The Plaintiff was afterwards enabled to adduce better evidence, and he presented the present petition, stating the discovery of new facts, shewing that the alleged debt was not due, and that the document dated the 10th of August 1854 had been concocted and not in fact executed until the 6th of November 1858, long after the Plaintiff's security and during the pendency of the suit. The information had been obtained from Perry, who had been formerly a clerk of Stubbs.

The allegation in the petition as to this document was as follows:—

"Your Petitioner has recently discovered, as the fact is, that a memorandum of deposit of the indenture of lease, dated 10th August 1854, was prepared in the office of the Defendant Thomas James Stubbs, in the month of July 1859, for the purpose of defeating the Plaintiff's mortgage, and that the memorandum was afterwards engrossed by Mr. Robert Lidgard Stubbs, the brother of the Defendant Thomas James Stubbs, and was afterwards signed by the Defendant William Harris Rawlings, and that, on settling the answer of the Defendant Thomas James Stubbs, it was discovered by the Defendants that the said memorandum did not extend to the costs, charges and expenses of this suit, and the intended insolvency of the Defendant William Harris Rawlings, who was then in prison, and it was thereupon arranged between the Defendants that another memorandum should be executed, and the Defendant Thomas James Stubbs thereupon altered the before-mentioned memorandum in pencil, by making it include costs, charges and expenses, and the same, as altered, was engrossed and signed by the Defendant William Harris Rawlings, at White Cross Street prison, in the month of September 1859, although it purports to bear date 10th day of August 1854, and the said memorandum so [52] engrossed and signed is the memorandum mentioned and referred to by the Defendant Thomas James Stubbs in the pleadings in this cause."

"Your Petitioner, the Plaintiff, has recently discovered, as the fact is, that the Defendant Thomas James Stubbs, who originally stated that the said indenture of lease was deposited with him on or about the 25th September 1854, subsequently fixed the 10th August 1854 as the date of the same being deposited, because the said Defendant discovered that the date of 25th September 1854 would not be sufficiently far back to make it antecedent to the Plaintiff's security."

This was supported by the testimony of Perry, the clerk of Stubbs, and by other evidence.

Mr. Southgate and Mr. W. H. Terrell, in support of the petition.

Mr. Selwyn and Mr. Cotterell, for the assignee of Stubbs.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a petition for leave to file a bill to review the decree pronounced by me in this cause in January 1861.

By that decree I disallowed the claim of the Plaintiff as an incumbrancer on the property of the Defendant Rawlings, being No. 8 Marlborough Road. I held that the Defendant Stubbs was entitled as an equitable mortgagee of the leasehold property, and I allowed the Plaintiff, as assignee of the Defendant Rawlings, who had become bankrupt, to redeem the Defendant Stubbs, and I made the usual decree for that purpose.

The equitable mortgage of Stubbs purported to bear [53] date the 10th of August 1854. Evidence is now adduced to shew that the transaction, in fact, took place in September 1859, after the bill was filed, and that it was effected by arrangement and collusion between Rawlings and Stubbs, for the purpose of defeating the Plaintiff. The Petitioner explains how he was set on the clue to make the discovery; how he discovered that Perry, who was the clerk of Stubbs during the year 1859, was also the principal agent in managing the transaction, and how he induced this Perry to disclose the whole affair, and he then refers to various other circumstances proved in the cause, and also brings forward additional evidence, for the purpose of shewing that this allegation of fraud and collusion against Stubbs and Rawlings does not depend merely on the evidence of the approver Perry, but that it explains many matters which were obscure in the former evidence, and further, that it is confirmed by the additional evidence adduced.

In 1862 Stubbs became bankrupt, and this petition is opposed by his assignees, who have not, on the present occasion, brought forward any evidence to rebut that adduced by the Petitioner; but, in substance, they insist that the case of the Petitioner has been already four times disposed of adversely to him; first, on the hearing of this cause in December 1860; secondly, in Chambers, under the decree for redemption; thirdly, in the bankruptcy of Stubbs; and fourthly, in a petition presented by the Petitioner in last year to rehear the case.

The first question I have to consider is whether, if the case were now at the hearing, for the purpose of making a decree, and this evidence were now before me, I should vary the decree I formerly pronounced. I have read the evidence very carefully and considered the bearing [54] of it, in conjunction with the evidence before me on the hearing of the cause, and I am of opinion that if the matter were brought before me on the former evidence in the cause, coupled with what is now adduced, and with no other or further evidence, it would have induced me to make a different decree to that which I then pronounced. Whether I should have simply disallowed the equitable mortgage claimed by Stubbs, the Defendant, or whether I should have directed an issue to try the validity of it, I do not mean now to express my opinion; but I should not have made simply the decree as it stands. If this were all, it would entitle the Petitioner to the leave he asks, provided it appeared that he came here as soon as he discovered the fraud and had obtained the evidence to establish it, and I think that he has done so.

But this is not alone the only thing to be considered. In answer to the Petitioner the Respondent contended that even if the equitable mortgage of the Defendant Stubbs were held to be invalid, still that he was a judgment creditor of Rawlings by a registered judgment which was prior in date to the judgment of the Plaintiff, and consequently, that the Plaintiff could have got nothing better than what he did by the decree pronounced in January 1861, even if the equitable mortgage of the Defendant were disallowed. But I think that this is not so.

The decree sought to be reviewed does not proceed on the footing of the judgment, but on that of the equitable mortgage to Stubbs, and consequently the Court did not examine or decide any question as to the validity or priority of the judgment. It appears also that the validity of the judgment of the Defendant Stubbs was impeached by the Plaintiff's bill, but all inquiry into this was rendered unnecessary by the establishment of [55] his equitable mortgage. It was also pointed out, I think correctly, that even if the validity of the judgment be assumed, the decree founded on it would have been of a different character from that which was pronounced by me. A decree founded on a judgment for £385 is very different from a decree founded on an equitable mortgage for £600. I think, therefore, that the circumstance of Stubbs having had a registered judgment against Rawlings does not afford an answer to the case of the Petitioner.

I then proceed to consider whether this case has really been already adjudicated upon by the Court, and I am of opinion that it has not. So far as the first three occasions adduced are concerned, it is, I think, impossible so to contend. This evidence now adduced was not before the Court on the original hearing, and the validity of the mortgage to Stubbs, though impeached, was not argued before the Court, there was in fact no evidence to sustain such a charge. As to the rest, that was decided in favour of Stubbs. All that was then established was the fact of certain advances having been made by him to Rawlings. This also was all that was proved in Chambers under the decree, and all that was proved in the proceedings in the Bankruptcy Court:

It is true that in the beginning of 1863 the present Petitioner presented a petition, similar to the present, for leave to review the former decision, and rehear the former decree, alleging the same facts that he now alleges; but his petition was supported solely by his own affidavit of information and belief of the facts, to which the Court could not, of course, pay any attention. For if such were not the rule of the Court, it would, in every case, be in the power of a defeated Defendant to stay the prosecution of proceedings under a decree, and to [56] occasion great expense as well as delay to the successful litigant, by the mere production of an affidavit of information and belief, which amounts to nothing, and which, if untrue, entails on him no risk, and may be adduced with perfect impunity.

But the case now is very different. Here the information is given to the Court by the positive testimony of witnesses, who, if they should speak falsely, may be convicted of perjury; the belief to be produced by such evidence is not the belief of the Petitioner that it is all true, but the belief of the Court that if this evidence had been adduced at the hearing of the cause and not met by any counter evidence, the Court would have come to a different conclusion. That belief is produced in my mind by the case as it now stands. It is true that it is not conclusive, for neither Stubbs nor Rawlings have been examined, and they may be able completely to discredit the evidence now adduced, and accordingly, the Respondents must have an opportunity of meeting the case now suggested, and which will be made at the rehearing of the case. But as the evidence stands uncontradicted, I am of opinion that I must accede to the prayer of the Petitioner, and give him leave to file a bill to review the decree of January 1861.

Costs reserved.

NOTE.—Affirmed by the Lords Justices, 23d November 1864.

[57] BOSTOCK v. SMITH. Dec. 7, 21, 1864.

A wife forfeits her dower under the Statute of Westminster the 2d, by her adultery, though it may have been brought about by the misconduct of her husband.

This was a suit by a widow for her dower. The defence was that, under the Statute of Westminster 2d (13 Edw. 1, c. 34), she had forfeited her right to dower by reason of her adultery. The Act is in the following terms:—

“Et Uxor, si sponte reliquerit virum suum et abierit et moretur cum adultero suo,

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amittat imperpetuum actionem petendi dotem suam quæ ei competere posset de tenemento viri si super hoc convincatur, nisi vir suus, sponte et absque coertione ecclesiasticâ, eam reconciliet et secum cohabitare permittat, in quo casu restituatur ei actio."

Mr. Hobhouse, for the Plaintiff, argued, first, that the adultery was not proved; and, secondly, that there had been no forfeiture under the statute, for the wife had not left her husband's house "*sponte sua*," but had been compelled to take that step by the cruelty and misconduct of her husband.

Mr. Selwyn, for the Defendant.

13 Edw. 1, c. 34; 2 Inst. 432-434; *Hethrington v. Graham* (6 Bing. (O. S.) 135); *Woodward v. Douse* (10 C. B. (N. S.) 722), were cited.

Dec. 21. THE MASTER OF THE ROLLS [Sir John Romilly]. It is desirable not to go into the details of this case. [58] But it is conclusively proved that the Plaintiff left her husband's house and went and lived in adultery.

On the other hand, it is but proper to state that she left her husband in consequence of her husband's behaviour and gross misconduct, which was such as would justify, if anything could justify, her act. But nothing could justify it.

The Statute of Westminster the 2d and the cases cited are conclusive, and the bill must be dismissed with costs.

[58] MEYRICK v. LAWS. Dec. 21, 1864.

When money in Court is subject to a trust for investment in land, and the tenant for life enters into a provisional contract for the purchase of an estate, subject to conditions of sale, the Court makes a general reference as to the title, and not whether a good title can be made subject to the conditions of sale.

A sum in Court was, under the will of the testator, subject to a trust for investment in land, to be held in strict settlement.

The tenant for life entered into a provisional contract for the purchase of an estate, subject to certain conditions of sale, and to the approbation of the Judge. The tenant for life now presented a petition to carry the contract into execution, and for a reference to approve of the title to the estate.

Mr. G. Law, in support of the petition, asked for a reference whether a good title could be shewn to the property, "subject to the conditions of sale under which the same had been sold."

Mr. Southgate, *contra*.

[59] THE MASTER OF THE ROLLS [Sir John Romilly]. The practice is, in these cases, to direct a reference as to title generally, and not to add, "having regard to the conditions of sale." The Judge in Chambers will consider whether any defect appearing on the title can be waived. Where the conveyancing counsel certifies that there is a good holding, though not strictly a marketable title, I am constantly in the habit of adopting it.

NOTE.—The registrar, Mr. Rogers, informs me that the same point was held by Vice-Chancellor Wood in *Re Orledge's Estate*, 14 January 1865.

[59] FORDHAM v. FORDHAM. Dec. 6, 1864.

[S. C. 11 L. T. 529; 11 Jur. (N. S.) 28; 13 W. R. 197. Discussed and followed, *In re Harvey* [1901], 2 Ch. 290.]

The entail of lands to be purchased with rents hereafter to become due to trustees may be barred under the statute 3 & 4 Will. 4, c. 74, s. 71.

The testator, George Fordham, gave his freehold, copyholds and leaseholds to trustees, and he directed them to enfranchise the copyholds within twenty years.

And as to his freeholds, copyholds and freeholds to be purchased as aftermentioned, he declared his will to be, that his trustees should "enter into the possession and receipt of the rents, issues and profits of the same estates, and should, until the expiration of twenty-one years after his decease," manage and pay the expenses and outgoings. And he directed the trustees to apply the surplus of his personal estate, and of the rents, &c., in payment of certain expenses of management and improvement, and to invest the surplus in the purchase of freeholds in Hertfordshire; and, in the meantime, to invest and accumulate the same, and which accumulations were to be subject to the trusts thereby declared of the fund from which the same should have proceeded.

[60] The testator continued as follows:—

"And I declare my will to be that, from and after the expiration of twenty-one years from my decease, my trustees shall stand seised of and interested in all my said freehold estates and all the freehold estates into which my said copyhold estates shall be converted by enfranchisement, and the freehold estates hereinbefore directed to be purchased by my trustees, upon the trusts following, that is to say:—Upon trust for Frederick Nash Fordham of Royston, in the county of Hertford, banker, during his life, without impeachment of waste, with remainder upon trust for the sons of the said Frederick Nash Fordham successively, according to seniority, in tail male," with remainder over to his brother for life, &c.

The testator died in 1855.

Frederick Nash Fordham had one son, Francis John, who attained twenty-one on the 11th of November 1863.

By a disentailing deed, dated the 12th of November 1863, Francis Nash Fordham, with the concurrence of his father, barred the estate tail, by conveying to a trustee all the devised freehold, copyhold and other real and personal estate of the testator, "*and all the money which, under the trusts of the will, was subject to be invested in the purchase of land, including money whether invested or to be invested, and whether the amount thereof was or was not ascertained,*" &c., "*and the lands to be purchased therewith,*" *to have and to hold the said premises unto the trustee and his heirs, freed and discharged from the estate in tail male of Francis John Fordham; and all remainders, to take effect after the determination thereof, to the use of Francis John Fordham and his heirs and assigns for ever.*

[61] This bill was filed by Frederick Nash Fordham and his son Francis John (who as yet had no issue), against the trustees and the parties in remainder, to have the rights declared and for a conveyance of the legal estate.

Mr. Baggallay and Mr. Bedwell, for the Plaintiffs, relied on the statute 3 & 4 Will. 4, c. 74, ss. 15, 71, and observed that the case as to the unreceived rents was similar to that of a legacy vested, but not payable until the legatee attained twenty-five, in which case the legatee was entitled to payment immediately on his attaining twenty-one.

Mr. Archibald Smith, for the trustees. This application is premature in regard to the rents hereinafter to be received and accumulated during the residue of the twenty-one years, for there is no person capable of disentailing lands to be purchased with money which has not yet been received. Prior to Lord Eldon's Act (39 & 40 Geo. 3, c. 56), a person absolutely entitled to money to be laid out in land might elect to take it as money and obtain payment of it without the formality of first investing it; *Benson v. Benson* (1 Peere Wms. 130). But in the case of a tenant in tail it was requisite first to invest the money in land and then bar the entail; and where a recovery was required, the money would not be paid out of Court until the second day of the next term; *Short v. Wood* (1 P. Wms. 470); *Trafford v. Boehm* (3 Atk. 447). The Eldon Act did not alter the law further than to relieve parties from going through the circuitry of actually investing the money before barring the entail, and the object might be obtained by petition. The effect of the subsequent Act (7 Geo. 4, c. 45) was similar. But in no case could [62] money be disentailed before received. The last statute, 3 & 4 Will. 4, c. 74, does not alter the law in that respect. The 71st section, which enables a tenant in tail to acquire the absolute interest in "money subject to be invested in the purchase of lands to be settled." But the meaning of the word "money" is governed by the interpretation clause (s. 1), which

applies to money in hand, and does not include money which may hereafter be received.

As regards the rents still unreceived, the tenant in tail is not yet entitled to receive them.

Mr. Snape, Mr. Lee and Mr. C. E. Hawkins, for the other Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Plaintiffs are clearly entitled to have the rents of the present year paid to them, and it is quite unnecessary to invest them in land. The same thing will happen in 1865 and in every succeeding year, and during the whole remaining period of twenty years they will, from time to time, be absolutely entitled to have the annual rents paid to them.

I am of opinion that the words of the statute are clear, and that they enable the tenant in tail to acquire an absolute right to any "money subject to be invested in the purchase of lands to be settled," including money received or to be received and the rents of this and of every succeeding year.

As the Plaintiffs would be entitled to have the rents paid to them every year, and there is no possibility of investing them in land, nobody else has any interest in them, and they are entitled to an immediate conveyance.

[63] JOHNSON v. HELLELEY. Nov. 7, 8, 1864.

[Affirmed with variation, 2 De G. J. & S. 446; 46 E. R. 447; 34 L. J. Ch. 179; 11 L. T. 581; 10 Jur. (N. S.) 1041; 13 W. R. 220. See *Walker v. Mottram*, 1881, 19 Ch. D. 363; *Pearson v. Pearson*, 1884, 27 Ch. D. 153.]

Upon the decease of one partner, a decree was made for the sale of the business as a going concern, and it was proposed to sell to any purchaser "the right to hold himself out as the successor of the firm of Samuel J. & Sons." Held, that the particulars of sale ought to explain that the surviving partner, William J., had still a right to carry on the same business in the same town in his own name.

Where, upon the sale of a business, a surviving partner had liberty to bid: Held, that the book debts and business ought to be sold together in one lot.

This was a suit to wind up a partnership of wine merchants carried on by John Johnson, deceased, with the Plaintiff William Johnson.

A decree had been made for the usual partnership accounts, and for the sale of the partnership property, in such manner and upon such terms as should appear most beneficial for the parties interested. Liberty was given to the Plaintiff to bid; and the conduct of the sale was entrusted to the Defendant Nicholson.

The partners carried on business under the style of "Samuel Johnson & Sons;" and the name appearing to be well known and forming part of the goodwill, the Chief Clerk proposed to give the purchaser the exclusive right to hold himself out as the successor of the firm of "Samuel Johnson & Sons."

This was objected to by the Plaintiff William Johnson, who, if this were allowed, required that the particulars of sale should contain a notice that he would be at liberty to carry on business in the same town.

Another question was, whether it should be obligatory on the purchaser, or optional only, to take the book debts of the concern, which were estimated at £50,000, and the stock-in-trade valued at about £10,000.

The case was adjourned into Court.

Mr. Hobhouse and Mr. Waller, for the Defendant [64] Nicholson, argued that it was unusual to insert such a notice as that proposed, the effect of which would be to damp the sale and to allow the Plaintiff to purchase the business at a reduced price. That after the sale of this business, as a going concern, for the benefit of the partners, the purchasers would have the exclusive right to call themselves successors of Samuel Johnson & Co., and that the Defendant could not use that title. That the rights of a surviving partner were now well ascertained, and that it was unnecessary to refer to them in the particulars and conditions of sale; *Crutwell v. Lye* (17 Ves. 335); *Churton v. Douglas* (Johnson, 174).

As to the book debts, that it was advisable that they should not be separated

from the business; for they formed the means of introducing the purchaser to the old customers and of retaining their custom. That they were not necessary for the Plaintiff, who required no introduction to the customers, and who wanted to purchase the business alone, which would destroy the value of the outstanding debts.

Mr. Faber, in the same interest, suggested that the words should be "exclusive right of using the title of successors of the firm of Samuel Johnson & Sons."

Mr. C. Hall. The Court will take care that a purchaser is not misled as to what he is buying. For that purpose, it is necessary to introduce into the particulars some notice of the rights of the surviving partners; this was done by Lord Eldon in *Cook v. Collingridge* (27 Beav. 456). It would be inaccurate to tell a purchaser that he would have the "exclusive right to hold himself [65] out as the successor of the firm of Samuel Johnson & Sons," when the surviving partner had still an undoubted right to set up the same business at the next door. Secondly. The obligation of purchasing, in conjunction with the goodwill, the large amount of debts would prejudice the sale of the business. They ought to be sold separately. He referred to *Smith v. Everett* (27 Beav. 446); *Mellersh v. Keen* (27 Beav. 236).

Mr. Hobhouse, in reply.

THE MASTER OF THE ROLLS. The reason why the option of purchasing the business without the outstanding debts should not be given to Plaintiff is obvious. He must give as large a price for these debts as any other person would who purchased the business. This would not be the case if they were sold separately.

Nov. 8. THE MASTER OF THE ROLLS [Sir John Romilly]. Having considered this case, I am of opinion that some notice must be given, in the advertisements, that the Plaintiff is entitled to carry on the same business in the same town. It is quite true that the Court of Chancery, when selling a business, is desirous of selling it as advantageously as possible for the benefit of the parties, but still it must adhere to that principle of equity to which I have so often had occasion to refer, namely, of acting with perfect good faith and of disclosing the whole truth. Now it seems impossible to say with truth, that you are selling to a purchaser "the exclusive right to hold [66] himself out as the successor of the firm of Samuel Johnson & Sons" when there is a surviving partner of that firm living, who is at perfect liberty to carry on the same business in the same place and in his own name.

I am of opinion, therefore, that the particulars of sale ought to state that the Plaintiff is at liberty to carry on a similar business in the same town.

As to the book debts, I retain my opinion that they ought to be sold with the business, because the possession of them is the mode by which the purchaser secures to himself the customers of the old firm.

NOTE.—Heard on appeal by the Lords Justices, 21st December 1864.

[66] BEST v. STONEHEWER. Nov. 19, 21, 1864.

[S. C. on appeal, 2 De G. J. & S. 537; 46 E. R. 484; 34 L. J. Ch. 26; 11 L. T. 468; 10 Jur. (N. S.) 1140; 13 W. R. 126.]

A testator directed an estate to be sold on the decease of his sister and three others, and the produce paid to such persons as should then "be the nearest in blood to him as descendants from his great-grandfather, J. S." The testator and his sister, both advanced in years, were the only lineal descendants of J. S. Held, that the collateral descendants of J. S. were entitled.

The testator, Thomas Fenton Grosvenor, devised certain real estates to his wife, Mary Grosvenor, with remainder to his sister, Mrs. Brentall, for life, with remainder in trust for Mrs. Sparrow and Mrs. Mary Moreton for life, and afterwards upon the following trusts:—

"And upon further trust, after the several deceases of my said dear wife and sister and the said Mrs. Sparrow and Mrs. Mary Moreton, to sell and dispose of all and singular the said last-mentioned trust estates and premises, either together or in lots,

by public auction, for the best price or prices that can reasonably be had or gotten for the same, and, after deducting all reasonable costs, charges and expenses attending such sale [67] and disposition, in trust to pay the residue of the moneys arising from such sale or sales and any rights, issues and profits that may be received in the meantime after the said several deceases *unto such persons or person as shall*, at the time of the decease of the survivor of them, my said dear wife, my sister and the said Mrs. Sparrow and Mrs. Mary Moreton, *be the nearest in blood to me as descendants from my great-grandfather* Mr. Joshua Stonehewer, heretofore of Leek aforesaid, and whose kindred with me originates from him, as well females as males, and whether from females or males, if more than one in equal degree then in equal shares and proportions, but if only one then to such only one and to their, his or her heirs and assigns."

The testator died in 1831 without issue.

At the date of the will, the only lineal descendants of Joshua Stonehewer were the testator himself and his sister Mrs. Brentall, who were both very advanced in years.

Joshua Stonehewer was the great-great-grandfather of the testator, and his daughter Ellen had married the testator's great-grandfather.

Mary Grosvenor was the last survivor of the four persons named in the will, and she died in 1863.

There was not, at her death, any lineal descendant of Joshua Stonehewer; but there were, however, lineal descendants of Thomas Stonehewer, the brother of Joshua Stonehewer, namely, great-great-grandchildren and great-great-great-grandchildren.

The testator's sister, Mrs. Brentall, was his heiress [68] at law, and the Plaintiff, who was entitled, by devise, to her real and personal estate, instituted this suit, stating that there was now vested in the Plaintiff real estate of the value of about £2000 which, if the said trust for the testator's relations were, under the circumstances, operative, was subject to such trust, and which the Plaintiff was ready and willing to deal with accordingly; but that a question had been raised, whether the ultimate trust for the person or persons nearest to the testator in blood was or not a valid and subsisting trust. The Plaintiff submitted that as there was, at the death of the testator's widow, no person living who was a lineal descendant of Joshua Stonehewer, the trust had failed, and that he was beneficially entitled to the trust property.

Mr. Selwyn and Mr. C. Hall, for the Plaintiff, argued that the "descendants from" Joshua Stonehewer must necessarily mean persons descended from him, and could not include descendants from his brother. That there being no such descendants, the devise was therefore inofficious, and that the property descended to the heiress at law of the testator and through her to the Plaintiff. They cited *Oddie v. Woodford* (3 Myl. & Cr. 584); *Thellusson v. Roberts* (23 Beav. 321); *Crossly v. Clare* (1 Amb. 397, and 3 Swan. 320); *Hawkins on Wills* (p. 172).

Mr. Southgate and Mr. Prendergast, for the great-great-grandchildren of Thomas Stonehewer. The expression is "descendants" generally and without qualification; it therefore includes collateral as well as lineal descendants. The testator could not have intended lineal descendants, for there was not the least proba-[69]-bility of there being any at the period of distribution. The word "descent" means the devolution of an estate, and "descendants" the persons on whom it descends, who may be either the lineal or the collateral heirs. They cited Webster's Dictionary; Johnson's Dictionary; Co. Litt. (10 b.; 13 b.; 237 a.); Blackstone's Comment. (vol. 2, chap. xiv.); *Craik v. Lamb* (1 Coll. 489).

Mr. Ince, for the great-great-great-grandchildren of Thomas Stonehewer.

Mr. Selwyn, in reply.

Nov. 21. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a question on the construction of the will of Thomas Fenton Grosvenor. The words are these:—[see *ante*, p. 66].

Mr. Joshua Stonehewer had no lineal descendants except the testator and his sister, and, at the time when the testator made his will, it was highly improbable that either of them would leave any issue surviving either of them.

By the words of the will, the property of the testator was to go to the descendants

of Joshua Stonehewer alive at the decease of the survivor of four persons, of whom his sister was one. The words therefore could not mean lineal descendants, because on the death of the sister after the testator, and without leaving any issue, there could be no lineal descendants. The Court [70] has, therefore, to consider whether it is possible to put a fair intelligible meaning on the words, for if it is not, then there must be an intestacy and the Plaintiff would be entitled. I think that it is not only possible to put an intelligible meaning on these words, but that, in truth, the meaning of the testator is very obvious.

It is usual, not merely in legal language, but even in popular parlance, to speak of two classes of descendants, the lineal descendants and the collateral descendants. In fact, if this were not so, the word lineal would be wholly superfluous as applied to descendants, but it is usual to call the transfer of an estate occasioned by the death of the holder of it as "the descent of the estate," and in like manner it is usual to call the person on whom it descends the descendant. The definition of "descendant" in Lord Coke, in Sir Wm. Blackstone, and indeed in all the law books, bear out this view. This is also confirmed by the definition to be found in the best dictionaries. Johnson gives us one of the meanings of the word "descent"—the transmission of any thing by succession and inheritance. In truth, unless the issue of the brother of a man who died intestate be called "the descendants" of that intestate, there is no word which would express the class; and unless we adopt this view, the words "collateral descendants," so frequently to be found in law books, are mere jargon without any meaning.

Suppose the testator here had used these words, "collateral descendants," could anyone have doubted his meaning? He says "descendants," he had no lineal descendants, then he meant mere collateral descendants. It is impossible for this Court to limit the words of a testator by a hypercritical and somewhat pedantic refinement to a narrow and unusual meaning, merely because [71] it is not perhaps quite exact as familiarly used, and to do all this for the purpose of creating an intestacy. The words on which I hesitated on Saturday, viz., "whose kindred with me originates from him," do not, on reflection, offer, to my mind, any difficulty. He, Joshua Stonehewer, is the link or point of union up to which both arrived, the testator directly and lineally, and the Defendants directly up to Thomas the brother, and thence collaterally to Joshua.

I am of opinion that the persons who are descendants from Thomas, the brother of Joshua Stonehewer, are entitled.

NOTE.—On appeal to the Lords Justices, the decision was affirmed, Lord Justice Knight Bruce dissenting. (28 March 1865.)

[71] WATSON v. PRYCE. Nov. 19, 21, 1864.

A testator gave his estate to his wife and his four children in equal proportions; but his wife was to have "her proportionate part" for her life, and it was given afterwards to the four children. And as to "the part of his estates," thereinbefore given to his daughter, she was to have it for life, with remainder to her children. Held, that the "part" of the daughter included her share in the part given to the wife for life; and that, therefore, she was only entitled to a life interest in it.

The testator devised and bequeathed his residuary real and personal estate unto his wife Sarah Coster Humphries, his daughter Mary Caroline Johns, and to his sons Samuel Humphries, Henry Humphries and Edward Humphries, in equal proportions, upon the following stipulations (that is to say), that his wife should have and enjoy the interest, dividends and profits of *her proportionate part* of his aforesaid estates and effects during her life, and after her decease, the testator gave, devised and bequeathed *the part* or proportion of his wife unto and between his daughter and his sons Samuel, Henry and Edward, their heirs, &c., [72] in equal proportions. "And as to, for and concerning the part of his aforesaid estates and effects thereinbefore given, devised and bequeathed to his daughter Mary Caroline Johns, his will and meaning was, and

he did thereby direct, that his said daughter should have "the income for her separate use for her life, and after her decease, he gave "her said *proportion* of his said estates and effects" unto her children living at her decease.

The testator's widow died in 1864, and a question had arisen, whether the one-fourth part of the share in which the widow took a life interest became, on her death, subject to the direction as to the separate use of his daughter for her life and to the gift over in favor of her children on her decease, or whether she took it absolutely.

Mr. Selwyn and Mr. Higgins, for the daughter, the Petitioner, argued that the word "share" would not include the portion which accrued to the daughter on the death of the widow.

Mr. Baggallay, Mr. Druce and Mr. Wickens, for the Respondents. *Douglas v. Andrews* (14 Beav. 347); *Doe d. Clift v. Birkhead* (4 Exch. 110).

Nov. 21. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case turns on the construction of the will of the testator, and is whether the accrued share of the Petitioner Mrs. Johns is subject to the settlement directed by the testator's will.

This case has been argued as if it were one of an [73] accrued share, in the ordinary sense of that term; that is, as if it resembled a case where a residue was divided equally between five children, with a direction as each died his share should be divided amongst the others. In which case, as I held in *Goodwin v. Finlayson* (25 Beav. 65), the accrued share would not go to the others.

But this is not that case; in truth it is not properly an accrued share at all. The question is in reality what is the proper construction to be put on the words, "and as to, for and concerning the part of my aforesaid estates and effects hereinbefore given, devised and bequeathed to my daughter Mary Caroline Johns," &c. The question is, whether the word "part" in the singular is confined to the one-fifth given to her immediately, or whether it includes the one-fourth of the one-fifth, subject to the life interest therein, given to the widow.

I am of opinion that these words include the whole interest already given to the daughter, that is, the one-fifth in possession, and the reversion in one-fourth of one-fifth, and that the direction of the testator is, that the whole of this should be settled. This, I think, is confirmed by what follows, where he speaks of "her said proportion." What is her proportion of his estate? The whole which she took. It is obvious that the words of the testator apply to the whole share of the daughter, namely, to her one-fifth and to that additional portion which would, after the widow's death, come to her. I will make an order accordingly.

[74] GLOVER v. HARTCUP. Nov. 22, 1864.

The testator, by his marriage settlement, covenanted to secure his wife a life annuity of £100 a year if she survived him. By his will, he gave her a life annuity of £100 a year. The Court held that this was in addition, and not in satisfaction, on three grounds. First, because the testator directed his debts to be paid; secondly, because he expressed it to be given "as an addition to her own property," and, thirdly, because he gave it "in full satisfaction of her dower, freebench and thirds upon his property."

Upon the marriage of Mr. George Glover with Charlotte Affleck in 1854, the lady's property was settled, and Mr. Glover entered into a covenant with the trustees that in case the marriage should be solemnized and Charlotte Affleck should survive George Glover, the heirs, executors and administrators of George Glover would, within six calendar months next after his decease, pay to the trustees "such sum of money as should be sufficient for the purchase, in such one of the insurance offices in London or Westminster as the trustees or trustee should think fit, of a clear annuity or yearly sum of £100 for the life of Charlotte Affleck, payable by half-yearly payments, which the trustees were to pay to Charlotte Affleck. And George Glover did thereby charge all the real or personal estate of or to which he might die seised,

possessed or entitled with the payment of such sum of money as should be requisite for the purchase of the annuity."

By his will, Mr. Glover gave all his real and personal estate to trustees in trust to convert, and his will proceeded as follows:—

"And I direct that my trustees or trustee shall stand possessed of the moneys to arise from the sale, conversion and getting in of my real and personal estate, upon trust, in the first place, to satisfy all my *just debts*, funeral and testamentary expenses, and the charges of executing the trusts hereby reposed in them, and, in the next place, to lay out and invest, in or upon Government, real or such other securities as they may deem [75] fitting, a sum sufficient to produce an annual income of £100, and to stand possessed thereof, upon trust to pay to my said wife, *as an addition to her own property*, the sum of £100 during the term of her natural life. And I declare that the provision hereby made for my wife is in full satisfaction of all her dower, freebench and thirds (if any) upon my property." He gave the residue to his children.

The testator died in 1862.

This suit was instituted by his widow, asking, amongst other things, a declaration that she was entitled to the annuity of £100 given to her by the will, in addition to the annuity of the same amount secured to her by the settlement.

Mr. Selwyn and Mr. Kekewich, for the Plaintiff, cited *Cole v. Willard* (25 Beav. 568); *Hassell v. Hawkins* (4 Drew. 468); *Coventry v. Chichester* (33 L. J. (Ch.) 361, 676); *Hales v. Darell* (3 Beav. 324); and see *Jefferies v. Michell* (30 Beav. 15); *Pinchin v. Simms* (30 Beav. 119); *Charlton v. West* (Ib. 124); *Edmunds v. Low* (3 Kay & J. 318).

Mr. Baggallay and Mr. H. Sargant, for the Defendants, the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Plaintiff is entitled to both. There are three circumstances which appear to me conclusive. First, there is contained in the will a trust for payment of debts, and this covenant to buy an annuity contained in the marriage settlement was a debt; next, [76] the second annuity is given "as an addition to her own property," which includes the money which became due to her on the death of her husband, when his estate owed her a sum sufficient to buy her an annuity of £100 a year. Besides this, the testator says that the provision by his will is to be "in full satisfaction of all her dower, freebench and thirds (if any) upon his property." That is, in satisfaction of nothing else but her dower, freebench and thirds, and her rights under the covenant in the marriage settlement is not one of these.

I am of opinion that she is entitled to both annuities.

[76] BLOXAM v. CHICHESTER. Dec. 21, 1864.

[Affirmed, 2 De G. J. & S. 444; 46 E. R. 447.]

A Defendant in custody for want of answer, filed a written answer, and was discharged; but he neglected to file a printed answer. The Court refused to direct the Record and Writ Clerk to issue his certificate to enable the Plaintiff to set down the cause for hearing.

One of the Defendants, being in custody for want of answer, filed a written answer and was discharged; but he neglected to file a printed answer, as required by the 3d General Order of the 6th of March 1860. That order provides that "If such printed copy shall not be left with the Clerk of Records and Writs, the Defendant shall be subject to the same liabilities as if no answer had been filed."

Under these circumstances, the Record and Writ Clerk refused to grant the Plaintiff a certificate that the cause was in a fit state to enable him to serve notice of motion for a decree, and to set down the cause.

Mr. Babington, for the Plaintiff, now asked that the Record and Writ Clerk might issue his certificate, in order that the cause might be heard. He pointed out [77] that the Plaintiff was in no default, as he could not make the Defendant comply with

the exigency of the order; and he suggested that the Defendant's solicitor might be ordered to file a printed answer.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think that I can give this direction, for the order points out what the Defendant is to be subject to. He is to be "subject to the same liabilities as if no answer had been filed," and he is therefore in the same situation as if he had filed no answer at all. If I were to accede to this application, the result would be that no Defendant would go to the expense of filing a printed answer.

I could not make the solicitor file a printed answer, unless I paid his costs out of the Suitors' Fund.

NOTE.—Affirmed by the Lords Justices, 21 December 1864.

[77] ANTHONY v. COWPER. Dec. 21, 1864.

Where an appearance has been entered for a Defendant who has absconded to avoid service, the bill may be taken *pro confesso* against him, without delivering to him the interrogatories which has been filed.

The Defendant having absconded to avoid being served with the bill, the usual advertisement was inserted in the *London Gazette*, requiring him to appear (Cons. Ord. X. rule 6). The Defendant did not appear, and the Court thereupon ordered an appearance to be entered for him. Afterwards, the Plaintiff inserted in the *London Gazette* the usual notice to take the bill *pro confesso* (XXIId Cons. Ord., Art. 2, 4).

When the time had expired, the order for taking the bill *pro confesso* was accordingly made, but the registrar hesitated in passing the order, on the ground that though the Plaintiff had filed interrogatories for the examination of the Defendant, yet he had not served them. He considered that (XXIId Cons. Ord., Art. 2) it could not be said that the Defendant had "not put in his answer in due time after his appearance," for (XXXVIIth Cons. Ord., Art. 4) a Defendant is only bound to put in his answer "within twenty-eight days from the delivery to him, or his solicitor, of a copy of the interrogatories which he is required to answer." That here, no such delivery had taken place, and that, therefore, the Defendant was not in default for want of answer. That in an anonymous case (4 Jur. (N. S.) 583) the Vice-Chancellor Wood, to meet the difficulty, had ordered that notice should be advertized in the *Gazette* that unless the Defendant answered the interrogatories, the bill would be taken *pro confesso* against him.

Mr. Speed, for the Plaintiff, now asked that the registrar might pass the order, observing that this Court had made a similar order in *Buttler v. Mathews* (19 Beav. 549), which had been followed by Vice-Chancellor Stuart in *Wilkins v. Hogg* (30 L. J. (Ch.) 492).

THE MASTER OF THE ROLLS [Sir John Romilly] said he did not see the necessity of delivering the interrogatories for the purpose of taking the bill *pro confesso*, that he remembered having considered the point in *Buttler v. Mathews*, and that he still thought that the conclusion to which he had then come was the correct one. He therefore directed the order to be passed.

[79] HOLGATE v. JENNINGS. Dec. 3, 6, 1864.

[Reversed in House of Lords, sub nom. *Martin v. Holgate*, L. R. 1 H. L. 175; 35 L. J. Ch. 789; 15 W. R. 135. See *In re Orton's Trusts*, 1866, L. R. 3 Eq. 380; *In re Applebee's Trusts*, 1873, 28 L. T. 103; *Ralph v. Carrick*, 1877, 5 Ch. D. 990; *Wingfield v. Wingfield*, 1878, 9 Ch. D. 665; *In re Woolrich*, 1879, 11 Ch. D. 666; *Crosthwaite v. Dean*, 1879, 40 L. T. 837.]

Gift of residue to widow for life, and afterwards to divide amongst such of six nephews and nieces "as should be living at the time of her decease;" but "if any or either

of them should be then dead leaving issue," then "that such issue shall be entitled to the father's or mother's share." A nephew and his only child died in the life of the widow: Held, that the child took no interest in the residue. Whether the same conditions are (by implication) applicable to a substitutional gift as are expressed in regard to the original gift, *quære*.

The testator died in 1854, having by his will given his real and personal estate to trustees, upon the following trusts, as regards the residue:—

"And as to the rest, residue and remainder of my said estate and effects, in trust to pay over the annual proceeds thereof unto my dear wife Susan Jennings, for and during the term of her natural life, and from and immediately after her decease, to distribute and divide the whole of my said residuary estate and effects unto and amongst such of my said four nephews and two nieces, namely, Joseph Crew Jennings, Thomas Robert Jennings, Edwin Jennings Martin, Arthur Martin, Elizabeth Holgate and Ellen Jennings, as shall be living at the time of her decease, in equal shares and proportions as tenants in common, and not as joint-tenants, but if any or either of them should then be dead, leaving issue, then it is my will and meaning that such issue shall be entitled to their father's or mother's share, but in equal proportions."

He then declared that the shares of Elizabeth Holgate and Ellen Jennings should be held for their separate use for life, with remainder to their husbands and children successively.

The testator's widow died in 1864. At this time, Joseph, Thomas and Edwin were dead. Of these Edwin alone had issue, namely, a daughter Augusta, who survived her father, but predeceased the widow, having died an infant in 1863.

[80] Elizabeth Holgate and her only child now presented a petition, which prayed that the residue, consisting of about £80,000 stock, might be paid in thirds between the three surviving residuary legatees.

Mr. Selwyn and Mr. Shebbeare, for the Petitioners, and Mr. H. F. Shebbeare and Mr. Freeman, for Respondents in the same interest, argued that the issue who predeceased the widow could not take, for the issue to take were such issue as a residuary legatee should leave "*then*," namely, at the death of the widow. They argued that this construction was fortified by the use of the word "divide," shewing the period for distribution and the ascertainment of the class, and that it was improbable that the testator "could have intended a dead person to be substituted for a dead person;" *Bennett v. Merriman* (6 Beav. 360); *Macgregor v. Macgregor* (2 Coll. 192); *Atkinson v. Bartrum* (28 Beav. 219); *Re Corrie's Will* (32 Beav. 426); *Turner v. Sargent* (17 Beav. 515).

Mr. Baggallay and Mr. G. Lake Russell. The cases as to substitutional gifts do not apply; for this is the case of a limited and not an absolute gift to the parents, and, on its failure, an original gift to the issue. To entitle the issue to take, it is not necessary that they should survive the tenant for life; no such condition is expressed, and it cannot be implied. The issue left means the issue living at the death of their parent and not of the widow; *Lyon v. Coward* (15 Sim. 287); *Re Wildman's Trusts* (1 John. & H. 299); *Crause v. Cooper* (*Ib.* 207); *Jarman on Wills* (vol. 2, p. 172 (3d edit.)); and see *Masters v. Scales* (13 Beav. 60); *Humfrey v. Humfrey* (2 Drew. & S. 49); *Re Pell's Trust* (3 De G. F. & J. 291).

[81] Mr. Selwyn, in reply.

Dec. 6. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is the construction of the residuary clause in the testator's will. The only survivors of the nephews and nieces are Arthur Martin, Elizabeth Holgate and Ellen Jennings. Edwin Jennings Martin died, leaving a daughter, Augusta, who also died before the tenant for life, and therefore before the fund became divisible. The question is, does she, under the words of this will, take anything, and ought one-fourth be paid to her legal personal representative, or is the residue divisible in three-thirds amongst the survivors? I think it unnecessary to go into all the cases on the point, they are very numerous and scarcely reconcilable. It is very desirable that this point should be settled by some authoritative decision, and as this fund is so large, it is very probable that this case may afford the opportunity of obtaining the decision of the House of Lords.

I think it unnecessary to say more than this :—I adopt and repeat the observation I made in *Re Corrie's Will* (32 Beav. 426), which expressed my view on the subject, and I think that this is a stronger case to uphold the same construction, because the words “then be dead leaving issue” cannot grammatically be said to be true if there be no issue then alive. It ought, to make it grammatical and to favour the case of the representative of Augusta Martin, to have been expressed thus :—“should then be dead having left no issue ;” and although this may seem a thin distinction, I think that “leaving no issue” and “having left no issue” are not equivalent expressions. The words “without leaving issue” have always been considered ambiguous. In *Forth v. Chapman* (1 Peere Williams, 663, and see 2 Jarman (2d ed.) 424), they were construed to mean an indefinite failure of issue as to real estate, and issue living at the death of the tenant for life as to personal estate. At this time, strictly speaking, Edwin Martin is dead without leaving issue, or leaving no issue ; it was not so so long as Augusta his daughter lived, but became so as soon as she died.

I am of opinion that this is not a case in which the daughter of Edwin can take any share ; and that the testator did not intend to substitute one dead person for another dead person. The three residuary legatees who survived the tenant for life are therefore entitled to the fund in equal thirds.

[82] *Re THE EAST BOTALLACK CONSOLIDATED MINING COMPANY (LIMITED).*
Dec. 5, 6, 1864.

[S. C. 34 L. J. Ch. 81 ; 10 Jur. (N. S.) 1193 ; 13 W. R. 197. Disapproved,
In re Silver Valley Mines, 1881, 18 Ch. D. 472.]

A company, established for working mines in Cornwall, was registered in the Stannaries Court, but had its registered office in London. It never commenced business, and never possessed or worked any mine. Held, under the 25 & 26 Vict. c. 89, s. 81, that it was a company “engaged” in working a mine in the Stannaries, and that the Stannaries Court, and not the Court of Chancery, was the proper jurisdiction for winding it up.

This company was duly registered in the Joint Stock Companies Registry Offices for the Stannaries of Cornwall in England in November 1863.

The objects for which the company was established, as stated in the memorandum of association, were, to purchase a lease of a mineral piece of ground in Cornwall, called the East Botallack Consolidated Mine, and any other adjoining mine, and to work the same. The registered office was in London.

[83] The company, however, never became possessed of or worked any mine whatever. The project proved abortive, and the company had never commenced business.

The Petitioner, a printer, who was a judgment creditor of the company, presented his petition to this Court, praying for an order to wind up the company. The question was whether, under “The Companies Act, 1862” (25 & 26 Vict. c. 89), the jurisdiction to make the order was in Chancery or in the Stannaries Court.

By the 79th section a company, under the circumstances therein stated, “may be wound up by the Court” as hereinafter defined. The 81st section provides that the meaning of the word “Court” shall, “in the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries,” mean the Court of the Vice-warden of the Stannaries. And in the case of a company registered in England that is not engaged in working any such mine as aforesaid, the High Court of Chancery.

Mr. Brooksbank, in support of the petition, argued that as this company had never been “engaged” in working a mine in Cornwall, the jurisdiction was in this Court. That, in this case, the office of the company was in London and the projectors and creditors resident there, and that London was the more convenient locality to wind up the company.

Mr. Jessel, for the company. This company has been registered in the Court of

the Stannaries, and that Court alone has jurisdiction to make the order. The word "engaged" cannot mean that the company should be [84] actually mining at the date of the petition, for otherwise the jurisdiction would be changed if a mining company registered in Cornwall ceased to work the mine. The 174th section directs that a company "formed for working mines" within the jurisdiction of the Stannaries shall be registered there. That fixes the jurisdiction.

Mr. Brooksbank, in reply. It is impossible to construe the words "a company engaged in working" as a company which has had no connection with Cornwall, but has merely issued a prospectus.

Dec. 6. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Stannaries Court is the proper Court for making a winding-up order in this case. It was argued that this was not to be treated as a company "engaged" in working minerals in the district of Cornwall, because it never proceeded to work any mine and broke up without proceeding in the undertaking. But, in truth, if this be a company at all, it is one for working mines in Cornwall, and it is registered as such.

The 174th section of the 25 & 26 Vict. c. 89, clause 3, shews that the fact of working mines in Cornwall at the formation of the company is not essential to give the Stannaries Court jurisdiction, but the purpose for which the company is established. The word "engaged" cannot mean actually engaged in mining at that moment, for if so a mining company in Cornwall which had discontinued mining altogether would cease to be within the jurisdiction of the Stannaries Court. This company was registered in the Court of the Stannaries, and the view [85] taken by the shareholders themselves was that it was within that jurisdiction. I think that it is impossible for this Court to deal with this petition, having no jurisdiction, and that it must be dismissed with costs.

[85] BULLOCK v. BULLOCK. Dec. 10, 1864.

[S. C. 11 L. T. 561; 11 Jur. (N. S.) 29; 13 W. R. 212.]

A testator, whose wife was of unsound mind, gave his estate to trustees, in trust, "to apply, from time to time, at their uncontrolled discretion, such annual sum" for the maintenance, &c., of his wife, as, together with her own income, "shall not exceed £500 per annum." Held, that the discretion referred to the application and not to the amount, and that the widow, who had recovered, was entitled to have her income made up to £500 a year out of the testator's estate.

The testator, by his will dated in 1862, gave his residuary real and personal estate to trustees upon the following trusts:—

"Upon trust, out of the annual income thereof, to apply, from time to time, at their or his *uncontrolled discretion*, such annual sum or sums of money, by equal quarterly payments, for the maintenance, comfort, and support of my dear wife, during her life, as, together with the interest or income of the moneys my said wife is or may be entitled to in her own right and under the settlement executed upon our marriage, shall not exceed the sum of £500 per annum. And I request my said trustees or trustee for the time being of this my will to make it their special care, that my said wife shall have every comfort and consideration that her unhappy state shall allow, either under the care and in the family of Charles Frederick Hodgson, with whom she now resides, or of some other skilful and kind-hearted medical gentleman, where she will have cheerful society and every attention paid to her reasonable wishes."

The testator died in 1863.

At the date of the will the testator's wife was of unsound mind, but she had recovered since his death.

[86] The total amount of the widow's income was about £430 a year, and she contended that, under her husband's will, she was entitled to have her income made up to £500 a year.

The Defendants contended the contrary, and that she was entitled to more than

the trustees might, in their uncontrolled discretion from time to time and according to circumstances, consider requisite or proper to be raised for her maintenance, comfort, and support.

This was a special case to determine the point.

Mr. Bullock and Mr. G. Simpson, for Mrs. Bullock. A gift of something not exceeding £500 is a gift of £500, and the discretion is limited to the application only. An addition of £70 a year must therefore be made to the widow's income. It would not be safe to leave a discretion as to the amount to the trustees, who have an interest in the residue.

Mr. Hobhouse and Mr. E. G. White, for the Defendants. This is a mere discretion which the Court cannot control, and it would be inconsistent with a discretion to hold that the widow was entitled to the *maximum* amount. This would destroy the discretion. *Green v. Spicer* (1 Russ. & Myl. 395); *Hill v. Potts* (8 Jur. (N. S.) 555); *French v. Davidson* (3 Madd. 396); *Pink v. De Thuissey* (2 Madd. 157); *Re Sanderson's Trust* (3 Kay & J. 497); *Cope v. Wilmot* (Ambl. 704, and 1 Coll. 396, n.); *Thompson v. Thompson* (1 Coll. 395); *Rudland v. Crozier* (2 De G. & J. 143) were cited.

[87] THE MASTER OF THE ROLLS [Sir John Romilly]. I have read over this will very carefully, and it appears to me to be ambiguous. The words "at their or his uncontrolled discretion" may either refer to the amount of the money or to its application; but I think they refer to the application, and not to the amount. If the testator had intended that his wife might have nothing, he would have said so; but she is to have something at all events, and, even according to the construction put upon the will by the residuary legatees themselves, something must be paid to her, and the trustees cannot, in their discretion, give her nothing at all.

I am of opinion that the only uncertainty, as to the sum to be paid, depends on the varying income of the widow, which is to be made up to £500 a year. I think the discretion was given as to its application, because the testator believed, at the time he made his will, that his wife could never recover, and he therefore desired that the manner in which it was to be applied, so as to be most conducive to her comfort, should be left entirely to the discretion of the trustees.

I concur in the observations of Vice-Chancellor Wood in regard to the word "comfort." It is impossible to say that £500 a year is too much for the comfort of a lady in her rank and position of life, whether she applied it herself or had it applied for her by the other persons appointed for that purpose.

That being my view of the case, I shall answer the first question in the affirmative, and say that she is entitled to such a sum out of the estate of the husband as will make her income amount to £500 a year.

[88] JOPP v. WOOD (No. 3). Nov. 5, Dec. 2, 1864.

[Affirmed, 4 De G. J. & S. 616; 46 E. R. 1057; 34 L. J. Ch. 212; 12 L. T. 41; 11 Jur. (N. S.) 212; 13 W. R. 481. For previous proceedings, see 28 Beav. 53; 54 E. R. 285; 2 De G. J. & S. 323; 46 E. R. 400; 33 Beav. 372; 55 E. R. 411. See *In re Tootal's Trusts*, 1883, 23 Ch. D. 537; *Ex parte Cunningham*, 1884, 13 Q. B. D. 425. Cf. *Lady Brooks v. Brooks' Trustees*, 1902, 4 F. 1014; *Winans v. Attorney-General* [1904], A. C. 287.]

A domiciled Scotchman went to India where he was engaged in mercantile pursuits for nine years. Held, that this residence and occupation in India did not, in the absence of any expression of intention, change his domicile.

J. S., a domiciled Scotchman, went to India in 1805, where he followed mercantile pursuits for nine consecutive years. In 1816 he married there, and he returned to Scotland in 1819, with his wife, and remained there a year. While there, he described himself in his will, and in a bond, as "of Calcutta, presently residing at Ayre," he obtained a plan for the improvement of his old family mansion, and was enrolled a freeholder of Ayrshire. He returned to Calcutta in 1820, and remained there until his death in 1830. During the nine first years of his residence in India he expressed no intention as to his domicile; but, during the last sixteen, he

expressed his intention of returning to Scotland, but which he never accomplished, except by his visit in 1819. Held, that the domicile of J. S., at his death, was Scotch, and that the domicile of his children, who were born in India, and died infants there, was that of their father.

The rule of law, that an engagement in India in the military service of the East India Company, or as a covenanted servant to that company, changes the domicile into Anglo-Indian, does not extend to a person who becomes the servant in a private establishment abroad, or who goes abroad for the purpose of acquiring a fortune, with the intention of returning, at some undefined period, when his object has been attained.

The case now came before the Court upon the petition of rehearing. (33 Beav. 372.) The question was as to the domicile of two children, Eleanor Smith and Mungo Smith, who died infants in India. Their domicile depended on that of their father John Smith, a domiciled Scotchman by origin, who went to India in 1805, and died there in 1860, having been engaged in mercantile pursuits for the whole of that period, except during a visit to Scotland in 1819. The facts are more fully detailed in the judgment of the Court.

Mr. Hobhouse and Mr. H. M. Jackson, in support of the petition.

Mr. Selwyn, Serjeant Atkinson and Mr. B. L. Chapman, for the principal Respondents, and Mr. Hanson, for the Crown.

The cases of *Aikman v. Aikman* (3 Macq. 854); *Allardice v. Onslow* (10 Jur. (N. S.) 352); *Attorney-General v. Dunn* (6 M. & W. 511); *Attorney-General v. Kent* (1 Hurl. & C. 12); *Attorney-General v. Fitzgerald* (3 Drew. 610); *Bruce v. Bruce* (2 Bosanquet & P. 229, n., and 6 Bro. P. C. 566); *Cockerell v. Cockerell* (2 Jur. (N. S.) 727); *Dreton v. Dreton* (10 Jur. (N. S.) 717); *Forbes v. Forbes* (Kay, 341); *Lord v. Colvin* (4 Drew. 366); *Maxwell v. McClure* (6 Jur. (N. S.) 407); *Moorhouse v. Lord* (10 H. of L. Cas. 272); *Munroe v. Douglas* (5 Madd. 379); *Raffenell, In re the Goods of* (3 Swab. & Tr. 49); *Whicker v. Hume* (13 Beav. 366), were cited.

Dec. 2. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon the best consideration that I have been able to give this case, I am of opinion that the domicile of the infant children was Scotch. Their domicile depends on the domicile of their father, and the question is, whether at the death of John Smith, their father, his domicile was Indian or Scottish.

John Smith was born in Scotland in 1786, and down to 1805 his domicile was that of his origin, and therefore Scottish. In 1805 he went to India, and was engaged as a clerk in the banking firm of Ferguson & Co. at Calcutta. In 1807 he became an indigo planter. In 1811 he returned to the bank, and became a partner in the bank of Ferguson & Co. In January 1816 he married, in Calcutta, Eleanor Gale his wife. On the 6th of November 1817 Eleanor, one of his children, was born, and she died on the 13th of July 1818.

The present question I have to consider is, whether at this time, viz., the birth of the child in 1817, John [90] Smith had acquired an Indian domicile, and had lost his domicile of origin. With respect to his intention of remaining permanently or temporarily in India, there is no evidence whatever prior to the year 1814. In July 1819 he visited Scotland with his wife, and while there, in October 1819, he executed a bond, in which he described himself as "of Calcutta, presently residing in Ayr." In December 1819 he made a testamentary disposition of his property, in which he described himself in like manner, as "of Calcutta, presently residing in Ayr." He says in this instrument, "In case I happen to die abroad, I direct my trustees to pay the expenses of my dear wife to this country." In 1819, also, he obtained plans for the improvement of his house at Drongan in Ayrshire, which was the old family mansion. In 1820 he was enrolled a freeholder of Ayrshire.

In October 1820 he returned to Calcutta; and on the 23d of August 1823 Mungo Smith the second infant child was born, and he died on the 3d of August 1824.

If the domicile of John Smith was Indian, when Eleanor was born and died, I am quite clear that he had not changed it in 1823 and 1824, when Mungo Smith was born and died.

In 1825 his wife set out on her return to England, she died on her voyage, in

May of that year, near the Mauritius; and in the same year he erected a monument to his wife in Calcutta. A year before his death he sent wine to Drongan for his own consumption.

On the 3d of December 1830 John Smith himself died at Calcutta.

[91] This is a short outline of the facts of the case, so far as related to his movements and his overt acts.

It is quite settled that two things are necessary to constitute a change of domicile; first, the *factum* of the change of residence; and next, the *animus manendi*. In other words, in order to effect a change of domicile, the person must have settled in a residence out of his former domicile, whether it be the domicile of origin or an acquired domicile; and he must also have the intention of making that residence his permanent home.

If John Smith had ever acquired an Indian domicile, it is clear that he never lost it, for the *factum* of a subsequent change of residence never existed. The real question, therefore, before me is, whether John Smith ever acquired an Indian domicile. This is certain: that in 1805 he went to reside in India, and that he continued to reside there till his death in 1830, with the exception of about a year that he spent in Scotland. There was, therefore, the *factum* of an Indian residence. If, therefore, the father of the infant had the intention of making India his home, he acquired an Indian domicile.

On this point a good deal of evidence is put in, consisting of letters of his, on which many comments have been made, and also on the inferences to be drawn from the facts I have already stated. The evidence amounts to this: that up to 1814 there is no expression of intention of John Smith either way, and that after 1814 there is a strongly expressed intention on his part of returning to Scotland. To state it otherwise:—For the first nine years of his residence in India there is nothing, except the facts I have stated, to disclose his intentions, and they amount to nothing. For [92] the last sixteen years of his residence in India, his intention of returning to Scotland, in my opinion, is clearly expressed.

I am of opinion that the facts I have stated and the acts done by him during the first nine years of his residence in India, do not shew an intention to remain there permanently, and that the fair and reasonable inference from the letters written by him during the last sixteen years of his residence in India is that his intentions, during the first nine years of his residence there, were the same as those which he entertained during the last sixteen years of his life. Unless, therefore, there is an irresistible inference to be drawn from the fact of his residence in India, coupled with his occupation there, which gave him an Indian domicile, I am of opinion he never lost his domicile of origin, but that he remained a domiciled Scotchman during the whole time of his residence in India.

Although the Vice-Chancellor Sir R. T. Kindersley, in the case of *Allardice v. Onslow* (10 Jur. 352), states that he held, and that the House of Lords also held that Dr. Cochrane, in the case of *Lord v. Colvin*, had acquired an Indian domicile, although his correspondence shewed an intention, during the whole of that period, to return to Scotland, I do not find, on reading carefully the judgment given by the Vice-Chancellor, that that question was, in fact, raised or determined before him, or that it was argued before or determined by the House of Lords. It seems to me to have been decided, in that case, that assuming that Dr. Cochrane's domicile was Indian, he had regained his Scotch domicile by his return to Scotland and his residence at Clippensen, Renfrewshire; [93] and that though he left it afterwards, and went to reside in Switzerland and in France, where he ultimately died, he had not lost his reacquired Scotch domicile.

In the case of *Bruce v. Bruce* (6 Bro. P. C. 566, and 2 Bos. & Pull. 229, n.), it was determined that a residence in India, for the purpose of following a profession there, in the service of the East India Company, created a new domicile; and in *Munroe v. Douglas* (5 Mad. 379), Sir John Leach considered this point to be settled by that case, and observed that "it was not to be disputed, therefore, that Dr. Munroe had acquired a domicile in India," although he repeatedly expressed his intention of returning to spend his latter days in Scotland. (Page 380.)

This point and the reason for it is put very clearly by Sir W. Page Wood in

Forbes v. Forbes (1 Kay, 341). He says (p. 356), "I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India.

And he subsequently adds, "And I think it concluded by authority, in which conclusion my reason entirely acquiesces that a service in India, under a commission in the Indian Army, of a person having no other residence creates an Indian domicile."

[94] I have not found any case in which this doctrine has been extended to a person who becomes the servant in a private establishment abroad, or who goes abroad for the purpose of acquiring a fortune, with the intention of returning at some defined period, when his object has been attained. If it were so, any merchant who goes to and settles in any foreign country, in order to correspond with a London and Liverpool house and to do this until he has acquired a sufficient fortune to enable him to live comfortably at home, would gain a domicile there, notwithstanding the repeated expression of his intention not to remain there, but to return as soon as he could.

Assuming the fact to be that one essential ingredient in a change of domicile (to use the expression of Lord Cranworth) is "*exuere patriam*," or, in other words, the "intention of making it the home of the party" (p. 47) (to use the expression of Mr. Justice Story), it is a strong thing that the law should draw an irresistible inference that he did entertain such an intention, from the fact that he ought to have entertained it, by reason of the nature of the duties he had to perform; and should not merely draw this inference of intention, but make the inference itself incapable of being rebutted by the strongest evidence of a contrary intention; this, however, is settled by the cases I have referred to. But I doubt whether such an inference can fairly be presumed in the case of a man who goes abroad to acquire a fortune in the best way he can, so as to make this inference so overwhelming, as to control and override the strongest expressions of a contrary intention.

It is clear that if it apply to India, it must apply to [95] France, Italy, and every foreign country. There cannot be any law on this subject as regards India, and another as regards the rest of the world. I must regard this exactly as I should have done if the residence and acts of John Smith had been at Bordeaux or Constantinople, instead of being at Calcutta.

I consider that the cases I have referred to, viz., *Bruce v. Bruce*, *Munroe v. Douglas*, *Cragie v. Lewin*, and *Forbes v. Forbes*, have settled the rule as to officers and covenanted servants of the East India Company resident in India, but I consider this to be the exception.

In this case, I find that the father of the infants always intended to return to Scotland, and never intended to make India his home. I am of opinion that his residence there from 1815 to 1830 did not give him an Indian domicile, and that he never lost his domicile of origin, which was Scotch; and I retain the opinion I before expressed on this subject, when the first petition was heard before me.

The petition of rehearing must, therefore, be dismissed with costs.

NOTE.—Affirmed by the Lords Justices, 28 February 1865. [4 De G. J. & S. 616.]

[96] CHARLESWORTH v. JENNINGS. Nov. 21, Dec. 6, 1864.

[S. C. 11 L. T. 439.]

The Plaintiff agreed to purchase a share in a partnership business, on the footing of a balance-sheet prepared by an accountant employed by the vendor, which all parties believed (with the exception of slight errors) to be, and was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The Court set aside the contract.

Mr. Hobhouse and Mr. Wickens, for the Plaintiff.

Mr. Baggallay and Mr. J. Pearson, for Jennings.

Mr. Daunev, for Verity.

Mr. Hobhouse, in reply.

Rawlins v. Wickham (3 De Gex & Jones, 304) was cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit by the Plaintiff to set aside a transaction by which he became the purchaser of the interest of the Defendant Jennings in a partnership concern of worsted spinners at Bradford in Yorkshire. The ground on which he seeks to set aside the transaction is that he was not informed of all the circumstances connected with the business which it was essential that he should have been made acquainted with, for the purpose of enabling him to come to a just conclusion as to his position in making such purchase.

The Defendant Jennings contends that the Plaintiff had full opportunity of making himself fully acquainted with all the circumstances relating to the partnership, and that he did not do so, it was because he did not desire it, and that he was anxious to buy the share, and to settle the matter as speedily as he could.

The facts, as they appear in the evidence, are very [97] few. In the year 1863 the Defendants, Verity & Jennings, carried on business as worsted spinners at Dudley Hill, a place distant a few miles from Bradford in Yorkshire. They were partners at will, and either of them might have dissolved the partnership at any time. An arrangement was proposed by which Jennings was to retire from the partnership, and the Plaintiff was to take his place. The terms on which this was to be done were to be settled at a meeting to be held for that purpose. Mr. Beattie, an accountant, had been employed by Verity & Jennings to make out a balance-sheet of the state of the concern, and he did, accordingly, make out a balance-sheet in December 1863; but he appears not to have considered it complete without further examination and information. At all events, he never delivered it to anyone as his final statement of the affairs of the concern. The meeting for settling the terms on which the Plaintiff was to take the place of Jennings, who was to retire, had been fixed to take place at the office of Mr. Carr, the solicitor of Verity & Jennings, on Monday the 18th of January 1864. On the previous Saturday (the 16th January) Mr. Jennings went to Mr. Beattie's office and took away all the books of the concern, and also the balance-sheet I have mentioned, and also the books at the mill, and removed them all to the office of Mr. Carr, to the same room where the meeting was to be held, and they were all there at that time. The meeting took place, accordingly, on Monday the 18th January 1864, at the office of Mr. Carr. The persons present were the Plaintiff, the Defendants Verity & Jennings, Mr. Carr, a Mr. Carver and a Mr. Stocks. At this meeting a memorandum in writing was drawn up and signed by the Plaintiff and the two Defendants, which is to this effect:—

“Memorandum of agreement made this 18th day [98] of January 1864 between William Verity, of Dudley Hill, in the county of York, worsted spinner, of the first part, Sam Jennings, of the same place, worsted spinner, of the second part, and Edmondson Charlesworth, of Bradford, in the county of York, worsted spinner, of the third part, whereby it is agreed, by and between the said parties hereto, as follows:— That the partnership lately subsisting between the said William Verity and Sam Jennings shall be, and hereby the same is dissolved from the day of the date hereof. That the said William Verity and Edmondson Charlesworth shall, on or before the 20th day of February next, pay to the said Sam Jennings the sum of £1000 for his share of all the property and effects of the said partnership, including the debts now owing to the said partnership and all dividends which may hereafter be received on debts owing to the said partnership. That on payment of the said sum of £1000, the said Sam Jennings shall assign to the said other parties hereto, or one of them, all his share and interest in the partnership effect and assets. That the said William Verity and Edmondson Charlesworth shall, at all times hereafter, indemnify the said Sam Jennings and certain friends of his, who have become sureties for payment of part of the liabilities of the said partnership, from the debts and the liabilities of the said partnership, and shall give to the said Sam Jennings the usual bond for that purpose. That the guarantee given by some friends of the said Sam Jennings to the Halifax Joint Stock Banking Company shall be procured and given up to the said

friends of the said Sam Jennings. That the expenses of preparing these presents, and all documents consequent thereupon, shall be paid by the said William Verity and Sam Jennings in equal shares."

That agreement is signed by all three parties, and [99] there is a receipt signed by Jennings for £100 "in part payment of the above-mentioned sum of £1000."

Shortly afterwards, the Plaintiff became acquainted with circumstances which induced him to regret having entered into the partnership, and thereupon he refused to complete the agreement he had entered into. Some negotiations were entered into to endeavour to effect a settlement, but ineffectually, and the Plaintiff refused to pay the £900 (the balance of the £1000) which, by the agreement, was stipulated to be paid on the 20th February 1864. The Defendant Jennings thereupon brought his action on the agreement on the 22d February 1864, and this bill was filed on the 7th of March for an injunction. On the hearing of the motion for the injunction, it was arranged that judgment should be given in the action, to be dealt with as the Court should direct, with a stay of execution in the meantime, and that the motion should be converted into a motion for decree, with additional evidence to be given on both sides. This has been done.

The important matter in this cause is to ascertain what took place on the 18th of January 1864, and how far, having regard to all the Plaintiff knew before that meeting and all that was disclosed at that meeting to him, he is bound by the memorandum of agreement which he duly signed on that occasion.

According to the Plaintiff's account, he knew nothing of the state of the concern before the meeting of the 18th of January; that, at that meeting, the balance-sheet made out by Mr. Beattie, which is proved as an exhibit in the cause, was produced; that although the books of the firm were in the room, they were not examined, and that all the arrangement proceeded and [100] was settled on the basis of that balance-sheet and on the faith that it was accurate.

If this be correct, it is impossible that the transaction can stand, or that the Plaintiff should be bound to fulfil the agreement he has signed. It is proved, and indeed it is not denied, that the balance-sheet is extremely inaccurate. Serious and important errors are pointed out in it. The balance due from the firm to the bankers was erroneously stated at £243, 15s., but this did not charge against the firm a bill of £395, 10s. 3d., drawn by Zaccheus Wilkinson on the firm, which had been dishonoured, and of which, though £125, 10s. 3d. had been paid by Wilkinson, the remaining £270 was still due from the firm, and of which, even according to the Defendant's case, £170 at least was a debt for which the firm was liable. The second error was an omission from the balance-sheet of a bill of £500 drawn by a firm of the name of Brown & Booth and accepted by the firm, and upon which the firm was still liable. The third error was the omission of two bills drawn by Tomlinson on the firm, and accepted by them, amounting in the whole to £489, 13s. The fourth error was the statement of a debt due from the firm to Wilkinson, which was set down at £135, 19s. 6d., but which, in fact, was £181, 15s., and a debt due from the firm to Oates, Ingram & Co., which was stated at £65, while in fact it was £239, 3s.

These five sums added together amount to £1479, 11s. 6d., making an error in the balance-sheet to that extent, which were debts of the concern not stated in the balance-sheet.

The manner in which this is met by the Defendant Jennings is as follows:—With respect to the first error [101] in the banker's account, he says that it was discussed at the time that Verity said that the bill was a forgery, and the Defendant alleges his belief that it has since been paid to Wilkinson. Neither of these propositions, however, appear to be established by any evidence before me. With respect to the other errors and omissions, amounting in the whole to £1209, 11s. 6d., it is not alleged that they were mentioned at the time of the meeting or before the memorandum of agreement was signed. But the defence mainly argued and insisted upon by the Defendant Jennings is that the balance-sheet was not relied upon at this meeting as being a correct statement of the affairs of the concern, that the Plaintiff was very desirous to come into the business and to buy out the Defendant Jennings, and that he neither required nor desired any accuracy in the statement of affairs of the concern, that he took the whole thing at a venture, from his personal knowledge

of the concern. The Defendant points out that there was no time to do anything more, as money had to be supplied to take up bills against the concern, which were falling due on that day, and which neither Verity nor himself were able to do, and that unless this had been done the concern would have stopped. Three witnesses, Carr, Stocks and Carver, all declare that the Plaintiff refused to take further time or to have another accountant employed, and that he stated that he had seen the books, and that if all the accountants in Bradford were employed they would be unable to make anything of them. The Defendant denies this, and attributes these expressions to a subsequent meeting of the 20th February, when an ineffectual attempt was made to arrange matters after the parties were at issue. Undoubtedly, if the Plaintiff had said to this effect: "I do not care whether the concern is thriving or failing, or what may be the extent of its liabilities; I am willing to pay £1000 to get you to [102] go out and to come in in your place,"—and if he signed an agreement to that effect, however singular such a course of proceedings might appear, it would be a binding agreement upon him.

But the evidence of the Defendant, even if it be literally true and unqualified by the evidence of the Plaintiff, is very far from amounting to such a case. In this case a balance-sheet is produced, and the matter is discussed on the basis of its general accuracy. On examining the evidence, I think it was not treated as being correct to a fraction, but it was dealt with as being, on the whole, a fair statement of the affairs of the concern, although the purchaser was informed that it could not be completely relied on, and although the seller observed that his interest in the concern was better than the balance-sheet disclosed, still his observations shew that it was on the footing of this balance-sheet that the parties were proceeding, and that all parties believed that, with the exception of some slight errors, it was generally correct. The observations of Mr. Carr, and of the Defendant Jennings also, wholly displace the defence that the Plaintiff was buying without desiring or intending to have any knowledge of the affairs of the concern, except that general information which he had before he came to the meeting.

So regarding the matter, although slight circumstances would not avoid the contract, yet I am of opinion that a purchaser cannot be compelled to complete a contract, entered into on the faith of a balance-sheet produced by the vendor as being, though subject to slight errors, substantially correct, when the errors were so serious as to amount to nearly £1480, and reduced the nominal balance (£1500) of stock in favour of the concern to some £20 or £30, and shewed that the concern [103] was barely solvent. This is, in truth, a question of degree. It cannot, in my opinion, be pretended that if the balance had been purely fictitious, it would have bound the Plaintiff to an agreement entered into after a discussion upon it. It cannot be pretended that the balance-sheet was treated as a piece of waste paper; this is, in fact, contradicted by the evidence on both sides, and unless it was intended to guide him, why was it produced at all? A few trifling inaccuracies might not have avoided the transaction, but when the errors are so serious as to make out that the concern, which was barely solvent, had a balance in its favour of nearly £1500, I am of opinion that this is a transaction which the purchaser cannot be compelled to complete.

The Defendant's case, even in the most favourable mode of putting it, regarding his evidence alone, cannot, as it appears to me, be put higher than this:—Jennings was a partner at will, and Verity could have dissolved the partnership at any time. The Plaintiff is desirous to take Jennings' place in the concern, and when he does so, but not before, he is willing to advance or to procure the funds necessary for the support of the concern, by taking up the bills which were then falling due. A meeting is held on the day on which the bills fall due, to determine what is proper for the Plaintiff to pay to Jennings for his retirement. For this purpose, Jennings produces a balance-sheet, which Mr. Carr, his solicitor, says cannot be relied upon, and says that he had better have the books more carefully examined by another accountant before completing, and he suggests that the Plaintiff should advance the money at once to take up the bills, and to let the agreement stand over until the accounts had been more accurately stated. The Plaintiff refuses to advance any money until he is a partner. The Defendant Jennings says, his interest [104] in the

concern is better than the balance-sheet shews ; the balance-sheet shews an excess of assets over debts of £1500, and thereupon the Plaintiff agrees to give £1000 to Jennings, being £750 for his share of the surplus assets, and £250 for his share of the goodwill, and he signs a memorandum to that effect. After this, it turns out that the £1500 excess of assets is merely imaginary, and that if the balance-sheet had been properly made out, it would have shewn either an excess of debts over assets, or at least a very small, if any, balance of assets. If such was the real state of the case, the agreement could not stand. I am, however, of opinion that this statement is more favourable to the Defendant than the fair inferences to be drawn from the evidence warrant, and, in my view of the case, the Plaintiff is entitled to a decree.

It was suggested, in the course of the argument for the Defendant, that the real transaction was a contract between the two Defendants Jennings and Verity, by which Verity bought out Jennings, and that both of them knew the books of the concern equally well, and that the Plaintiff was merely the surety for carrying this agreement into effect. I do not think that this was the real character of the transaction ; it is wholly unsupported ; indeed, in my opinion, it is contradicted by the evidence. But if it were a mere case of surety, it is obvious that a Plaintiff could never be compelled to abide by a suretyship, entered into by him without a full knowledge of the circumstances by which he would be bound as soon as he had entered into it.

I am of opinion, therefore, that the Plaintiff in this suit is entitled to have the memorandum delivered up to be cancelled, that satisfaction must be entered up on [105] the judgment, and that an account must be taken of the business since the 18th of January, and that the Plaintiff, on the rendering of such account, is entitled to be indemnified against the debts of the concern incurred prior to that period.

[105] TURNER v. BAYLEY. Nov. 7, 1864.

[For previous proceedings, see 4 De G. J. & S. 332 ; 46 E. R. 947.]

The Plaintiff entered into the service of the Defendant at a weekly salary, and it was verbally agreed that he should also have a share of the profits ; but he was to take the Defendant's word as to the amount of profits made, and was, in no case, to examine or investigate the books of the business. In a suit to recover the Plaintiff's share of the profits, the parties contradicted each other as to the proportion to which the Plaintiff was entitled. Held, at the hearing, that the Defendant must produce the books in order to determine the point in dispute. The Court also directed an inquiry as to the proportion, and an account of the profits to be taken.

The Plaintiff entered into the service of the Defendant as his foreman ; and it was verbally agreed that he was to receive a weekly salary, and a share of the profits of the business. The Plaintiff said it was one-sixth, while the Defendant said that it was one-twelfth. According to the Defendant's statement, part of the agreement was, that the Plaintiff was to take the word of the Defendant as to the amount of profits made, and that he should, in no case, be entitled to demand or question the business transactions or *examine or investigate the books of the business*, or object to the Defendant's statement as to the amount of profits. The Plaintiff's share had been paid down to the 13th of May 1860 ; but differences having afterwards arisen, the Plaintiff quitted the Defendant's service on the 2d of January 1863, and instituted this suit for an account of the profits and payment of his share.

The Defendant in his answer stated the amount of profits between these dates, and was willing to pay one-twelfth of them to the Plaintiff.

Upon motion, made on the 20th of February 1862, [106] for the production of the books of the business, the Master of the Rolls made the order ; but the Lords Justices discharged it, thinking it premature, and they directed the motion to stand over until the hearing.

The cause now came on, upon the former motion to produce and upon a motion for decree.

Mr. Baggallay and Mr. Speed, for the Plaintiff.

Mr. Selwyn and Mr. Brooksbank, for the Defendant, still resisted the production of the books.

THE MASTER OF THE ROLLS [Sir John Romilly]. The determination of this question depends on the weight to be attached to the oaths of the parties themselves, for the Plaintiff says that the agreement was one thing, and the Defendant that it was another. However, it is very probable that the truth will appear from the books themselves; but the Defendant, in whose possession the books are, will not produce them.

While the Court holds, that when a person keeps back evidence it is to be taken most unfavourably to him, how, consistently with that maxim, can the Defendant succeed in his contention, while he admits he has in his possession evidence which will probably clear up the doubt as to the effect of the contract, but which evidence he refuses to produce?

I shall order an account to be taken of the profits from the 13th of May 1860 to the 2d of January 1863. Then I shall direct an inquiry as to what proportion of such profits the Plaintiff is entitled to, and order the Defendant to produce the books and documents set forth in the schedule to his affidavit.

NOTE.—Reg. Lib. 1864, B. fol. 2470.

[107] THOMPSON v. HUDSON. Nov. 3, 1864.

A judgment creditor, whose debt had been satisfied but who had not entered satisfaction on the rolls, was made a Defendant to a foreclosure suit. He disclaimed. Held, that he was not entitled to his costs, in consequence of his negligence in not entering up satisfaction of his judgment.

This was a bill of foreclosure. It appeared that a judgment creditor of the mortgagor, who had been satisfied, had not entered up satisfaction on the roll, and he had consequently been made a Defendant to the suit. By his answer he disclaimed; and at the hearing

Mr. F. Miller appeared for the judgment creditor, and asked for his costs as a disclaiming Defendant; but

THE MASTER OF THE ROLLS [Sir John Romilly] refused him his costs, saying that having given notice to the public on the roll of his claim, it was his duty to inform the public, by the same mode, that it had been satisfied. And that having necessarily been made a Defendant to the bill of foreclosure, he could not have his costs.

[107] M'CAROGHER v. WHIELDON. Dec. 5, 1864.

The first and second mortgagees of an estate had power of sale and of giving good receipts. They joined together in selling, and each received his portion of the purchase-money, for which they gave a receipt to the purchaser. Held, that a title depending on this sale was perfectly good.

The following question arose as to the title to some property sold in the suit.

The price had been twice mortgaged, and both the first and second mortgagees had a power of sale, and of giving receipts. Both mortgagees joined in a sale of the mortgaged property, and they divided the purchase-[108]-money between them, the first mortgagee being paid in full, and the residue being paid to the second mortgagee; and they gave receipts for the portions they respectively received.

Mr. Selwyn and Mr. H. Smith argued that the title was perfectly valid, the sale having been effected by both mortgagees.

They referred to *Rede v. Oakes* (32 Beav. 555), since reversed [4 De G. J. & S. 565], and *Hope v. Liddell* (21 Beav. 183).

Mr. Bristowe, *contra*, argued that it was not a marketable title. That it was not clear under which power the property had been sold, and that it was necessary for the mortgagee who sold to give a discharge for the whole of the purchase-money, and that here there was a receipt of the whole purchase-money from neither. That powers of sale were construed with strictness, and that there being no joint power of sale, and no power to divide the purchase-money, the title was at least doubtful, and could not be forced on a purchaser.

THE MASTER OF THE ROLLS [Sir John Romilly]. It is obvious that the first mortgagee might have sold under his power of sale, and have given a good discharge for the purchase-money, and which the purchaser was not bound to see to the application of. The second mortgagee might have done the same. I cannot, therefore, see any reason why they could not combine together and sell, and give a good discharge for the purchase-money. It appears to me that the objection cannot be sustained.

[109] FLEMING v. ARMSTRONG. Dec. 7, 1864.

[S. C. 11 L. T. 470; 5 N. R. 181.]

A sale was directed in a partition suit of a freehold estate in which a married woman was interested for her separate use without power of anticipation; the Court having first made her costs a charge on her share, and directed them to be raised by a sale.

A freehold farm was vested in the Plaintiffs Jane Fleming and Harriette Green and the Defendant Eliza, the wife of George Armstrong, as tenants in common. The one-third share of Mrs. Armstrong was settled to her separate use without power of anticipation.

This was a suit for the partition of the estate, and it was asked that the estate might be sold, it being more advantageous to all parties, as it would produce a higher price if the entirety were sold. The difficulty arose as to the share of Mrs. Armstrong being limited to her separate use without power of anticipation.

Mr. Dryden, for the Plaintiffs.

Mr. A. Thompson, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly] declared that the one-third share of Mrs. Armstrong in the fund ought to stand charged with the costs of the suit of herself and husband, and that such costs ought to be raised by a sale of her third part. He then, by consent, ordered the whole farm to be sold, and the purchase-money to be brought into Court.

NOTE.—Reg. Lib. 1864, A. fol. 2541. See *Davis v. Turvey*, 32 Beav. 554, and the cases there cited, and *Hubbard v. Hubbard*, 2 Hem. & Miller, 38.

[110] ROBSON v. FLIGHT. Nov. 7, 11, Dec. 3, 1864.

[Reversed, 4 De G. J. & S. 608; 46 E. R. 1054; 34 L. J. Ch. 226; 11 L. T. 725; 13 W. R. 393. See *Earl of Gainsborough v. Watcombe Clay Company*, 1885, 54 L. J. Ch. 994.]

Where a person takes a lease without inquiry as to the title of the lessor, he cannot plead purchaser for valuable consideration without notice; and it was held that the purchaser of a lease, subject to a stipulation that the vendor's title should commence with the lease, could not avail himself of that plea.

A testator devised a freehold house to trustees on certain trusts, and said, in effect, "I hereby declare and direct" that, during the minority of the *cestuis que trust*, the

estate "shall and may" be demised by the trustees (naming them) and the survivor and his executors and administrators at rack rent for twenty-one years. The trustees disclaimed, and a proper lease was granted by the heir at law, on whom the estate had descended. The Master of the Rolls held that the lease was valid, but Lord Chancellor held the contrary.

This case reported *ante* (33 Beav. 268) on another point, now came on for hearing. The facts of the case were these: John Hall, by his will dated in October 1818, devised a freehold house, No. 45 Ludgate Hill, to two trustees (Stanger and Harrison) in fee, upon trust to pay one-half of the rents to his son John Ebdell Hall for life, with remainder to his children, and to stand seised of the other moiety in trust for the separate use of his daughter Eliza Hall (afterwards Mrs. Robson) for life, with remainder to her children. The will contained the following clauses:—

"Provided always and I do hereby *declare and direct* that, during the minority or respective minorities of any person or persons for the time being entitled under this my will, all and singular the real estate or any part or parts thereof, to which he, she or they shall for the time being be entitled as aforesaid, *shall or may be leased or demised by the said Edmund Stanger and Joseph Harrison, and the survivor of them, and the executors or administrators of such survivor*, at rack rent, for any term of years in possession not exceeding the term of twenty-one years:

"Provided also and I hereby declare and direct, that from and after any person or persons for the time being [111] entitled under this my will to an estate or interest in any part or parts of my said real estate for the term or terms of his, her or their life or respective lives shall have attained his, her or their respective age or ages of twenty-one years, then all or any part or parts of the said real estate to which he, she or they shall for the time being be entitled, as aforesaid, shall and may, with his, her or their consent in writing, and subject to any lease or leases thereof which may have been previously made, under or by virtue of this my will, be leased or demised by the said Edmund Stanger and Joseph Harrison and the survivor of them, and the executors or administrators of such survivor, at rack rent for any term of years in possession not exceeding the term of twenty-one years."

The will contained a power for the appointment of new trustees, in the case of their dying or refusing or declining to act, exercisable by the acting trustee, or if both should die or decline to act, then by the trustees so declining or the executors or administrators of the deceased trustee.

In May 1826 the testator died. The trustees named in the will of the testator refused to act in the trusts of the will; one of them died in November 1827, the other disclaimed the devises and trusts by a deed in June 1828, and no new trustee had ever been appointed in their place.

Prior to the testator's death, he had made a mortgage in fee of the hereditaments in question to John Plank and his heirs for ever to secure £800, and the legal estate in the hereditaments was now vested in his devisees or in persons claiming under them. The testator left surviving him John Ebdell Hall his only son and heir at law and his daughter Eliza Robson (then [112] Eliza Hall), and administration with the will annexed was granted to the son.

On the 10th November 1836 John Ebdell Hall and Eliza Robson granted a lease of the house in question to J. Nicholson for twenty-one years, in consideration of the covenants therein contained and of the surrender of the old lease. This lease was assigned to Thomas Russell.

On the 4th January 1840 Mrs. Robson died, leaving Eliza Robson, the first Plaintiff, her only child surviving her, who attained twenty-one on the 27th December 1860.

On the 1st January 1848 John Ebdell Hall granted a new lease of the house to Thomas Russell for twenty-one years, in consideration of the covenants therein contained and of the surrender of the former then subsisting lease. The rent reserved was £180, and the term would expire on Christmas Day 1869. This lease was, in 1856, purchased by the Defendant Thomas Flight, subject to the usual condition of sale, *that the vendor's title should commence with the lease under which the premises were held*. The property was conveyed to the Defendant John Cannon, in trust for the Defendant Thomas Flight.

John Ebdell Hall died on 22d October 1857, leaving the two infant Plaintiffs, his only children, surviving him, and leaving Thomas Robson his executor. The rents had since been duly received and applied for the benefit of the Plaintiffs.

In November 1863 the London, Chatham and Dover Railway Company, under their compulsory powers, took possession of the premises for forming their rail-[113]-road thereon, and, in pursuance of the 85th section of the "Lands Clauses Consolidation Act, 1845," they delivered to the Plaintiff, Eliza Robson, the usual bond, in the penal sum of £2257 with a condition, which recited that she was entitled to one moiety of the premises, subject as to the lease, and that they had deposited in the Bank of England £2257, the estimated value of her interest. The railway company also delivered to the guardians of Elizabeth Ebdell Hall and John Ebdell Hall the younger a similar bond, and made a similar deposit, in respect of their interest in the other moiety of the premises subject to the lease.

This suit was instituted by the adult daughter of Mrs. Robson and the two infant children of the son, against Flight and his trustee and the mortgagees, insisting on the invalidity of the lease of 1848. The bill charged that unless the lease should be set aside, the railway would purchase and pay for the Plaintiffs' interests in the premises as if they were subject to the lease, whereby the value thereof would be greatly diminished, and Flight would receive from the railway company purchase-money and compensation in respect of the full value of the lease; and that the Plaintiffs would not, until such lease should be set aside, be in a position to take proper steps for having the amounts of purchase-money and compensation payable to them by the railway company ascertained and paid.

The bill prayed for the execution of the trusts of the will as regarded this property, for a declaration that the Plaintiffs were entitled to this property and the proceeds discharged from the lease, and that it might be set aside, and that Flight might account for the rents, and that the purchase-money and compensation payable [114] for the premises discharged from the lease might be ascertained and applied in payment of the mortgage.

The Defendant Flight, by his answer, insisted on the validity of the lease, and that he was a purchaser for valuable consideration, and he denied all notice of the Plaintiffs' title.

Mr. Southgate and Mr. Bagshawe, for the Plaintiffs. The power of leasing contained in the testator's will was one given only to two persons and the survivor and the executors and administrators of the survivors. They never executed it, and it could not have been executed by any other person in their place. No authority is given to the heir of the testator to interfere and grant leases of the property, and this lease, purporting to be granted by him, is therefore wholly void.

Secondly, the Defendant cannot avail himself of the plea of being a purchaser for valuable consideration without notice. He had constructive notice of the title of his lessor; *Attorney-General v. Backhouse* (17 Ves. 293); *Steedman v. Poole* (6 Hare, 193); *Attorney-General v. Hall* (16 Beav. 388). Mr. Flight stipulated for a title commencing with the lease, and neglected the proper precaution of examining into the title; he must be held to have knowledge of that which would have appeared if he had required the production of the vendor's title, and he has notice that the lease was invalid, having been granted by one having no authority to do so; *Peto v. Hammond* (30 Beav. 495), and see *Worthington v. Morgan* (16 Sim. 547). It appears on the lease itself that it was granted in consideration of the sur-[115]-render of another lease granted by different persons; this put the parties upon an inquiry as to the title.

Mr. Selwyn and Mr. Henning, for Flight. First, Flight is a purchaser for valuable consideration of this lease without notice of any defect in it, and therefore the Court will not assist in depriving him of the benefit of his purchase. Actual notice is positively denied, and is not attempted to be proved; constructive notice cannot be imputed to him, for it is the universal practice not to produce the landlord's title either on granting or assigning a lease; in fact, it is impossible, for no landlord would consent to shew it. This, therefore, is not like the case where a purchaser of an estate wilfully neglects to require the ordinary proof of the vendor's title, in order to avoid seeing the defects. The Courts of late have been very disinclined to extend the doctrine of constructive notice. The cases cited do not lay down any general rule in

regard to the notice to be imputed to a lessee, but they turned upon the particular circumstances of each case. This defence is applicable to an equitable interest; *Attorney-General v. Wilkins* (17 Beav. 285).

Secondly. The Plaintiffs have acquiesced and affirmed the lease by the receipt of the rent since the death of John Ebdell Hall in 1857, and they would never have disputed its validity but for the accident of the property having been taken by a railway company.

Thirdly. This is not, in form, such a suit as the Plaintiffs are entitled to maintain. The property is gone, having been taken possession of by the railway company, and the lease destroyed; and the only question is, the amount of compensation and damages to be paid to the [116] Plaintiffs by the company; this is a mere legal right, which the Plaintiffs have no right to contest in equity. The grounds of the suit, in regard to the relief prayed, are altogether informal, mixing up in one suit matters having no connection.

Fourthly. This is a perfectly valid lease, in equity at least. It was granted not by virtue of a simple power, but under an imperative trust for the benefit of all parties interested. The testator "declares and directs" that during the minority his real estate "shall" be leased. The object was to provide against the premises being unoccupied, and to secure the regular receipt of the rents for the benefit of the infant *cestui que trust*, and it became imperative on the trustees (whoever they might be) to perform it; *Beauclerk v. Ashburnham* (8 Beav. 322); *Cadogan v. Earl of Essex* (2 Drew. 227).

The distinction between a power simply and a power in the nature of a trust to be executed for the benefit of others is clearly pointed out in *Brown v. Higgs* (8 Ves. 569, and 5 Ves. 495); *Attorney-General v. Lady Downing* (Wilmot's Notes, p. 23); *Lewin on Trusts* (p. 536). Even where such a power has not been executed at all, the Court holds that the *cestui que trust* does not lose the benefit intended for him through the operation of the fiduciary power.

It is a settled rule of this Court that a trust never fails for want of a trustee; and here, upon the disclaimer of the trustees, the heir at law became a trustee and was bound to perform the trusts. Can it be said that, by reason of the disclaimer, the trusts were not to be executed at all? If the trust failed by the dis-[117]-claimer, the Plaintiffs' title itself would be destroyed. Suppose there had been an imperative direction to advance or maintain the infants, would that have been destroyed by the disclaimer, and, if not, why is any other trust for their benefit? The Court would either have performed the trust or have compelled the trustee to perform it. The effect, in fact, of the disclaimer was this:—Merely to omit and strike out from the will the names of the trustees. If the names of the trustees had been left in blank, the result would have been that the trusts and powers would continue, but be vested in the heir. Here the lease has been *bond fide* granted, without any collusion and for the best rent, and the interest acquired by the tenant is precisely that sanctioned by the testator, and which the Court itself would have directed. It might have been onerous or advantageous; then why should this Court set it aside when accidental circumstances have perhaps increased its value?

Lastly. At all events, this lease was operative, to some extent, during the life of the grantor.

Mr. Kingdon, for Robson and the mortgagees.

Mr. Woodruffe, for Cannon, the trustee for Flight.

Mr. Southgate, in reply.

Dec. 3. THE MASTER OF THE ROLLS [Sir John Romilly]. The point on which I reserved my judgment in this case is, whether the power of granting leases, vested in the trustees of a will by the testator, was destroyed by [118] reason of the trustees having disclaimed the trusts and refused to execute any of the powers conferred upon them by the will. The facts of the case are shortly these:—[His Honor stated them.] The Defendant has set up four defences. The first was, that he was a purchaser of the leases for valuable consideration without notice of the defect. This I disposed of at the time. I am satisfied that this doctrine does not apply to the case of a man who takes a lease, with possession, without inquiring for the title of his lessor to grant such a lease. If it were otherwise, the usual provision that

the assignee of a lessee shall not inquire into the lessor's title must be a useless and injurious condition, as his condition would be much safer if he intentionally abstained from inquiring. However, in this case, if it had been material, I am disposed to think that, as the lease of November 1836 was granted on a surrender of the former lease, which had been granted by the original testator, the Defendant had notice of the defect in the title of his lessor.

The second objection was that the Plaintiffs had acquiesced in the lease by the receipt of the rents. This also I stated at the hearing could not be maintained, inasmuch as two of the Plaintiffs are infants, and if the objection had any weight, would resolve itself simply into a question of misjoinder, which could be remedied by amendment to be permitted by the Court at the hearing.

The third objection was to the frame of the bill, which asked for a declaration of the invalidity of the lease, without requiring any consequential directions, inasmuch as none could be given here, except such as were merely nominal, as the railway company had taken possession of the house and pulled it down, and [119] the only question now was, who were entitled to that portion of the purchase-money which has been assessed as the value of the remaining six years of the lease? And it was insisted that this Court could not make such a declaration, where it could not give any directions consequent thereon. This objection I also stated had, in my opinion, no force in the circumstances of the case. My opinion therefore is, that the bill is well and properly framed for the purpose of raising the question at issue, which is one of nicety and importance.

The fourth objection, on which I reserved till this day the expression of my opinion, was this:—The Defendant insists that this power to grant leases is not a mere naked power granted to trustees, but that it is a trust created by the testator for the benefit of the *cestuis que trust*, and that, consequently, it does not fail by reason of the disclaimer of those trusts by the persons in whom they are vested by the will. It is argued that, if necessary, the Court itself would have executed these trusts and granted the leases, if no one else could have been found who was competent and willing to do so; and that further, if these leases had been granted by some one incompetent properly to grant them, and if it appeared that this had been done for the benefit of the *cestuis que trust*, and that the sustaining of these leases would also be for their benefit, this Court would have supported and enforced them exactly as if it had originally sanctioned the proceedings.

The distinction between a mere power and a trust is often very thin, and the limits between them difficult to be drawn without ambiguity when applied to a particular case. In *The Attorney-General v. Lady Downing* (Wilmot's Notes, p. 23), C. J. Wilmot points out the great distinction between a [120] power and a trust. "Powers," he observes, "are never imperative, they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative and are obligatory on the conscience of the party entrusted. This Court supplies the defective execution of powers, but never the non-execution of them, for they are meant to be optional. But the person who creates a trust means it should at all events be executed."

Where powers and trusts are united together, then the trust can only be performed by the exercise of the power; and in that case the power, though not so expressed in the instrument creating it, is, in fact, imperative, and is so treated in equity; and the Court will, in those cases, as in *Brown v. Higgs* (8 Ves. 561), carry the trust into execution at the expense of the person in remainder.

Accordingly, in all cases where a power is given by a will to sell an estate and apply the proceeds for the benefit of the *cestuis que trust*, the power is treated as auxiliary to and forming part of the trust, and the heir at law, on whom the legal estate may have descended, will be compelled to join in the sale and give effect to the object expressed in the testator's will. I am of opinion that the same rule applies where the testator gives a power of leasing for the purpose of dividing the rents to be received thereby amongst the persons designated as *cestuis que trust* in his will, and that a Court of Equity would compel the heir at law, in whom the legal estate is vested, to join in such lease for the purpose of making the same valid. And where this is done it is not, in my opinion, material whether the words of the will by which

the power is created are permissive merely or imperative, if the whole of the context of the will [121] shews that the granting of such a lease is auxiliary to and essential for the due execution of the trusts contained in the will.

In this case, there is this peculiarity: the legal estate in the hereditaments was, when the lease was granted and is now, outstanding in John Plank's devisees; in fact, therefore, a valid legal lease was not and could not have been granted without his concurrence, and he might, at any time, have ejected the lessee and taken possession. But that circumstance does not, in my opinion, affect the present question. The mortgagee is or will be paid off, and, subject to his interest, the whole interest passed to the *cestuis que trust* created by the testator's will. I assume the property to remain in specie, which is the only way in which I can properly regard the question; no decree or order of mine, in this suit, will affect the interest of the mortgagee, or make this a valid lease as against him; it leaves his rights untouched. But, as between the tenants for life and the remainder-men, that is, as between the deceased son and daughter and the present Plaintiffs, their children, I am of opinion that the granting of a proper lease was essential to the due execution of the trusts of the will, and that, as between them, I must treat the case exactly as if there had been no mortgage, and as if, on the disclaimer of the trustees, the legal estate had descended on John Ebdell Hall, as the heir at law of the testator, in which case, a valid legal lease of the hereditaments would have been granted by him.

The words of Lord Eldon in *Brown v. Higgs* are so important on this question that I read a passage from his judgment, which applies to this case (8 Ves. 570): "It is perfectly clear that where there is a mere power of [122] disposing, and that power is not executed, this Court cannot execute it. It is equally clear that wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust. One question, therefore, is, whether John Brown had a trust to execute or a power and a mere power. But there is not only a mere trust and a mere power, but there is also known to this Court a power which the party to whom it is given is entrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust that if the person who has that duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place."

To apply this to the present case, I assume that the trustees had not disclaimed the trusts imposed upon them, but had refused to execute any lease of the hereditaments in question. I consider it clear that, in that case, the Court would have compelled them to do so, or would have "discharged that duty in their room and place," either by the appointment of new trustees in their stead, or by such other means as laid within the power and jurisdiction of this Court. If I am right in this, it disposes of this case. What the trustees would have been compelled to do, had they accepted the trust, the Court will perform if they have disclaimed the trusts; if performed by others, or where, in the absence of trustees, the interest vests in the heir at law, by whom the lease must be granted, it will, if properly performed, be sanctioned and enforced by the Court; and the mere accidental circumstance that the legal estate is outstanding in mortgagees, instead of descending on the heir at law, cannot, in my opinion, affect this principle, provided that the rights of the mortgagee are [123] nowise thereby interfered with. I have not thought it necessary to dwell, in the observations I have made, on the peculiar words of the will which creates the power, because I think it does not rest on the technical meaning of the words themselves, but on the spirit and scope of the testator's will in creating the power; but when I refer to the words of the will themselves, I think that they are in terms imperative, and not merely permissive [see *ante*, p. 110].

In all that I have hitherto said, I have assumed that this mortgage in 1848 was a proper lease, at rack rent and for the best rent that could be obtained for the same; had it been otherwise, it would not have been a proper execution of the power, and it would have been void for another reason, not because the power had failed, but because there had been a breach of trust in the execution of it. But this case is not made on the present occasion; in truth, the whole contest has arisen by reason of the

increase in the value of the property occasioned by the invasion of railways into the City of London.

I am of opinion, therefore, without prejudice to the rights and interests of the mortgagees that this lease is a valid lease, and that the Defendant is entitled to the benefit of it. Assuming, therefore, that the rents have been properly accounted for, this bill fails, and must be dismissed.

NOTE.—Upon appeal, on the 15th of February 1865, Lord Westbury, L. C., concurred with the Master of the Rolls as to the first point, but disagreed with him on the second. [4 De G. J. & S. 608.]

[124] STUMMVOLI v. HALES. July 9, 14, 1864.

[S. C. 10 L. T. 807; 10 Jur. (N. S.), 716; 12 W. R. 1137; 4 N. R. 473. See *Hawes v. Hawes*, 1880, 14 Ch. D. 618.]

The testator directed some property to be divided, at a future period, amongst the then surviving children of John and Sarah Worn and Catherine Hales. Sarah was a sister of the testator, but Catherine was a stranger, and Sarah had children, but Catherine was a spinster at the date of the will. Held, that Catherine, personally, and not her children, was entitled to participate.

The testator, by his will, dated in 1846, directed that when the youngest child of John and Sarah Worn came of age, certain property should be divided, in equal shares, amongst the then surviving children of John and Sarah Worn and Catherine Hales, daughter of Francis and Catherine Hales. And he directed that John and Sarah Worn should enjoy the interest of the whole of the above moneys during their joint lives, and then to be divided, share and share alike, amongst the above-mentioned children of John and Sarah Worn and Catherine Hales.

The testator died in December 1846.

Sarah Worn was the sister and residuary legatee of the testator, and six of her children were born before the date of the will. Catherine Hales was not related to the testator, but was a daughter of his executor. She married, for the first time in 1850, a Mr. Chapman.

On the 2d of February 1860 the youngest child of John and Sarah Worn attained twenty-one, and at that time there were eight surviving children of John and Sarah Worn, and seven children of Catherine Chapman.

John Worn died in 1863, and Catherine Chapman on the 3d of February 1860. Sarah Worn was still living.

The question was, whether Catherine Chapman or her children were entitled to share in the property.

[125] Mr. Hemming, for the Plaintiff, a child of Sarah Worn. The fund is divisible in ninths, for Catherine alone, and not her children, was the object of the gift. In bequests of this description "to the children of A. and B.," the rule is that where A. and B. stand in the same relationship to the testator, and are described in the same manner, and both have families, the Court holds that the children only are the object of the testator's bounty. But when the position of A. and B. is different, the Court considers the proper construction to be that the fund is divisible amongst the children of A. and B. personally. Here one of the persons named was a sister of the testator, the other was a stranger; one had a large family and the other was a young unmarried lady. The position of the two was therefore very different. This case is therefore governed by *Lugar v. Harman* (1 Cox, 250). In that case, a residue was bequeathed to one for life, and after her death, to be divided equally amongst "all and every the child and children of my late cousin E. L. and my cousin P. F. and their lawful representatives." It was held that this was a bequest to the children of E. L., and to P. F. himself and not to his children.

The construction is confirmed by the absence of the repetition of the word "of"

before "Catherine Hales;" *Peacock v. Stockford* (3 De G. M. & G. 78). The case of *Mason v. Baker* (2 Kay & John. 568) is distinguishable; for there A. and B. were in the same relationship to the testator. So, in the case of *Re Davies' Will* (29 Beav. 93), where A. and B. were both strangers to the testator.

Mr. De Gex, for assignees of a child, Mr. Stock, for [126] the husband of Catherine, and Mr. Eddis, for the children of Catherine, argued that the children of Catherine alone took; that the gift was, in the first instance, to "the surviving children" of someone, and that the testator afterwards specified of whom, by saying, "of John and Sarah Worn and Catherine Hales."

July 14. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether Catherine Hales is personally entitled to the benefit of this legacy, or whether she has no interest in it, but her children are entitled. The words of the will are these [see *ante*, p. 124]. I am of opinion that, by these words, the testator meant Catherine Hales personally and not her children. The case of *Lugar v. Harman* (1 Cox, 250) is precisely in point. The other cases differ a little and are distinguishable by reason of the context of the will; as, for instance, when a testator says, I give the whole of my property to the children of my brother John and my brother James, it is to be inferred that he meant the children of both. To ascertain the meaning you must look at the circumstances of each case, and to the position in which the parties were placed. Here, it appears that Sarah Worn was the testator's sister, and he gives to her and her husband an interest for their joint lives, and he makes Sarah Worn his residuary legatee, and he directs this particular property to be divided "amongst the then surviving children of John and Sarah Worn and Catherine Hales, daughter of Francis and Catherine Hales." This Francis Hales appears to have been no relation to the testator, but only the daughter of the person he made his executor.

[127] The way I read it is this:—When the youngest child comes of age the property is to be divided between Catherine Hales herself and the children of Mr. and Mrs. Worn; that is, the testator selects a child of his executor, and he directs that she shall participate with the children of his sister and brother-in-law. This, I think, is the true construction of this will, and it is consistent both with the words of the will and with the decided cases.

The fund is therefore divisible into ninths, and one of these belongs to the legal personal representative of Catherine Hales.

[127] COOMBE v. HUGHES. Jan. 27, 1865.

[Affirmed, 2 De G. J. & S. 657; 46 E. R. 531. See *Bousfield v. Bousfield*, 1869, 21 L. T. 137.]

Where, after an absolute gift to A. B., there is superadded a direction to accumulate, which is partially void under the Thellusson Act (39 & 40 Geo. 3, c. 98), A. B. is entitled to the void accumulations.

A testator gave an absolute interest to a married daughter, and afterwards superadded a direction to accumulate the fund during the life of her husband for the benefit of herself and her children. The direction to accumulate becoming void at the end of twenty-one years: Held, that the daughter was entitled absolutely to the subsequent income until the death of her husband.

The testator devised and bequeathed his residuary real and personal estate to trustees, upon trust to convert and hold "upon trust for his two sons Arthur Quin Hopper and Harman Baillie Hopper and his daughter Eleanor Hughes, the wife of Henry Philip Hughes, and to divide and pay over the same to and among them in such shares and proportions, and in such manner that the shares and proportions of each of the said Arthur Quin Hopper and Eleanor Hughes should be less than the share of Harman Baillie Hopper by the sum of 20,000 sicca rupees, which he had then already settled upon each of them, the said Arthur Quin Hopper and Eleanor Hughes respectively. And [128] the testator directed that the shares and proportions

of Arthur Quin Hopper and Harman Baillie Hopper in the residue of his estate, should be paid over to them, as soon as conveniently might be after the same should have been respectively got in and recovered, for his own respective use and benefit. And with respect to the share of his daughter, Eleanor Hughes, the testator directed that it should not be paid to her, but that such a sufficient portion of his Government securities, then deposited in the general treasury at Calcutta, should be retained and not sold by his executrix and executors, as might be equal to her share of the residue of his estate, and that it might be allowed to *accumulate*, with the growing interest continually added thereto, during the lifetime of her husband Henry Philip Hughes. And upon the death of her husband it was to be held upon certain trusts for her and her children.

The testator died in 1843, and the period allowed by the Thellusson Act (39 & 40 Geo. 3, c. 98) for the accumulation expired in 1864.

The testator's daughter, Eleanor Hughes, and her husband, Henry Philip Hughes, were still living, and the question which arose in 1864 was, as to whom the future income of her share belonged. On the one hand it was claimed by Mrs. Hughes, and on the other it was said that there was an intestacy until the death of Henry Philip Hughes, and that it passed to the testator's next of kin.

Mr. Baggallay and Mr. Nalder, for the Plaintiffs, the trustees.

Mr. Hobbhouse and Mr. Cotton, for Mr. and Mrs. Hughes and their children. There is an absolute gift [129] in possession of one-third of the residue to Mrs. Hughes, which the testator has subsequently attempted to cut down by a direction to accumulate. The absolute interest is, therefore, only affected to the extent to which the accumulation attempted to be engrafted on it is valid. The accumulation is declared void beyond twenty-one years from the testator's death, under the Thellusson Act (39 & 40 Geo. 3, c. 98); and the accumulations directed contrary to the statute then cease, but are to "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Mrs. Hughes is that person, and she, therefore, is absolutely entitled to the future income until the death of her husband; *Salmon v. Salmon* (29 Beav. 27); *Trickey v. Trickey* (3 Myl. & K. 560); *Whitell v. Dudin* (2 Jac. & W. 279); and see *Kampf v. Jones* (2 Keen, 756); *Carver v. Bowles* (2 Russ. & Myl. 301); *King v. King* (15 Irish Chan. R. 479); *Jarman on Wills* (vol. 1, p. 254 (2d edit.)).

Mr. Selwyn and Mr. G. L. Russell, for some of the next of kin, contended that, according to the context of the will taken together, there was no absolute, but a mere limited gift to the daughter, to take effect on the death of her husband; that the prior part was only intended to regulate the division of the funds, which was followed up by a declaration of the trusts by which the shares were to be affected. That the Thellusson Act did not accelerate the gift to the daughter, but left the intermediate income undisposed of, so as it passed to the next of kin as undisposed of; *Green v. Gascoyne* (34 L. J. (Chanc.) 268).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the testator's daughter is en-[130]-titled, and I think that the case, which has been cited, of *Green v. Gascoyne* (34 L. J. (Chanc.) 268), is very strongly in her favour on this point. The question, as has been well argued, really is, whether there is a gift to the daughter in the first instance; I think that the words of the will are perfectly clear on that point. The trustees are to sell and dispose of and convert into money the whole residue, and then they are to hold it upon trust for the testator's two sons and his daughter, and to divide and pay over the same to and among them in such shares and proportions and in such manner that the shares and proportions of Arthur and Eleanor shall be less than the share of Harman by the sum of 20,000 sicca rupees, which the testator had settled upon those two children.

If the will had stopped there, there could be no question but that there was a positive and absolute bequest of one-third of the residue to each, after bringing the 20,000 rupees into hotchpot.

Having done this, the testator goes on to direct that the share of the two sons shall be paid to them immediately as got in. Then, with respect to the share of his daughter (which share has already been ascertained and given to and directed to be paid to her), he puts this qualification :—That it shall not be paid to her, but that a

portion of his securities equal to her share should be retained by his executors, and that this should accumulate during the life of her husband, and if she predeceased her husband it was to go to her two brothers, and if she did survive her husband it was given to her and her children. That is the effect of the will.

Now, I am of opinion that the moment the Thellusson [131] Act interferes and says that the accumulations beyond twenty-one years "shall be null and void," I have then to strike that excess out of the will, and that the gift to the daughter, which is previously given in the first instance, remains untouched. The excess does not fall into the residue or go to the next of kin, but it remains part of the legacy out of which it was intended to be carved.

I was anxious to look at the case of *Green v. Gascoyne* (34 L. J. (Ch.) 268), to see whether that case affected this principle, but in my opinion, upon reading it, it really establishes and strengthens it. The rule respecting the operation of the statute is very clearly expressed by the Lord Chancellor in that case, and it is impossible for any one to assent to it more entirely than I do; but what he observes and points out in that case is this:—That there was no gift to anybody until after the accumulations directed by the will had been made; so that it is the very converse of this case. In this case there is a gift to the legatee in the first instance, and then the accumulations are carved out of it; but, in the will in *Green v. Gascoyne*, the accumulations are to take place first, and then the proceeds of the sale are given to certain legatees. In *Green v. Gascoyne* there was really no gift at all until after the accumulations had been completed; but in this case there is a previous gift, and the superadded direction to accumulate being void, so far as it exceeds the limits allowed by the statute, I think that the income accruing between the expiration of twenty-one years from the testator's death and the death of Mr. Hughes must be declared to belong to the daughter absolutely.

NOTE.—Affirmed by the Lords Justices, 3d May 1865. [2 De G. J. & S. 657.]

[132] *RE MAY. Jan. 28, 1865.*

[S. C. 34 L. J. Ch. 236; 11 L. T. 658; 11 Jur. (N. S.) 149; 13 W. R. 377; 5 N. R. 297. See *In re Edmonds*, 1871, 25 L. T. 152; *In re Kellock*, 1887, 56 L. T. 890.]

The Court cannot, since the General Order of the 2d of August 1864, entertain a special petition for the delivery and taxation of a bill of costs, and for payment over to the client of the balance of the cash account. Such applications can now only be made in Chambers.

This was a special petition presented by a client for the delivery and taxation of his solicitor's paid bill, and for payment of the balance of some money which the solicitor had received on behalf of his client, and had retained on account of his costs.

The petition was presented subsequent to the General Order of the 2d of August 1864 (33 Beav. i.), which directs that all applications for taxation "shall" be made to a Judge at Chambers by summons, instead of by special petition to the Court.

It was objected that the application ought to have been made in Chambers.

Mr. Southgate and Mr. Joliffe, in support of the petition. This case is not within the recent General Order, which relates only to applications for the delivering and taxation of a bill of costs, and to the delivery over of the client's deeds, &c., "or for any or either of those purposes." Here the real object of this petition is, to make an officer of the Court refund a sum of money received by him on behalf of his client, after retaining what is due to him. This is not even a case within the statute of the 6 & 7 Vict. c. 73, s. 37, which does not refer to the payment of money by a solicitor to his client; it is an application to the ordinary general jurisdiction of the Court, independent of the statute. In cases like the present it is a much more convenient course to state the facts on a petition, than to leave the Court to gather them from a mass of opposing affidavits; [133] and, in the end, this mode is the least

expensive. At all events the Court has jurisdiction to make the order, and the question on the form of the application is merely one of costs.

Mr. Selwyn and Mr. E. Karslake, *contra*, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this is an ordinary petition for the taxation of a bill of costs, and one in which, if the General Order had not been made, the Court would have had jurisdiction to order a taxation; but if I entertain the argument of the Petitioner, I should have no jurisdiction, for, if this bill cannot be taxed under the statute, it cannot be taxed at all. It appears to me that this is an ordinary case, and, but for the General Order, I should have no hesitation in ordering the taxation. Lord Langdale constantly dealt with cases of this description, and I myself have done so down to the present time. Being an ordinary application for the taxation of a solicitor's bill, we have this General Order, which is imperative and binding on me. It is in these terms:—

"All applications made under the statute 6 & 7 Vict. c. 73, to refer any bill of any attorney or solicitor of his fees, charges and disbursements for any business done by such attorney or solicitor to be taxed and settled, and for the delivery of such bill, and for the delivery up of such deeds, documents and papers, or for any or either of those purposes, shall hereafter be made to a Judge at Chambers by summons, instead of by special petition to the Court, except applications for orders of course, which are to be made as heretofore."

[134] Look at the prayer of this petition, it asks for the very things mentioned in the General Order, the delivery and taxation of the bill of costs. There are, it is true, cases in which the Court, under its general jurisdiction, directs a solicitor to pay over money to his client, without any reference of his bill, as when, upon the sale of property, the purchase-money is received by a solicitor, who does not pretend that he has any claim on it for any costs; or where a sum of money is paid to a solicitor for a specific purpose, as for the payment of legacy duty, or the like. In these instances the Court does not order a taxation, but the payment at once of the money.(1)

I am of opinion that I cannot entertain this petition, that the application can only be made upon summons in Chambers, and that I must refuse it with costs. The order will be without prejudice to any application in Chambers.

[134] BAGOT v. BAGOT. Nov. 15, Dec. 5, 1864.

In 1775 A. B. became owner in fee of estates W. and L. The W. estate was subject to mortgages amounting to £5344, and the L. estate to a mortgage amounting to £2200, all of which were created by A. B.'s ancestor. In 1787 A. B. mortgaged the L. estate for £8000, reserving the equity of redemption to himself, and personally covenanting to pay the money out of this sum. He paid off the three mortgages on the W. estate; A. B. died in 1806. Held, as between the representatives of A. B., that the mortgage was primarily payable out of A. B.'s personal estate.

The question was, whether a certain mortgage on the real estate of Walter Bagot (deceased) was, as between his representatives, primarily payable out of his personal estate. The question arose under the following circumstances:—

Egerton A. Bagot died in 1775, seised in fee of certain hereditaments in Warwickshire and Lancashire, which [135] were subject to several mortgages created by himself. The Warwickshire estates were subject to three mortgages, amounting together to £5344, 3s. 4d., and the Lancashire estate was subject to a mortgage to Whalley for £2200.

By his will, Egerton A. Bagot devised these estates in tail to Walter Bagot, who, in the same year (1775), suffered a recovery and acquired the fee-simple.

In 1787 Walter Bagot borrowed a sum of £8000 by way of mortgage from the

(1) See *Re Aitkin*, 4 Barn. & Ald. 47; *Tylee v. Webb*, 14 Beav. 14; *Re Becke*, 18 Beav. 462; *Dixon v. Wilkinson*, 4 De Gex & Jones, 508.

Earl of Dartmouth and Lord Bagot on the security of the Lancashire estates alone, and on that occasion the following deed was executed :—

An indenture, dated the 12th of July 1787, was made between Whalley and Cottam (who were entitled to the mortgage of £2200 on the Lancashire estates), and Walter Bagot and the Earl of Dartmouth and Lord Bagot, which recited as follows :—
 “And whereas the said Walter Bagot, being desirous to pay off and discharge the said principal sum of £2200 so due and owing to the said Whalley and Cottam as aforesaid, hath applied to the Earl of Dartmouth and Lord Bagot to advance and lend him the same, which they have agreed to do; and the said Walter Bagot having occasion to borrow and take up at interest the further sum of £5800, they, the Earl of Dartmouth and Lord Bagot, have also agreed to lend and advance him the same (making together the principal sum of £8000), on having the same secured on the hereditaments and premises in manner hereinafter mentioned.” The indenture witnessed that in consideration of £2200 paid to Whalley and Cottam, at the request of Walter Bagot, and in consideration of £5800 paid to Walter Bagot, Whalley, Cottam and Walter Bagot conveyed the Lancashire estates to the [136] Earl of Dartmouth and Lord Bagot in fee, subject to redemption by Walter Bagot and on repayment of £8000 and interest. This sum Walter Bagot covenanted to pay.

Walter Bagot also, at the same time, gave his bond to secure the £8000 and interest.

Walter Bagot applied £5344, 3s. 4d., part of the £8000, in paying off the three mortgages on the Warwickshire estates; the £2200 was paid to Whalley and Cottam, the mortgagees of the Lancashire estate, and the residue, £455, 16s., the Court said, had been applied in payment of specialty debts due by Egerton A. Bagot. No releases of these three mortgages had ever been executed; no receipt had been endorsed on the mortgage deeds, which were found amongst Walter Bagot's papers after his death, and no declaration of trust had ever been executed in favour of Walter Bagot.

Walter Boyd died in 1806, and the question, now raised between the persons interested in his real and personal estate, was this :—Whether the amount still remaining due in respect of the £8000 mortgage (£5333, 15s.) was primarily payable out of the personal estate of Walter Bagot.

Mr. Osborne and Mr. Colt, for the Plaintiff, contended that the personal estate of Walter Bagot was primarily liable to pay the mortgage debt, for the debt was unquestionably owing by Walter Bagot to the mortgagees by virtue of the covenant and bond; that, although the debt originated with the first testator, still the circumstance that a new and distinct mortgage had been executed, whereby the equity of redemption of the estate had been limited to Walter Bagot, the owner in [137] fee of the estates, who had entered into a personal covenant to pay the money, and had given his bond binding himself and his representatives to pay the £8000, which had the effect of creating a new mortgage primarily payable out of his personal estate. They observed that the original mortgages had not been transferred or kept on foot, that no declaration of trust had been made in favour of Walter Bagot, and that the debt and security under the deed of 1787 was altogether different in amount and otherwise from the mortgages paid off.

Mr. Hobhouse and Mr. Kelly, in the same interest.

Mr. Selwyn, Mr. Baggallay and Mr. Rasch, for the Defendants, insisted that the debt, having in fact been created by the ancestor, was a primary charge on the real estate of such ancestor. That the object of making the £8000 mortgage was merely to consolidate the mortgages on Walter Bagot's estate, and not to extend his liability or make the debt of his ancestor his personal debt. That the letters and codicil shewed that such alone was his intention, and that the deed of 1787 was not sufficient to change the liability.

Mr. Hobhouse, in reply.

The following cases were cited :—*Barham v. The Earl of Thanet* (3 Myl. & K. 607); *Townsend v. Mostyn* (26 Beav. 72); *Earl of Tankerville v. Fawcett* (1 Cox, 237); *Hickling v. Boyer* (3 Mac. & Gor. 635); *Shafto v. Shafto* (1 Cox, 207); *Burrell v. Earl of Egremont* (7 Beav. 205); *Hedges v. Hedges* (5 De Gex & Sm. 330); *Grice v. Shaw* (10 Hare, 76); *Johnson v. Webster* (4 De G. M. & G. 474); [138] *Swainson v. Swainson* (6 De G. M. & G. 648); *Earl of Clarendon v. Barham* (1 Younge & C. Ch. C. 688);

Tyrrhitt v. Tyrrhitt (32 Beav. 244); Coote on Mortgages (p. 317 (3d edit.)); and see Locke King's Act (17 & 18 Vict. c. 113).

Dec. 5. THE MASTER OF THE ROLLS [Sir John Romilly]. The conclusion I have come to from the evidence before me is, that the £8000 raised by Walter Bagot was applied in payment of the four mortgages which were subsisting at the time when he came into possession of the property, and I accordingly propose to find this as a fact. A portion of this mortgage debt of £8000, to the extent of £2666, 5s., was subsequently paid off by Walter Bagot, and at his death the only charge on this property was £5333, 15s., the remains of the £8000 mortgage.

I am unable to distinguish this case in principle from the case of *Barham v. Lord Thanet* (3 My. & K. 607). The decision in that case was one, which, at the time, was thought to be open to considerable question, and the counsel engaged in it on behalf of the Plaintiff advised an appeal, which, for family reasons, was not prosecuted; but it has always been cited and treated as a binding decision, and it would not be possible for me to avoid following it. That being so, it governs this case, which, in my opinion, is a much stronger case for making the mortgage the debt of the owner of the estate.

In *Barham v. The Earl of Thanet* (*Ibid.*), Charles Earl of Thanet became owner of the family estates, subject to a mortgage of £80,000. He paid off £50,000, [139] part of that debt, out of his own moneys, and the remainder, £30,000, he assigned to a new mortgagee, who advanced the £30,000 to pay the original mortgage; he reserved a new equity of redemption and a different rate of interest. Sir John Leach held that this £30,000 became the debt of Earl Charles and was payable out of his personal estate.

Here, Walter Bagot, having various mortgages affecting his fee-simple property, and specialty debts of his father to pay, mortgages the Lancashire property for £8000, and with the money pays off a mortgage of £2200 affecting the Lancashire estate, three mortgages of £5344, 3s. 4d. affecting the Warwickshire estate, and £455, 16s. 8d. specialty debts due by his father. The consequences are obvious; this is not the transfer of any existing security, but it is a new and distinct mortgage created by him, and it does not the less become his debt, because he chooses to apply the money in payment of charges which he was not personally liable to pay. Suppose he had applied the whole in payment of the debts of his father, the £8000 would equally have been his own debt. He borrowed money for certain purposes and applied it as he pleased, and he became liable to pay the money so borrowed.

But if the mortgagee who had advanced the £8000 had paid it to the other mortgagees, who had simply assigned their securities to him, then, even though Walter Bagot had covenanted to pay the £8000, his personal estate would not have been the fund primarily liable to pay it; but it is otherwise where he borrows money and gives a mortgage for it, receives the money and applies it as he thinks fit. It is immaterial whether this is in payment of other debts which he might not have been personally liable to pay.

[140] I am of opinion that the personal estate of Walter Bagot is the fund primarily liable to pay this mortgage debt of £5333, 15s., and that being so, and his personal estate being less than that amount, it is superfluous to consider the other points argued.

[140]. *Re FORSYTH*. Dec. 20, 21, 1864; Jan. 12, 1865.

[S. C. on appeal, 2 De G. J. & S. 509; 46 E. R. 472; 12 L. T. 687; 13 W. R. 932.
See *In re Gold*, 1871, 24 L. T. 10.]

To prevent the sale of the mortgaged property by a first mortgagee, a *puisne* mortgagee took a transfer of the first mortgage, by deed executed by him, which recited the amount due on the first mortgage. This, however, included the costs of the first mortgagee's solicitor, no account of which had been delivered until afterwards. The bill contained some costs of the solicitor against the mortgagor, and therefore not mortgagee's costs. Held, that the *puisne* mortgagee was not entitled, on summons, to an order for the taxation of the bill.

This was an application made on the summons by Mr. Greenwood, under the General Order of the 2d August 1864 (33 Beav. i.), for the taxation of Mr. Forsyth's bill of costs under the following circumstances:—

In 1861 Mr. Jackson mortgaged certain hereditaments to Messrs. Hall and Armstrong for £3000. In 1863 he executed a second mortgage to Messrs. King and Riley for £610, and in the following year, 1864, he executed a third mortgage to Mr. Greenwood for £500.

In June 1864 the first mortgagees advertised the property for sale, and at this time the sum of £3264, 8s. 4d. was due on the first mortgage to Hall and Armstrong, and £610 on the second mortgage to King and Riley.

Mr. Greenwood, in order to stop the sale, applied to Mr. Forsyth, the solicitor of the first and second mortgagees, and he undertook to redeem the mortgagees by payment of the principal and interest due thereon. Mr. Forsyth said that the amount of the costs would be £450, and that it would take him some time to make out the bills; but that, in order to make it even money, he would take £425, 11s. 8d., making, on the whole, £4300 to be paid for the redemption of the [141] two mortgages. Mr. Greenwood had not the money himself and he applied to Mr. Cowland, for whom he acted as agent in this matter, to advance the money required, upon having a transfer of the mortgages made to him. Accordingly Mr. Cowland advanced the money to Mr. Greenwood, who thereupon paid the £4300 to Mr. Forsyth, who gave him a receipt for it, which specified the amount paid in respect of the mortgages, and that £425, 11s. 8d. was in respect of costs and expenses incurred in reference to the business; the accounts thereof to be hereafter adjusted. Messrs. Hall and Armstrong and Messrs. King and Riley duly transferred their mortgages to Mr. Greenwood, by an indenture dated the 14th June 1864, to which Jackson the mortgagor was no party. By this indenture, it was recited that £3690 was due on the first mortgage, and £610 on the second mortgage, and it then witnessed that, in consideration of £3690 paid by Greenwood to Hall and Armstrong, they assigned and transferred their mortgage securities to Greenwood, and, in consideration of £610 paid to King and Riley, they also transferred and assigned their securities to Greenwood.

By another indenture, bearing date the following day, viz., the 15th June 1864, and made between Mr. Greenwood of the first part and Mr. Cowland of the second part, after reciting that Cowland had agreed to pay off the within-mentioned sum of £4300 and to take a transfer of the within-mentioned securities, the indenture witnessed that, in consideration of £4300 paid by Mr. Cowland to Mr. Greenwood, he conveyed the same sum, due on the securities within mentioned, and all the interest to become due thereunder and thereon, and he also granted and assigned the hereditaments mortgaged.

[142] Shortly after this Mr. Forsyth delivered his bill of costs, when it appeared that a portion of it consisted of costs incurred by neither the first nor the second mortgagees, and costs which could not properly be added to the mortgage securities, and which (the Court said) would not have been payable by Mr. Greenwood if he had filed a bill to redeem the mortgages. In fact, they consisted of costs which had been incurred by Jackson the mortgagor, and were due from him to Forsyth, but not in his character of solicitor of the mortgagees, and they were costs which Forsyth, though solicitor of the mortgagees, could not have required them to pay.

Mr. Greenwood thereupon applied, by summons, for an order to tax Mr. Forsyth's bill, and his application was adjourned into Court.

Mr. Selwyn, for Mr. Greenwood, argued that, as he had been compelled to pay the costs in order to prevent a sale of the property, and therefore, under pressure, the bill was taxable under the 6 & 7 Vict. c. 73. Secondly, that it was taxable at the instance of the third mortgagee, who was not only the party liable to pay but who had actually paid it.

Mr. Hobhouse, *contra*. The bill is not taxable under the 7 & 8 Vict. c. 73, for no part of the business was transacted in Chancery, but part was done in the Common Pleas; this Court, therefore, has no jurisdiction in the matter. If the bill be taxable, then the application must be made by Mr. Jackson, whose estate will be sought to be charged. But, in fact, it is a mere matter of account between the mortgagor and the mortgagees, and Greenwood, who has executed a deed ad-[143]-mitting the amount to be due, is estopped, and cannot open the account upon summons.

Mr. Selwyn, in reply.

Jan. 12, 1865. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a case of some singularity; in form it is an application to tax the bill of Mr. Forsyth, but, in substance, it is to alter and reform an indenture of transfer of a mortgage to Mr. Greenwood, who is the applicant upon the present occasion. The real state of the facts is this:—[His Honor stated the facts.]

Mr. Greenwood says, "I have been deceived in this matter by Mr. Forsyth, though unintentionally on his part. I never intended to pay more than what was actually due on the mortgages prior to mine, and I intended merely to pay the amount which I should have been liable to pay if I had redeemed them. I insist, therefore, upon the repayment of so much as did not consist of costs incurred by or were payable to the prior mortgagees, or to their solicitor acting as such."

There is a great deal of force in what Mr. Greenwood alleges, but it is difficult to see how he can obtain relief on the present application. It seeks to tax the bill of Mr. Forsyth, and, in doing so, to exclude the consideration of all items due from the mortgagor alone. If the application were to tax the whole bill, and the only question were the fact whether the business had been done, and, if so, whether the proper amount had been charged for it, then it would be an application to have the bill of Forsyth as to costs incurred in respect of the [144] mortgages taxed. The proper person to apply for that purpose is Mr. Jackson, who unquestionably would be entitled to do so, but who, as I understand from counsel, is satisfied with the bill, and who neither takes nor authorizes any steps to be taken for that purpose.

If, on the other hand, this be an application to reduce the amount paid upon the redemption or transfer of the mortgages, I am unable to see how this can be obtained on an application to tax this bill.

The case lies in a peculiar position. On one hand, I do not understand that Mr. Jackson admits that £4300 was the amount due on the mortgages to Hall and Armstrong and to King and Riley; and, if he do not, there is nothing that I can find in these papers to bind him as to any such matter, and the result may be, that Greenwood or Cowland, having paid the £4300 on the belief that this was a charge on the property included in the first mortgage, may find, on investigation, that this amount is reduced to £4100, or even to a lower sum. Certainly Mr. Jackson is not bound by the deed to which he was no party, and I have seen nothing which amounts to an admission, on his part, that such an amount was due. In such case, the result may be, and, if the account of the bill of costs given by the applicant be correct, probably will be that Mr. Greenwood or Mr. Cowland has paid a debt due from Jackson to Forsyth, for the repayment of which they have no security at all.

Subject to an observation I am about to make on the indentures of transfer, it would appear clear that, if from any cause whatever, Mr. Greenwood became liable to pay a bill of costs due from Jackson to Forsyth, he (Greenwood) would be entitled to have that taxed, and [145] could be required only to pay so much thereof as Jackson himself would be bound to pay, and which amount would, of course, be the measure of what Greenwood could recover again against Jackson. It is true that Jackson might waive this taxation and admit the amount claimed to be the amount due; and this, on the present occasion, as far as he can do so, not being a party to this proceeding, I understand Mr. Jackson to do. But this is not Mr. Greenwood's application; his object is to exclude altogether Jackson's bill of costs due to Forsyth, and to confine the payment to the bills of costs properly payable by Hall and Armstrong and by King and Riley. And in answer to this application so limited, even if it could be obtained on application to tax, arises this difficulty, viz., that Mr. Greenwood is party to a deed under seal by which he admits the amounts due on the mortgages to be £4300, which, if true, supersedes all question of taxation, either of the whole bill or of a part of it. It appears, on the evidence before me, that this recital is not correct, and that this was not the amount due on the two sets of mortgages; but Mr. Greenwood, as long as the deed so stands, seems to me to be estopped from alleging the contrary: it is clear that if, independently of the deed, Mr. Greenwood were entitled to have the bill taxed, there is nothing in the mode and time of payment to deprive him of that right. But though payment of an undelivered bill of costs, in the absence of any agreement as to the amount of the bill, without

inspection, will not debar a person of the right he had to tax previously to payment, yet I know no case where a person who has executed a deed, acknowledging the amount of the bill to be a given fixed sum, has been allowed to have the bill taxed and the amount in the deed altered, as long as that deed remains uncanceled. Here it goes still further, for the deed admits the amounts to be due on each mortgage, amounting together [146] to £4300, and I am of opinion that, as long as this stands in the deed, I cannot allow the amount to be contested.

It would unquestionably have been different if a written agreement had been executed between Mr. Forsyth and Mr. Greenwood, whereby Mr. Forsyth agreed to have the amount of what was due on each mortgage ascertained, notwithstanding the deed, and had agreed to repay what, if anything, on taking that account, should appear to fall short of the amount mentioned in the deed and paid by Greenwood, or even if, in the absence of any written agreement, a parol agreement to the like effect had been clearly proved; but then the application would have proceeded on the agreement as a separate matter, and the deed would have remained without the necessity of any alteration. But although I have carefully examined the evidence for this purpose, I have been unable to find any such agreement even alleged, much less proved. The consequence is that this is not a case where, on an ordinary application to tax the bill, the Court can entertain the question. If the Court can deal with it all, on which point I decline to express any opinion, it must be by bill.

In my opinion, however, Greenwood had not properly explained to him that the £425, 11s. 8d. for costs included costs due from the mortgagor Jackson, as well as the costs of the two sets of the mortgages, and I shall, therefore, in dismissing the summons, decline to give any costs on either side.

NOTE.—Affirmed by the Lords Justices, 29th June 1865. [2 De G. J. & S. 509.]

[147] STRAKER v. EWING. Dec. 20, 1864; Jan. 11, 1865.

[S. C. 11 L. T. 588; 11 Jur. (N. S.) 127; 13 W. R. 286.]

Stoppage *in transitu* is an ordinary legal right, as to which this Court, unless by reason of some unusual circumstances, will not interfere.

The Plaintiff sold some coals to the Defendant, and shipped them for exportation, and the bill of lading was made out and delivered to the vendee's agent. The Plaintiffs, not having received payment, instituted a suit for an injunction and to obtain possession of the bill of lading, and they supported their equity by allegations of gross fraud, which were disproved. The bill was dismissed with costs, the Plaintiffs' remedy being by action against the purchaser for the price.

This Court visits very severely a Plaintiff who makes a charge of fraud against a Defendant, which he is unable to sustain by evidence. The rule is more stringent where the introduction of the charge is made for the purpose of giving the Court jurisdiction.

The expression "costs following the event" refers to an event produced by the decision of the Court, and not to one arising from a compromise between the parties.

The facts of this case are fully stated in the judgment.

Mr. Selwyn and Mr. Kay, for the Plaintiffs.

Mr. Baggallay and Mr. Lindley, for Ewing:—*Goodhart v. Lowe* (2 Jac. & W. 349); *Browne v. Hare* (3 Hurl. & N. 484); *New Brunswick, &c., Company v. Conybeare* (9 H. of L. Cas. 711).

Mr. Stephens, for Nasmyth.

Mr. Kay, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. This, though in form a motion to determine how and by whom the costs of the various parts to this suit are to be paid is, in substance, the hearing of the cause.

The object which the Plaintiffs had in filing the bill has been attained by the

injunction obtained by them [148] in the suit, and they contend and insist that the costs must follow the result.

The Defendants, or rather the principal Defendant, contends that the suit is altogether improper, that it was an abuse of the process of this Court, and that but for an allegation of fraud and collusion, and another of insolvency, both of which allegations are disproved by the evidence, the suit would have been stopped by demurrer, and no injunction at all obtained. They insist, also, that the injunction was obtained on a false representation made to the Court, and that even if the suit could have been entertained, this injunction would have been dissolved on the real facts being made apparent to the Court.

The facts of the case are as follows :—

The Defendant Ewing, in the year 1864, carried on business as a commission merchant both in London and in Liverpool, but he resided in London, and transacted his business at Liverpool, through his agent the Defendant Fraser of the firm of Fraser, Bond & Co.

In July 1864 Fraser, as the agent of Ewing, agreed with the Plaintiffs that they should supply a quantity of coke, to be shipped to the East Indies, at 23s. per ton free on board some ship to be named by the Defendant. Accordingly, the Plaintiffs, in performance of their contract, in the month of September last, delivered 753 tons, 6 cwt. of coke on board the "Pensacola" lying at Liverpool, and completed this delivery on the 17th of September, and they sent the invoice of this delivery to the Defendant Ewing, which was made out to him in these words :—

"Newcastle-upon-Tyne.—Messrs. James Ewing & Co. debtors to Straker [149] & Sons, per Henry Smith & Co., per the 'Pensacola,' J. Stewart, master, for 753 $\frac{1}{2}$ tons Brancepeth coke, at 23s. per ton, £866, 5s. 11d."

Three days afterwards the "Pensacola" sailed for Bombay. The bills of lading bore date the same day as the invoice, but, as the coke had not been paid for at that time, they were made out in the names of Fraser, Bond & Co., of Liverpool, "as agents." These last words were inserted in the bills of lading without specifying for whom they were agents.

In this state of things, without reference to anything further, the legal rights and obligations of the parties concerned were very clear; the Defendant Ewing was liable to pay the Plaintiffs the £866, 5s. 11d., the invoice price of the coke, and he was entitled to receive the bills of lading.

A complication, however, arose in the transaction from this circumstance :—The coke in reality was bought by Ewing for the Defendant Nasmyth, and this circumstance appears to have been known to Henry Smith & Co., the agents of the Plaintiffs at Liverpool, through whom the contract was entered into. It was probably also known to the Plaintiffs themselves. There appears to have been an unsettled account between the Defendant Nasmyth on the one side and the Defendant Ewing on the other. Ewing insisted that if Nasmyth took the coke he should pay for it. Nasmyth, on the other hand, insisted on having the coke, and also on making it the means of discharging a balance claimed by him to be due to him on this account. He declared that he would only pay the balance of the invoice price, after deducting the amount he claimed to be due to him from Ewing. In this [150] state of circumstances Ewing gave notice to Fraser, Bond & Co. not to part with the bills of lading until they were paid for the coke, and Nasmyth, through his solicitors, gave a similar notice to Fraser, Bond & Co. not to part with the bills of lading except to Nasmyth, offering, on this being done, to pay any balance of account which might be due from him to Ewing.

In this state of things the course which ought to have been pursued by all parties seems to me to be very plain. The sellers of the coke were the Plaintiffs, the buyer was the Defendant Ewing. Fraser, Bond & Co. ought to have indorsed over and delivered the bills of lading to Ewing, on receiving from him an undertaking to indemnify them against all proceedings by the Plaintiffs in respect of them, and possibly by Nasmyth, though he obviously had no legal rights either to the coke or to the bills of lading. The Plaintiffs ought to have applied to the Defendant Ewing for payment of the price of the coke, and if he refused it they should have commenced an action at law against him. Instead of doing this, they file a bill in this Court to

prevent Fraser, Bond & Co. from parting with the bills of lading, and praying for a receiver to take possession of the bills of lading and of the coke.

The question, therefore, which I have to consider is, what course I ought to have taken if this suit had come to a hearing, and, if the Plaintiffs were still unpaid, the price of the coke sold by them. So regarding it, the case appears to me, on the whole of the evidence, to be a simple, ordinary case of goods sold and delivered by one person to another person, who is the buyer. If this Court were to interfere in such cases, it would produce great evils and lead to much expensive litigation. Here Ewing, through Fraser, Bond & Co., contracts to buy [151] a certain quantity of coke from the Plaintiffs, to be delivered on board a ship at a particular price. The Plaintiffs duly perform their part of the contract, the coke is duly delivered on board the "Pensacola." When this was done all the property of the Plaintiffs in and all their lien upon the coke was gone. The delivery, as they very properly put it in their bill, was complete. The captain of the "Pensacola," who received the coke and signed the bills of lading, received the coke as the agent of the purchaser, and the delivery was as complete as if the delivery had been made personally to the Defendant Ewing.

This being so, all question about stoppage *in transitu* is gone, and that doctrine has no relation to or bearing upon this case. If one merchant sells and delivers goods to another without receiving the prices of them, the only remedy the seller has is by action at law; he cannot seize the goods he has delivered, either in the hands of a purchaser or in the hands of any agent or servant of his. This observation applies as well to the bills of lading as it does to the goods themselves; exactly the same rights and obligations attach to the bills of lading as attach to the goods themselves. If the Plaintiffs were entitled to stop the bills of lading, they would have been entitled to stop the coke in the "Pensacola" until the payment had been made to them. Accordingly, this is the view taken in the pleadings, and this is the scope of the prayer of the Plaintiffs' bill which in paragraph 4 prays that a receiver may be appointed to take possession of the coke.

This is, however, in my opinion a complete misconception of their position by the Plaintiffs. They were at liberty to refuse to part with their goods until they had been paid, but having done so all they could require [152] was payment from the buyer, and this Court was not and is not the proper tribunal to enforce payment.

But the Plaintiffs have gone far beyond this, for they have filed this bill in order to enforce payment of the coke without ever having applied to the purchaser, viz., the Defendant Ewing for payment. They have been satisfied with the statement of Fraser, Bond & Co. that Ewing said that he would not pay for the coke, and without making any application to him personally, they put this bill on the file. They not only do this, but they go a great deal further, and make the following charges against the Defendants Ewing and Nasmyth:—

"The Plaintiffs have discovered, and it is the fact, that the mode of obtaining the said coke from the Plaintiffs was altogether a scheme, concerted between James Ewing and Charles James Nasmyth, in order to get such coke from the Plaintiffs without paying the price thereof, and that for this purpose the last-mentioned Defendant agreed that the said coke should be purchased by James Ewing as the ostensible buyer thereof, and that Charles James Nasmyth should then pretend that such coke was bought by him as principal, and that he should then claim to set off against the price hereof a debt which was previously due from James Ewing to him, and should thus obtain payment of such debt, and should leave the Plaintiffs to recover payment if they could from James Ewing, who, as all the Defendants knew, was quite unable to make such payment."

In another part of the bill the Plaintiffs charge the Defendant Ewing with insolvency. In support of this charge of insolvency there is not one tittle of evidence; not only is it untrue, but it does not appear that the Plaintiffs ever at any time believed it to be true. The [153] utmost that the Plaintiffs venture to swear respecting the imputed insolvency of the Defendant Ewing is, that they had reason to think that he might have been insolvent; but they do not say that they ever thought so; and this assertion that they had reason so to think is introduced, not for the purpose of proving the allegation, but for the purpose of endeavouring to defend the introduction of it,

while on the evidence itself there is nothing which could induce a reasonable man to entertain such opinion. Insolvency is a very serious charge to be made against a person engaged in trade or commerce, and when made wantonly, or without due consideration, it recoils on the person who makes it.

The other charge is one of still graver import; it alleges that both the Defendants (Ewing and Nasmyth) entered into a scheme to obtain goods from the Plaintiffs without paying for them. This charge is supported thus in the affidavit on which the injunction was obtained:

"I believe that it is the fact that the mode of obtaining the said coke from the Plaintiffs was altogether a scheme, which was concocted between James Ewing and Charles James Nasmyth in order to get such coke from the Plaintiffs without paying the price thereof, and that for this purpose the said last-mentioned Defendants agreed together that the said coke should be purchased by James Ewing as the ostensible buyer thereof, and that Charles James Nasmyth should then pretend that such coke was bought for him as principal, and that he should then claim, as he does in fact now claim, to set off against the price thereof a debt previously due from James Ewing to him, and should thus obtain payment of such debt, and should leave the Plaintiffs to recover payment if they could, from James Ewing who, as I believe all the said Defendants knew, was quite unable to make such a payment."

[154] This charge not only is not proved but it is disproved, not merely by the oaths of the parties concerned but also by the whole character and by all the details of the transaction itself, and though the Plaintiff Joseph Straker, in the passage I have read, swears to his belief only, now on the full disclosure of the whole matter, there does not appear that there was or is a single fact which ought to have induced a reasonable man to entertain such a belief.

This Court has always visited, and I trust will always visit, very severely a Plaintiff who makes a charge of fraud against a Defendant, and is afterwards unable to sustain the charge by evidence. But if this rule is to be made more stringent in any one case more than another, it is when the only circumstance that can give the Court jurisdiction to entertain the case at all is the fact that the Defendants have been guilty of fraud and collusion, where in fact the interposition of the Court is rested on this allegation, and where its aid is prayed to defeat such fraud and collusion.

I have already stated my opinion that this was not even a case for stoppage *in transitu*; but if it were, and the case is presented in that light by the bill, this would be an ordinary legal right enforceable by an ordinary legal remedy, and, unless by reason of some unusual circumstances, this Court would not interfere. And, accordingly, in order to give this Court power to entertain the case, it must be shewn that some fraud on the part of one or more of the Defendants or some collusion between them existed. Assuming such fraud to exist the suit is properly framed, without it there could be no pretence for making the Defendant Nasmyth a party, between whom and the Plaintiffs there was no privity of any sort. Accordingly, in order to obtain [155] the interposition of the Court, it is broadly alleged in the bill that the two Defendants, Ewing and Nasmyth, laid a scheme to obtain the coke without payment, in other words to defraud the Plaintiffs of their property. And as some evidence of this was necessary in order to obtain from the Court an *interim* order or an injunction, this accusation is inserted, though in a somewhat more mitigated form, in the affidavit on which the injunction was obtained in the passage I have already read, not indeed as a positive fact, but as a matter believed by the Plaintiffs to be true. Thereupon, and on the strength of this, the Court granted an *interim* order or an *ex parte* injunction, which amounts to the same thing; this is extended from time to time, in order to enable the affidavits on both sides to be completed, till the hearing of the motion, and when the motion is heard it turns out that there is not a shadow of truth in this charge. On this ground alone the Court would have dissolved the injunction if it had been applied to for that purpose.

But treating the matter now as the hearing of the cause, and assuming for this purpose that the Plaintiffs have not received any part of the price of the coke delivered by them, this case fails in every respect; the Court has no power to entertain the question, and the defamatory charges, by which the jurisdiction was en-

deavoured to be obtained, have wholly failed. In such a case, if it had rested there, it would be plain that the Plaintiffs' bill would simply have been dismissed with costs. As the case now stands, in addition to this, it appears that no application for payment was made to the Defendant Ewing before the bill was filed, and that though he told Fraser, Bond & Co. that he would not pay for the coke, yet, when he took legal advice and understood his position, he was at once ready and [156] willing to pay for it if he got the bills of lading, and this he has accordingly done.

I might now properly conclude, but before parting with the case I am desirous of noticing an argument in favour of the Plaintiffs, which I stated in the outset, and which has been much insisted upon on their behalf. It is this:—It was said that the general rule adopted by the Court is to make the costs follow the event; that in this case the effect of this suit has been to obtain for the Plaintiffs the price of the coke supplied by them, and that they ought therefore to have the costs incidental to their successful suit. There is an obvious fallacy in this reasoning; when the Court uses the expression "that the parties must abide by the usual rule, and that the costs must follow the event," it speaks of an event produced by the decision of the Court, not one settled by the compromise of the parties. If no compromise had been entered into and the suit had been brought to a hearing before me the event would have been the dismissal of the bill. I am, by the arrangement between the parties, to deal with this case exactly as if no compromise had been entered into, exactly as if this cause had been argued before me on the present evidence, at a time when it was ripe for hearing. The rule, therefore, so far from being favourable to the Plaintiffs, is adverse to them. This suit, in my opinion, ought not to have been instituted, and the Plaintiffs can derive no advantage from a compromise, extorted by the combined effect of the peculiar position of risk in which this cargo would have been placed had it arrived in India without anyone being authorized to receive it, and the order of the Court produced by the misstatements I have commented upon. The injunction obtained by the allegation of collusion and insolvency may possibly have been the cause of the Defendant [157] Ewing paying the money rather than running the risk of the coke being lost on its arrival at Bombay, from the want of some person authorized to receive and dispose of it. But the injunction was improperly obtained, and although it may, in the way I have mentioned, have been beneficial to the Plaintiffs, it can confer no advantage upon them as regards the final conclusion and costs of the suit.

It follows from all this that the Plaintiffs must pay the costs of the suit of all the Defendants. As the costs of Fraser, Bond & Co. have already been paid by the Defendant Ewing, he will add them to his own costs and receive the increased amount from the Plaintiffs, who will also have to pay the costs of the Defendant Nasmyth.

[157] HUNT v. MANIERE. Dec. 8, 1864.

[Affirmed, 34 L. J. Ch. 142; 11 L. T. 723; 11 Jur. (N. S.) 28;
13 W. R. 363; 5 N. R. 181.]

Spurious champagne, having a counterfeit brand, was deposited with wharfingers, who, having notice of the fraud and that an injunction was about to be applied for, refused to deliver it over to the holder of the dock warrants. The Court, upon bill filed, restrained an action for damages for the non-delivery, commenced by the holder of warrants against the wharfingers.

The Plaintiffs, Messrs. Hunt, were London wharfingers. In the year 1862 some cases of champagne, branded as the produce of Veuve, Cliquot, Ponsardin & Co., were warehoused at their wharf on dock warrants made out in the name of Bernard. The wine was in fact spurious, and branded with the counterfeit mark of the firm of Veuve, Cliquot, Ponsardin & Co., and who, having discovered the fraud, gave notice of that fact to the Plaintiffs on the 6th February 1863. They also stated that the wine was about to be sold, and that they would apply for an injunction on the next day to prevent the sale, and they requested the Plaintiffs [158] to detain the wine until the injunction should have been obtained. The bill was accordingly filed by

Ponsardin (*Ponsardin v. Stear*) on the 13th of February 1863, the only Defendants being Stear and the Plaintiffs. About 3 o'clock on the same day Manière, who was the indorsee of the dock warrants, demanded the wine of the wharfingers, but they refused to deliver it. An injunction was granted on the same day to restrain the Plaintiffs from parting with the wine, and notice of which was given to the Plaintiffs on the same day, but after they had refused to deliver it to Manière. The writ of injunction was served on the Plaintiffs subsequently.

By arrangements, in the suit of *Ponsardin v. Stear*, the wine was sold as in *Ponsardin v. Peto* (33 Beav. 642), the counterfeit brand having been removed.

Manière, insisting that the Plaintiffs were not justified in refusing to deliver up the wine to him the indorsee of the dock warrants, brought an action against the Plaintiffs in June 1864, to recover damages for the wrongful conversion of the wine. This action had proceeded to notice of trial. On the 25th of November 1864 the Plaintiffs instituted this suit against Manière to restrain him from proceeding in his action at law, and a motion was now made for an injunction.

Mr. Selwyn and Mr. J. Howard, for the Plaintiffs. The Plaintiffs, having notice of the fraud intended to be practised on Messrs. Cliquot and the public, and that an injunction was about to be obtained to prevent it, were fully justified in refusing to deliver over the wine, and thereby assist in the fraud. The Court, having cognizance over the subject, will protect the Plaintiffs, and, if any damages are to be recovered, it must be in this Court.

Mr. Hobhouse, Mr. Lovell and Mr. Morgan Howard, for the Defendants. The duty which the Plaintiffs had undertaken, as mere agents, was to deliver over the property to the persons having the legal right to the possession, that is, to the indorsee of the dock warrants. It was not for them to have regard to the mere notice of any stranger that a wrong was intended, or that a bill was about to be filed; nothing but a positive injunction could justify them in refusing to deliver over the goods to the rightful owner. The proper test of what was the Plaintiffs' duty is this:—Would they have incurred any liability by delivering over of the wine to Mr. Manière? It is plain they would not, for, until the injunction was granted, they were under no obligation except to the owner, and a wharfinger cannot set up the rights of a third party. At all events, the Plaintiffs' liability is a question to be determined at law, and the action which will decide it ought to proceed; *Farebrother v. Welchman* (3 Drew. 122).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the wharfingers acted rightly on this occasion. As I understand the case, it stands thus: There are certain wharfingers in possession of wine which they know to be a fraudulent and spurious imitation of the manufacture or growth of other persons. They are informed by the persons injured that they are about to file a bill and to obtain an injunction to restrain their parting with the wine.

[160] The holder of the dock warrants then comes and asks for the delivery of the goods before the wharfingers have notice of any injunction, and the wharfingers decline to deliver them, saying that an injunction was about to be applied for. They then send to ascertain, and find that an injunction had actually been granted at the time when the application was made for the goods. The holder of the dock warrants then brings an action against the wharfingers for the non-delivery of the wine.

I am of opinion that the wharfingers would have acted culpably if they had parted with the wine on that occasion. I assume that, at law, they were bound to deliver it up to Manière, and that a jury would give him damages for the non-delivery, though to what extent I do not know; still I am of opinion that this Court would require persons, in the situation of these wharfingers, not to deliver up the wine.

Suppose this case:—A sum of £1000 being deposited at a bankers in the name of a mere trustee, a person applies to the bankers saying, "This is a trust fund belonging to me which the trustee is going to misapply; I am about to apply for an injunction, therefore do not part with the money in the meantime;" afterwards the bankers refuse to pay it to the trustee, and subsequently notice of an injunction is given to the bankers. Can the trustee bring an action against the bankers for the damage he has sustained by being prevented from committing a breach of trust? If that be law, it certainly is not equity. Here the only damage which the Plaintiff in this action

has sustained is that the spurious wine would have sold for more if he had been allowed to sell it as the genuine wine of Cliquot & Co., and he brings his action against the wharfingers for having prevented him from committing that fraud.

[161] I believe that before the writ of *distringas* to prevent a transfer of stock had been sanctioned by Act of Parliament (5 Viet. c. 5, ss. 4, 5), it did not prevent the Bank of England from allowing a transfer, but the practice was that the bank gave notice to the person who had lodged the *distringas* that they would stop the transfer for three days, in order to enable him to obtain an injunction.⁽¹⁾ But did anybody ever hear of an action being brought against the bank by a trustee who had thus been prevented by them committing a breach of trust?

I am clearly of opinion that this is a case in which the wharfingers acted properly, and that they are entitled to an injunction to stay the action until the hearing of this cause or further order.

[161] WHITEHEAD v. LYNES. Dec. 20, 1864; Jan. 11, 1865.

[34 L. J. Ch. 201; 11 Jur. (N. S.) 74; 13 W. R. 306.]

Where a person seeks for damages on the ground of the improper use of the process of this Court, and the person against whom the complaint is made requires the matter to be tried at law, this Court will permit it to be tried at law, instead of itself assessing the damages.

A four days' order seems still to be the proper process for compelling a receiver to pay over his balances in accordance with an order of the Court.

This was an application on the part of Alfred Tyrrell, the receiver in the cause, that an inquiry might be directed to assess the damages which he had sustained by the wrongful issue and execution of two writs of *fiery facias* on 16th September last, and that William Cross and John Edens, in whose names such writs were issued by Mr. Burrell their solicitor, and Mr. Burrell himself, or some or one of them, might be ordered to pay to Alfred Tyrrell the amount which [162] should be so assessed, and that they might pay the costs of this application and consequent thereon.

By an order, dated 22d March 1862, it was ordered that the receiver should pay the future balances which should be reported due from him in respect of the descended freehold estates, as to $\frac{1}{16}$ th parts thereof to William Cross, and as to $\frac{1}{16}$ th parts to John Edens.

By the Chief Clerk's certificate, dated 13th April 1864, a balance of £818, 11s. 5d. was certified to be due from the receiver on passing his account, and which sum was to be paid as follows:—"£730, 16s. 4d. part thereof, which had arisen from rents and profits of the descended freehold estates, was to be paid and applied by Alfred Tyrrell in the manner directed by the order of the 22d of March 1862."

Claims had been made on these sums by certain other persons, who had filed a bill and presented a petition for enforcing them, of which notice had been given to the receiver. In consequence of these disputes the money remained in the hands of the receiver's solicitors.

On the 16th of September 1864 two writs of *fiery facias* were issued by Mr. Burrell, as the solicitor of William Cross and John Edens, and put in execution against the receiver; one of such writs at the suit of William Cross for £365, 8s. 2d. (being his $\frac{1}{16}$ th part of the sum of £730, 16s. 4d.), and the other of such writs at the suit of John Edens for £267, 19s. 4d. (being his $\frac{1}{16}$ th parts of the sum of £730, 16s. 4d.).

On 22d September an application was made by the receiver to Vice-Chancellor Kindersley, as the Vacation [163] Judge, to discharge the writs of *fiery facias*; upon which application an order was made discharging the writs and for payment by the

(1) See *Toulmin v. Copeland*, 6 Price, 405; 7 Price, 631; *Scott v. The Bank of England*, 2 Younge & Jervis, 327; *Fellows v. The Bank of England*, Younge, 385; *Argent v. The Bank of England*, 1 Younge & C. (Exch.) 557; *Williams v. The Bank of England*, 2 Younge & C. (Exch.) 265.

receiver of the sums of £365, 8s. 2d. and £267, 19s. 4d. to Messrs. Cross and Edens respectively.

The questions now argued were, first, whether a *fi. fa.* was the proper process against a receiver under the Court; secondly, whether, under the peculiar circumstances of the case, any process ought to have been issued *ex parte* against the receiver; and, thirdly, as to the proper modes by which the receiver should enforce his claim for damages.

The first question depended principally upon whether the order of 22d March 1862 (which directed the receiver to pay to Mr. Cross $\frac{1}{11}$ th parts and to Mr. Edens $\frac{1}{11}$ th parts of the balances which should be certified to be due from him), together with the Chief Clerk's certificate of 13th April 1864, constituted such an order for payment as would entitle Messrs. Cross and Edens to sue out a writ of *feri facias* under the Consolidated Order XXIX., rule 6, and whether a receiver was a "*person*" within the meaning of the Consolidated Order and rule. It had hitherto been considered the practice of the Court, in the case of a receiver, that, before any compulsory process could be issued against him, a four-day order should be obtained for the payment by the receiver of the money, and this appears to have been laid down by Lord Eldon in *Davies v. Calcraft* (14 Ves. 143); but no case on the subject appears to have been decided since the General Orders of 10th May 1839 (made in pursuance of the Act of 1 & 2 Vict. c. 110), which authorized the issuing of [164] writs of *feri facias*, and which is now the Consolidated Order XXIX., rule 6.

Mr. Baggallay and Mr. Hardy, for the receiver, insisted that the process was irregular, and that the Court ought to assess the damages occasioned to the receiver by the wrongful act of Cross, Edens and their solicitor. They cited *Barker v. Braham* (3 Wels. 368); *Bates v. Pilling* (6 Barn. & C. 38); *Sowell v. Champion* (6 Adol. & E. 407); *Rolin v. Steward* (14 C. B. Rep. 595); *Frowd v. Lawrence* (1 Jac. & W. 655), *Bailey v. Devereux* (1 Vern. 269); *Bray v. Hooker* (Dick. 638); *Daniel's Prac.* (vol. i. p. 361 (3d edit.)).

Mr. Selwyn, for Cross and Edens, insisted on the regularity of the process and on their right to have the matter tried at law.

Mr. Hobhouse and Mr. Hemings, for Burrell, argued that he was not personally responsible; *Cohen v. Morgan* (6 Dow. & Ry. 8); *Carratt v. Morley* (1 Q. B. Rep. 18); and that it was a question to be tried at law.

Mr. Baggallay, in reply, cited *Arrowsmith v. Hill* (2 Phill. 609).

THE MASTER OF THE ROLLS considered that a four days' order, and not a *fi. fa.*, was the proper process against the receiver to compel payment. But, secondly, whether that were so or not, he thought that, under the peculiar circumstances of this case, the Messrs. Cross and Edens were not justified in issuing the *feri facias*. He reserved the question as to damages.

[165] Jan. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. This was an application by a receiver appointed by the Court, asking the Court to assess damages, sustained by him by reason of the improper issue of two writs of *feri facias*, and the question was, whether I could properly direct such an inquiry. I have already decided that these writs had been improperly issued.

I have considered all the cases on this subject, which are not numerous, having entertained considerable doubts as to the propriety of the order to be made. I think that the case of *Arrowsmith v. Hill* (2 Phill. 609), governs this case. The result of the cases seems to be that the Court has power to direct an inquiry as to the damage sustained by the improper use of the powers of this Court, and also that, as a general rule, this Court will not allow its process to be inquired into in a Court of law. But in *Arrowsmith v. Hill*, Lord Cottenham expressly lays it down that, if the person against whom the complaint is made is desirous of having it tried in a Court of law, he is entitled to have it so tried. Here the complaint is made against the Defendants William Cross and John Edens, and against their solicitor, Mr. Burrell, and, as I understood their counsel, they insist that, if the matter is to be tried at all, it shall be by an action at law. I think that after the case of *Arrowsmith v. Hill*, I cannot refuse this to them, and accordingly, I shall make the same order as in that case. I shall treat this as an application for leave to bring an action at law, as Lord Cottenham did in the case above referred to. I shall give such leave and reserve the costs of

this application, which I shall probably make abide the result of the action. I am also influenced in some degree by con-[166]-sidering that, in a case of this description, a jury is a very fit tribunal to determine the amount of damages, if any, to be awarded to the receiver. It will, of course, be open to the Defendants in the action to contest the accuracy of the opinion I have expressed, that no writ of *f. fa.* ought to have issued, and to contend that the writ of *f. fa.* was properly issued.

[166] HARROP v. WILSON. Jan. 21, 24, 1865.

[S. C. 11 L. T. 699; 11 Jur. (N. S.) 102; 13 W. R. 334.]

A widow became entitled to her dower, after which the lands were taken compulsorily by a public board, and one-third of the purchase-money was paid into Court, invested, and carried over to a separate account to answer the dower. The widow died in October, between the July and January dividends. Held, that her estate was entitled to an apportionment of the latter dividends.

In 1822 Joseph Gittins died seised in fee of two freehold houses in Shrewsbury, out of which his widow was entitled to dower.

These houses were taken in 1834, under compulsory powers by the paying trustees of that town. They paid the purchase-money into Court, and, under an order of this Court made in 1835, one-third of the purchase-money, amounting to £511 consols, was carried over to the dower account of the widow, and the dividends were ordered to be paid to her for life, with liberty to apply.

The widow received the dividends down to the 5th of July 1864, and she died in October 1864. A petition was now presented by a purchaser of the heir's interest in the fund, for payment to him of the £511 consols. The question was whether the personal representative of the widow was entitled to an apportioned part of the dividends which had accrued between the 5th of July and her death in October.

Mr. T. H. Terrell, in support of the petition. The [167] widow has no claim to an apportionment. It is clear that, independently of the statute 11 Geo. 2, c. 19, s. 15, there would be no apportionment, and that Act only applies to the case of lands demised by a tenant for life, where the lease expires on his death, and the rent became lost, as neither the executors of the tenant for life nor the remainder-man could recover the apportioned rent. The remedy was one directed merely against the tenant. Here there was no demise at all, and therefore there can be no apportionment. But even if it be considered that there was something amounting to a parol demise, still, before the actual assignment of the widow's dower, the lease must necessarily be considered as the lease of the heir and not of the dowress, and on a demise by the heir, continuing after the death of the widow, there could be no apportionment; *Ex parte Smyth* (1 Swanst. 337).

Mr. Renshaw, for the widow's representative. The houses were taken compulsorily and without the assent of the widow, and the purchase-money was liable to be reinvested; it must, therefore, be treated as being land. But the carrying over of one-third of the fund was equivalent to an assignment of her dower. If she had been in the personal occupation, she would have had the enjoyment down to her death; but if she had let it, she would have been entitled to an apportionment under the express words of the statute 11 Geo. 2, c. 11; *Kevill v. Davies* (15 Sim. 466); and see the 4 & 5 Will. 4, c. 22.

Mr. Terrell, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. As I understand the case, I think the estate of the widow is entitled to an apportionment in respect of her [168] dower. This, at least, is quite clear, that if the dower had been assigned, and the lands assigned to her had been held by her tenant whose demise determined by her death, she would then have been entitled to an apportionment of the rents of her one-third down to the day of her death.

Here, a public body, having authority under the Act, take the two houses compulsorily. They admit that the widow is entitled for life to one-third of the

purchase-money, which amounts to £511, and, instead of reinvesting it in land to answer her dower, they pay it into Court. I am of opinion that it is then in the same position as the land itself, and that the dividends on the fund are analogous to the rents which would have been produced upon a demise by the widow of the lands assigned to her for her dower. She is not to be prejudiced by the land being converted into money, and she is entitled to the same benefit as she would have been if the real estate had remained unconverted and appropriated to her in respect of her dower.

I am of opinion that the statute does apply in equity, and that the widow's representative is entitled to an apportionment of the dividends down to her death. I will, however, see if further consideration will induce me to alter my impression.

Jan. 24. THE MASTER OF THE ROLLS. The further consideration of this subject has confirmed me in my opinion that this is a case which is equitably within the statute the 11 Geo. 2, c. 19, and that the widow is entitled to an apportionment of the dividends in respect of her dower. She was entitled to her dower [169] out of a real estate, which was taken adversely by a public body, and the portion of the purchase-money allotted in respect of her dower was £511 stock. This was deposited in the Court of Chancery, and the dividends were ordered to be paid to her for life in lieu of her dower. I stated on a former occasion that I must treat this money exactly in the same manner as if it had been land, for the houses were taken compulsorily and the purchase-money became liable to be reinvested in land. I must, in fact, treat the money in Court as a farm assigned to the widow for her dower. If so, the case is strictly within the statute.

It was argued that there had been no demise, but I think that I must treat the case as if a proper and strict demise had been made by the widow of her portion of the estate. If the money in Court be considered as land, it must be treated either as in the possession of the widow down to her death or in the possession of her tenant under a demise from her subject to a rent, and which demise terminated on her death. If that be so, she and her representatives are entitled to an apportionment, not only on the principle of all the decided cases, but also on the equitable construction of the statute.

I think that the case is answered the moment the Court comes to the conclusion that the money is to be treated as so much land assigned to the widow for her dower.

The representative of the widow must have her costs.

[170] MATHERS v. GREEN. *Jan. 16, 17, Feb. 14, 1865.*

[Reversed L. R. 1 Ch. 29; 35 L. J. Ch. 1; 13 L. T. 420; 11 Jur. (N. S.) 845; 14 W. R. 17. See *Steers v. Rogers* [1893], A. C. 232; *Heyl-Dia v. Edmunds*, 1899, 81 L. T. 580.]

As to the right of one of the several co-owners of a patent to use it separately from the other co-owners without accounting for the profits.

A. obtained a patent for a machine, after which A. and B. jointly obtained a patent for improvements of the same machine. A. used both patents independently of B. Held, by the Master of the Rolls, that B. was entitled as against A. to an account of his, B.'s, share of the profits derived from A.'s user of the second patent, but his decision was overruled by the Lord Chancellor.

The question of law in this case arose under the following circumstances:—

In 1859 Thomas Green, a manufacturing engineer, obtained a patent for a lawn mowing machine, and this patent belonged to him exclusively.

In 1861 the Plaintiff, Richard Mathers, a mechanical engineer, entered the service of Mr. Thomas Green at a salary of £200 a year.

In the latter part of 1861 Mr. Mathers invented some improvements of the lawn mowing machine, and a joint patent for such improvement was, in December 1861, obtained in the joint names of Mr. Mathers, Mr. Thomas Green and of his son Mr. Willoughby Green. As to this patent, the Court came to the conclusion that these

three persons were joint owners of it. The Plaintiff, Mr. Mathers, left the service of Messrs. Green in 1861, disputes then arose between the parties, and in May 1863 the Plaintiff instituted this suit against Messrs. Green, by which he claimed one-third of the profits made by the Defendants from the user of the second patent by the Defendants, and from the royalty derived from licences granted to use it.

The Defendants, amongst other things, alleged that Plaintiff had agreed to receive a fixed salary in payment for his services and the invention; but this the Plaintiff contested.

[171] Mr. Southgate and Mr. P. Kingdon, for the Plaintiff, argued, first, that the Plaintiff had entered into no agreement affecting his rights in the second patent, and that as it had been granted and registered in the joint names, his right was conclusively established; 15 & 16 Vict. c. 83, s. 35. That the Plaintiff was therefore entitled to one-third of the patent and to one-third of the profits made by it, and consequently to an account of such profits. That the case was like that of one of several tenants in common or joint-tenants who was entitled to recover his share of the rents. On this *M'Mahon v. Burchell* (2 Phill. 127); *Henderson v. Eason* (17 Q. B. Rep. 701); *Leake v. Cordeauz* (4 W. Rep. 806), were cited. They referred to *Hancock v. Bewley* (John. 601), in which the question as to the rights of one of several co-owners of a patent to use it on his own account was discussed but not decided.

Mr. Selwyn and Mr. Phear, for the Defendants, argued that, by agreement between the parties, the Plaintiff had no interest in the patent in question. Secondly, that the Plaintiff was entitled to no account, the case being, in that respect, governed by *Re Russell's Patent* (2 De Gex & Jones, 130), where an invention having been made by two persons, and an application being made for a patent, the Lord Chancellor ordered that the two inventors should be treated as if they were joint grantees of the letters patent, and that the patent should be granted to two trustees, one to be named by each party, and "each party to have a free licence to himself and partners, if any." They argued also that the register was merely *prima facie* proof of the ownership of the patent; that there was no exclusion of the Plaintiff, and that he had [172] no right to share in profits made by the Defendants in their separate trade.

Mr. Southgate, in reply.

Feb. 14. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, what are the rights of the Plaintiff in respect of the patent. He claims one-third of the profits made by the Defendants arising from the use of this patent. This is contested on the part of the Defendants; they contend that the Plaintiff agreed to take and did take his salary at the rate of £200 per annum, during the time he was employed by them, as full payment for his services in and about the making of such invention, and in full satisfaction of all claims by him in respect of that invention. I am of opinion, however, that the Defendants fail in making out any such agreement.

I am, therefore, of opinion that the Plaintiff is entitled to all such rights as flow out of his being one of three joint owners of a patent.

What these rights are has been the subject of much discussion, the counsel for the Defendant contending, on the authority of *Russell's Patent* (2 De G. & J. 130), that the rights of the persons who were jointly interested in a patent was that each one was entitled to use it freely and to have an equal share in the profits arising from the granting of licences to use it, but nothing more. In the case in question no difficulty or contest arose on this point; the contest was, who was entitled to the patent? and as soon as the Court had determined that the Plaintiff and Defendants were alike entitled to it, the [173] mode of working that out was settled to the satisfaction of both parties, in the manner I have mentioned, by assigning the patent to two trustees in trust for each of them to use separately.

But it is obvious that, if that course were adopted in the present case, it would work great injustice. The patent in which the Plaintiff is interested is for the improvement of a patent which is the property of the Defendant Mr. Green the father, and consequently the Plaintiff cannot use the patent in which he is interested without infringing the patent which belongs to the Defendant, who can of course use both as he pleases. Virtually, therefore, such an order, if made here, would be to give the whole patent to the Defendants.

But I am of opinion that, in such a case as the present, the rights of the Plaintiff

are measured by one-third of the profits made by the use of this patent for the improvement of the former, and that the Defendants must account to the Plaintiff for one-third of any profits which they have so made. It is true that this will not be a matter easily to be ascertained, for the profits arising from the prior patent are first to be ascertained or estimated, and then to be deducted from the profits made on the sale of improved lawn mowing machines, before the profits arising from the second patent can be ascertained. But however difficult this may be, still I am of opinion that this must be done, and that this account must be taken by me in the best way I can, unless the parties can come to some satisfactory arrangement on the subject, so as to supersede this necessity.

If licences are granted to use this patent separately, there will be no difficulty as to them, the Plaintiff will [174] simply be entitled to one-third of the money derived from such licences.

As this suit has been occasioned by the Defendants disputing, what, in my opinion, is the right of the Plaintiff, he must have his costs of the suit up to and including the hearing, but not including the subsequent taking of the accounts between the parties.

NOTE.—Reversed by Lord Cranworth, L. C., Nov. 1865. [L. R. 1 Ch. 29.]

[174] ATTORNEY-GENERAL v. GREENHILL (No. 2). Jan. 11, 1865.

A clerical error in the enrolment of a decree corrected by the Master of the Rolls.

This was a transferred cause, in which a decree had been made by the Master of the Rolls. (33 Beav. 193.) The decree had been enrolled, but, by mistake, as the decree of the Vice-Chancellor Wood.

Mr. V. Hawkins applied that the emolument might be corrected.

THE MASTER OF THE ROLLS [Sir John Romilly] at first doubted whether the order ought not to be made by the Lord Chancellor, but after conferring with the registrar he made the order, saying that it was a mere clerical error. (See 4 Beav. 563, 568.)

[175] OVERINGTON v. WARD. Jan. 17, 1865.

A bill to protect a testator's estate until a legal personal representative has been appointed, and also to administer the estate, is irregular. It should be limited to the first object.

The testator died in the East Indies in July 1864, having left all his property to the Defendant Ward, in trust, as to part for the Plaintiff, and as to the rest for the Defendant Hewitt.

The bill, filed by the legatee against Ward and Hewitt, stated as follows:—

"The Defendant Ward intends to procure a grant to himself of probate of the said will, or, as the case may require, letters of administration with that will annexed to the estate and effects of the said Edward Hewitt, deceased, but it will be impracticable for him to procure such grant until the arrival in England of the attesting witnesses to the said will, and it is not probable that they will arrive in this country until the month of February 1865, at the earliest.

"No grant of such probate or letters of administration has yet been procured, and there is not any suit pending touching the validity of the said will or for obtaining any such grant." (See 20 & 21 Vict. c. 77, ss. 70–73.)

The bill then proceeded to state circumstances which shewed the necessity of protecting and managing the shares of a ship, which formed part of the testator's property. The bill prayed, first, the administration of the real and personal property of the testator, and next, "that in the meantime, until a grant of probate of the said will or of letters of administration with that will annexed to the estate and effects of the said Edward [176] Hewitt, deceased, shall have been procured, some proper

person may be appointed to manage and deal with the shares, late of the said Edward Hewitt, deceased, of the said barque, and to receive the freight and other profits which shall become payable or arise in respect thereof."

To this bill Ward and Hewitt demurred, on the ground that the Plaintiff had not made a legal personal representative of the testator a party to the bill.

Mr. Rigby, in support of the demurrer. A suit for a receiver *pendente lite* is never brought to a hearing; *Barton v. Rock* (22 Beav. 81, 376); and you cannot attach to such a suit a prayer for administration, when a legal personal representative has been appointed of the estate; *The Baron de Feuchères v. Dawes* (5 Beav. 110), followed in *Rawlings v. Lambert* (1 John. & Hem. 458). The difficulty in obtaining probate or letters of administration is not a sufficient answer to the objection; *Penny v. Watts* (2 Phill. 149).

Mr. Phear, in support of the bill, argued that, under the admitted circumstances of the case, no legal personal representative could be obtained; and secondly, that the Plaintiff was at least entitled to some part of the relief prayed, in the absence of such representative.

THE MASTER OF THE ROLLS [Sir John Romilly] thought the objection to this bill must be allowed, as the Plaintiff asked for a general administration of the estate, but that the Plaintiff was entitled to have the property protected. He said that he would give leave to the Plaintiff to amend the bill by striking out the first paragraph of the prayer, and that he would give no costs.

[177] *Re CHAMBERS. Jan. 31, 1865.*

[S. C. 34 L. J. Ch. 292; 11 L. T. 726; 11 Jur. (N. S.) 230; 13 W. R. 375; 5 N. R. 298. Explained, *In re Holroyde and Smith*, 1881, 43 L. T. 722.]

A solicitor, after delivering his bill of costs, may, before being served with an order for taxation, withdraw it and substitute another bill of a reduced amount.

Mr. Chambers had been engaged as the solicitor of Mr. Graves in some intricate matters, including a Chancery suit, and it seemed to have been understood between them that he was to be paid liberally for his services.

The matter ended successfully, and on the 19th of November 1864 Mr. Chambers sent his bill of costs to his client, amounting to £571. The bill was objected to, and after some negotiations and discussion, Mr. Chambers, on the 20th of December 1864, admitted that there were some charges which could not be sustained on taxation.

On the 6th of January 1865 Mr. Chambers delivered a new bill of costs, and, at the same time, he gave notice that he abandoned the first and substituted the second. The amount of the second bill was nearly £100 less than the first. After this, on the 11th of January 1865, Mr. Chambers was served with an order to tax *the first bill*. The order was dated the 29th of December, but had really been delivered out, upon an *ex parte* application, on the 7th of January 1865, and after the second bill had been delivered. The client insisted in proceeding to tax the first bill, to avoid which, Mr. Chambers now moved that the order for taxation might be discharged, or that the taxation might proceed on the second bill.

Mr. Selwyn and Mr. Nalder, in support of the motion. [178] An order of course, obtained *ex parte*, is effectual only from the time of its service, or, at the utmost, from notice of its existence; this did not take place until the 11th of January. The solicitor was, therefore, entitled to correct the errors in his first bill and substitute another more accurate. Having done this, *bona fide*, prior to order to tax, the second bill only ought to be referred to the Taxing Master.

Mr. Baggallay and Mr. Francis Webb, *contra*. A solicitor, having once delivered his bill of costs, is bound by it, and he cannot substitute another without the leave of the Court; *In re Carven* (8 Beav. 436). Here the order for taxation was made prior to the delivery of the second bill, and the solicitor could not avoid the costs of the taxation by altering his demand and delivering another bill. If the second had been the one first delivered, the client might, possibly, have paid it without taxation.

THE MASTER OF THE ROLLS. The only question is, whether the solicitor is not entitled to have the taxation proceed on the second bill. I have myself refused to allow a solicitor to alter his bill of costs after it had been taken in for taxation; but Lord Langdale allowed it in one or two cases, under special circumstances. I should be disposed to think that this gentleman, on paying all the costs which his client has sustained, would, until the order for taxation, be entitled to substitute a second bill.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. The sole question is, whether the taxation should [179] relate to the first bill or the second bill of costs. I cannot say that the solicitor has acted unwisely in not incurring the expenses of the taxation before coming for the opinion of the Court.

I am of opinion that a solicitor cannot deliver his bill with items of overcharge, and say, "I do not intend this to be my bill, but, if objected to, I intend to deliver another," nor after a bill has been once referred for taxation, when he finds that items in it will be struck off, can he deliver another bill of costs. But the circumstances of this case are different, for the substituted bill was delivered before the service of or notice of the order to tax. I think the proper course of the client was, to allow the substitution of the amended bill. Taxation is not a vindictive proceeding, but a mode of ascertaining what is really due.

Lord Langdale held, and I have also held, that a solicitor cannot substitute, as a matter of course, a second bill for the first, but I have not held that you never can do it.

Suppose a bill is delivered which includes, by mistake, erroneous items, and the client objects to them and says, "I will tax this bill," and thereupon the solicitor agrees to withdraw the items. Would not this Court allow him to correct the mistake at any time before there is an order to tax the bill? I am of opinion that if this were done *bonâ fide* the Court would allow it.

I think the proper order to be made on this occasion is to substitute the second for the first bill in the order or taxation, on condition that Mr. Chambers pay all [180] the costs incurred by his client up to and including the 7th of January.

I give no costs of this application.

NOTE.—See *In re Wells*, 8 Beav. 418; *In re Walters*, 9 Beav. 299; *Re Whalley*, 20 Beav. 576; *Re Catlin*, 18 Beav. 519; *Re Tilleard*, 32 Beav. 476; *Loveridge v. Botham*, 1 Bos. & P. 49; *Re Blakesley*, 32 Beav. 379.

[180] BOLITHO v. HILLYAR.(1) Feb. 18, 1865.

[S. C. 11 Jur. (N. S.) 556; 13 W. R. 600.]

Bequest to A. for life, and afterwards to the testator's brothers and sisters, share and share alike, or their children in case of their decease. Held, that the children of a brother, who survived the testator, but died in the life of the tenant for life, were entitled.

A deed relating to a reversionary interest in a fund was executed by some married women and their husbands. One having survived her husband, who died before the fund fell into possession: Held, that the deed was not binding on her, and that therefore it was not binding on any of the other parties to it.

The first question raised, in this case, was as to the construction of the following bequest in the will of William Bennicke:—

"I give and bequeath the residue of my property in the funds to my dear wife Anna Lacey Bennicke during her life, after which it is, in case I have no child or children by her, to descend to my brothers and sister, share and share alike, or their children lawfully begotten, in case of their decease; but if I should have a child or children by my dear wife, then it is to descend to them and their heirs."

(1) *Ex relatione*.

The testator died in 1812, without having had any children, and his widow survived him. The testator had two brothers and one sister; one of his brothers, James Bennicke, died in 1826, in the lifetime of the testator's widow, leaving six children. By his will he gave his reversionary interest in the testator's property in trust for certain persons.

[181] The testator's widow died in 1862.

Under these circumstances, the first question submitted for the opinion of the Court was, whether James Bennicke took such a vested interest in the residue of the testator's property in the funds as enabled him to dispose of it by his will, or whether he merely took a vested interest, subject to be divested in the events which happened, viz., his decease leaving children before the death of the tenant for life.

The second question raised for the opinion of the Court was, whether a deed which had been executed in 1821 by the children of the testator's sister and the children of James Bennicke, some of whom were, at the time of the execution of the deed, married women, was binding upon them or those claiming under them. The deed in question was made between the children of the testator's sister and of James Bennicke, and they thereby mutually covenanted to give up, in favour of each other, any right of survivorship which they had or might have in the testator's property under his will, in case they died in the lifetime of the tenant for life. At the date of this deed, four of these children were married women, but they and their husbands executed the deed. One only of these married women, viz., Mrs. Penfound, survived both her husband and the tenant for life, and she died in 1863. Her will purported to dispose of her reversionary interest under the testator's will. Mrs. Penfound had not, except by her will, confirmed the deed of 1821.

Upon this, the second question raised for the decision of the Court was, whether the deed of 1821 bound the interests in the trust funds of all or any of the parties thereto, who were married women at the time of [182] its execution, and further, if the deed ought not be considered as binding on the interests of any one of such married women, then whether it was binding upon any of the other parties to it.

Mr. Southgate and Mr. E. Charles, for the Plaintiffs, contended, first, that upon the true construction of the testator's will, James Bennicke took a vested interest subject to be divested, and that, on his death, leaving children, the latter were entitled to his share, which was unaffected by his will; *Hervey v. M'Laughlin* (1 Price, 264); *Salisbury v. Petty* (3 Hare, 87); *Edwards v. Edwards* (15 Beav. 357). Even where the gift was to a person "and" his children, instead of "or" his children, as was the case here, the same construction was placed upon it; *Pearson v. Stephen* (5 Bli. 203); *Bennett's Trust* (3 K. & J. 281).

Secondly, that the deed of 1821 was binding on the interests of all the married women who executed it, by reason of their having expressly confirmed it or of their predeceasing their husbands, who had also executed the deed. They observed that *Peto v. Peto* (16 Sim. 590) would no doubt be cited on the other side, as shewing that if the deed did not bind one of the parties, it failed to bind the rest; but that that case was distinguishable from the present, in this:—that there, a married person, whose execution of the deed was relied upon by the other executing parties, never executed it at all.

Mr. E. Lloyd contended, first, that the testator's brother took a vested interest at the testator's death, which he had power to dispose of by his will; *Sturgess v. Pearson* (4 Madd. 411). Secondly, that the deed did not bind [183] the reversionary interest of Mrs. Penfound (see *Honner v. Morton*, 3 Russ. 65), and was not, therefore, binding on the other parties; *Peto v. Peto* (16 Sim. 590).

Mr. W. W. Mackeson supported the contention of the Plaintiffs on the second point. He argued that Mrs. Penfound had confirmed the deed of 1821 by her will, which was quite inconsistent with the view of the deed not binding her interest; *Thompson v. Finch* (22 Beav. 316). But that if she were not bound, then he contended that the other parties to the deed were bound.

Mr. Robson, for other parties.

Mr. Wickens, for the trustees.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the agreement of 1821 is not binding upon the interests of any of the parties to it. It

was decided in *Peto v. Peto* (16 Sim. 590), that when persons enter into a mutual contract, the consideration for which is, that all the parties shall be bound by it, then, if one cannot be or is not bound, the contract is not binding on the rest. It must be treated as whole and entire, and the Court cannot make the parties to it enter into another contract.

If, in this case, Mrs. Penfound's interest is not bound, it is clear that the Court would make a new contract, if it were to enforce it between the remaining parties, omitting her share as though she had not been a party to it. If I were to do this, I should [184] in fact be ordering the contract to be performed *cy prés*, and thus give to the parties something different from what they contracted for.

The remaining parties might if they had thought proper have provided for the risk of the married women not being bound by the deed, and if they had wished to do so, they ought to have provided conditionally for this case, and then I could have dealt with the contract. I think that Mrs. Penfound has not confirmed the agreement, and her will can only be regarded as the expression of an intention of what she would have done if she had died in the lifetime of the tenant for life, when it would have been her interest to confirm it.

The result is that, in my opinion, the deed is not binding on her, and it follows that it is not binding on any other of the parties to it.

With respect to the first point which was argued, the cases cited by the Plaintiffs shew, that in gifts of this kind, where property is given to A. for life, and afterwards to B. or his children in case of his decease, B., on surviving the testator, takes a vested interest, liable to be divested in the event of his dying leaving children before the period of distribution, namely, before the death of A., the tenant for life.

[185] *Re THE PATENT ARTIFICIAL STONE COMPANY (LIMITED)*. Dec. 10, 17, 1864.

[S. C. 34 L. J. Ch. 330; 11 L. T. 561; 11 Jur. (N. S.) 4; 13 W. R. 285.]

Petition by a shareholder in a limited company, whose shares were fully paid up, to wind up the company refused, though the company was heavily in debt and made very small profits, the petition not being supported by any other shareholder or creditor, and the company, which had been at work about a year and a half, not having had a fair trial.

This was a petition presented by Mr. Busch, who held thirty-five paid-up shares in the company, for winding it up under "The Companies Act, 1862" (25 & 26 Vict. c. 89, ss. 79, 80).

The company was registered and incorporated in July 1862 as a limited company, and its object was to work a patent of Mr. Longbottom, for making artificial stone for scouring purposes.

The nominal capital was £20,000 in £10 shares, of which 1500 paid-up shares were allotted to the patentee. Of the remainder, 110 only were taken, and of these ninety-eight only were fully paid up. The £980 received for the shares had been applied in the purchase of leaseholds, plant, machinery, &c. This, together with the patent, the sum of £120 due for unpaid calls, and a small sum of £25 cash, formed the whole assets of the company.

On the other hand, the liabilities amounted to £917, of which £220 would not become due until August, and £605 was due to the directors for loans, for the payment of which they did not press, and there was one judgment creditor, but he took no part in these proceedings.

The company had as yet been principally engaged in perfecting their machinery, and had only worked for [186] about a year and a half, during which period they had effected sales to the amount of £65 only.

Mr. Selwyn and Mr. De Gex, in support of the petition, argued that the object of the company had failed, that the company was insolvent and unable to meet its liabilities, and ought to be wound up.

Mr. Locock Webb, for the company. The company being limited, the Plaintiff is

under no further liability, and no other shareholder and no creditor desires the company to be wound up. The company has only been engaged in business for about a year, and it has not as yet had a fair trial, and the evidence now shews that there is every prospect of success.

Mr. Selwyn, in reply. The Plaintiff, though under no liability, is entitled to have his share of the surplus (if any) ascertained and paid to him.

Dec. 17. THE MASTER OF THE ROLLS [Sir John Romilly]. On perusing and considering the affidavits in this case, I am of opinion that a sufficient case for winding up this company is not made out. So far as the Petitioner is concerned, he has personally no interest, properly so called, in the matter, for all his shares are paid up and he cannot be called on to contribute anything more. If the assets are more than sufficient to pay the debts, he might, by possibility, get some return of the money he has paid; but this is a very remote contingency, and it is not, in my opinion, a sufficient interest, in the absence of other circumstances, to support such a petition. If it were, a petition might be presented to wind up the moment he had paid up his share.

[187] I am also of opinion, on reading the affidavits, that the company has hitherto hardly had a fair trial, for the purpose of determining whether it is in a situation to effect its proposed objects. The principal creditor has a judgment, but he takes no steps to enforce execution and thereby stop the affairs of the company; and the only shareholder besides the Petitioner who has expressed any opinion on the subject is desirous that the concern should go on. I am of opinion that there is not a sufficient case for winding up this company, and I must therefore dismiss the petition with costs.

[187] WILSON v. THE WEST HARTLEPOOL HARBOUR AND RAILWAY COMPANY.

July 15, 16, 27, 1864.

[Affirmed, 2 De G. J. & S. 475; 46 E. R. 459; 34 L. J. Ch. 241; 11 L. T. 692; 11 Jur. (N. S.) 124; 13 W. R. 361. See *Bateman v. Mid-Wales Railway Company*, 1866, L. R. 1 C. P. 511; *In re National Savings Bank Association, Brady's case*, 1867, 15 W. R. 754; *Hunt v. Wimbledon Local Board*, 1878, 4 C. P. D. 61; *Melbourne Banking Corporation v. Brougham*, 1878, 79, 4 App. Cas. 169; *Hart v. Hart*, 1881, 18 Ch. D. 685; *Howard v. Patent Ivory Manufacturing Company*, 1888, 38 Ch. D. 163.]

Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose and ratify his acts, they cannot afterwards dispute acts done by him within the scope of such agency.

An officer of a company had been publicly accustomed to enter into contracts on their behalf as to their surplus lands, though not authorized under the corporate seal, and his acts had always been sanctioned. Held, that a written contract of such a character entered into by him was binding on the company.

A contract for the sale to the Plaintiff of lands of a company was entered into, without any specific authority, by their manager, and it was afterwards part performed by the delivery of possession and other acts of the company and its officers. Held, that it was binding on the company, and that the Plaintiff was entitled to enforce its specific performance.

This was a suit instituted by Mr. Wilson against the West Hartlepool Harbour and Railway Company for the specific performance of an agreement for the sale to Mr. Wilson of some surplus land belonging to the company, which was situate on the east side of the railway. This agreement, it was alleged, had been entered into by Mr. Chester, the manager of the company.

It appeared that previously, in August 1859, Mr. [188] Wilson had contracted with the company for the purchase of another piece of land on the west side of the railway, on which he intended to establish some iron works, and to which he had removed his machinery and plant.

Shortly afterwards the company became desirous that Mr. Wilson should give up the land on the west side, and take, in lieu thereof, some of their surplus land on the opposite side of the railway.

Negotiations took place between him and Mr. Chester, the manager of the company, on the subject, and ultimately Mr. Chester wrote to the Plaintiff as follows :—

“ West Hartlepool Harbour and Railway.

“ General Manager’s Office, West Hartlepool, Nov. 7, 1859.—Dear Sir,—On condition that you return to the company the piece of land on the west side of the railway, bought of them in August last, I beg to offer to sell you the three pieces of land shewn on the plan given you ” [describing them], “ at the rate of £220 per acre, subject to the conditions and stipulations on which you bought the before-mentioned piece of land in August last, viz., ” &c., &c.

The letter then specified the stipulations, two of which were as follows :—“ 3dly. The West Hartlepool Harbour and Railway Company shall bring a sufficient supply of suitable water for the use of the works.” “ 6thly. The West Hartlepool Harbour and Railway Company will lay down two lines the entire length between the main line and the land now offered, for standage and for your exclusive use.” The letter en-[189]-closed a schedule, and was signed in the following form :—

“ P. pro. The West Hartlepool Harbour and Railway Company,
“ SAMUEL CHESTER.”

It appeared that this correspondence had been entered in the books of the company and indexed, and that copies of the letters had been kept in the private office of Mr. Chester belonging to the company.

On the 15th of November 1859 the Plaintiff wrote to Mr. Chester a letter containing an unqualified acceptance of this offer.

The Plaintiff immediately entered into possession, and his plant and machinery were thereupon removed from the land on the west to that on the east side, and other machinery was also brought there by the railway company. The land last purchased was measured by the surveyor of the company, and, in accordance with the contract, the railway company laid down the branch lines of rails and made borings in the land for water. In fact, the Plaintiff remained in undisturbed possession of the eastern land until the company repudiated the contract, as after mentioned.

In December 1860, in consequence of some other works having been projected, the company became very anxious to obtain the eastern land, and that the Plaintiff should obtain another site for his works; and they entered into negotiations with him which lasted until May 1861; but the attempts to arrange the matter ultimately failed.

In May 1861 the company gave the Plaintiff notice [190] that they repudiated the contract, and refused to complete.

Mr. Chester died in March 1860, and in November 1861 the Plaintiff filed this bill for specific performance.

Mr. Selwyn and Mr. Fry, for the Plaintiff, cited *The London and Birmingham Railway Company v. Winter* (Craig & Ph. 57); *The Earl of Lindsey v. The Great Northern Railway Company* (10 Hare, 700); *Laird v. The Birkenhead Railway Company* (John. 500); *Pauling v. The London and North-Western Railway Company* (8 Exch. 867).

Mr. Hobhouse and Mr. Hawkins, for the Defendants :—8 & 9 Vict. c. 16, s. 97; *Lindley on Partnership* (p. 207); *Midland, &c., Railway Company v. Johnson* (6 H. of L. Cas. 798); *Buckmaster v. Harrop* (7 Ves. 340).

July 27. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted to enforce the specific performance of a contract contained in two letters. The former was written by Mr. Chester, now deceased, formerly a servant of the company, containing the offer, and the latter the acceptance by the Plaintiff of that offer. The contract is complete as it stands, and the only question really in issue is,

whether Mr. Chester had any authority, as their agent, to bind the company? and secondly, whether, if he had not, the company have since ratified and confirmed it; and have so acted, after it had come to their knowledge that Mr. Chester had assumed and [191] taken upon himself so to act, as to adopt him as their agent?

Nobody can read those letters without seeing that Mr. Chester assumed to act on behalf of the company as their agent, that he thought that he was entitled and authorized so to do, and that he had authority to enter into this contract. In the same month of November 1859 the Plaintiff's machinery and plant were transferred from the first plot to the second by various officers of the company, and possession was, in fact, given to the Plaintiff. In the same month Mr. Thomas Bell, the resident engineer of the company, in accordance with the terms of the contract, which I have read, laid down the rails from the main line of the company. Though the company in its corporate character could see nothing, nor be bound by any acquiescence, except under its corporate seal, still every member of the company, who attended to the affairs and business of the company, and every officer and servant of the company, saw all this going on. At the same time, the correspondence is entered in the books of the company and is duly indexed, and copies of the letters are kept in the private office of Mr. Chester belonging to the company, and, judging from the account I have received of the contents of the book, it seems to contain various other matters of a similar character, and to have been a book solely referring to the affairs and business of the company. During all this time, neither the company in its corporate character, nor any one of the directors in his individual character, does anything to lead the Plaintiff to suppose that they did not consider the contract binding on them; the utmost which they allege they did was, to administer a private rebuke to Mr. Chester and to inform him that he had no authority to enter into this contract. If they did not consider themselves bound, and if they meant to repudiate the [192] contract, the course which they ought to have adopted was perfectly clear; they should have caused a letter to be written to the Plaintiff by the secretary in the name of the company, informing him that they repudiated the contract, and that Mr. Chester had no authority to enter into it. But although negotiations were going on between the company and the Plaintiff to induce him to take another piece of land, it was not until August 1860 that any written notice was given to the Plaintiff that the contract was repudiated by the company; and the Plaintiff swears, positively, in contradiction to an assertion on the part of the Defendants, that this was the first notice he ever received, verbal or written, that the company did not consider themselves bound by this contract. This is clear, that Mr. Chester assumed to act as having full power to contract for the sale of the land of the company, and to bind them by such contract. He was also, as it appears by the evidence, so regarded by strangers. He acted so on several occasions, and the evidence given in Court by Mr. Aird, and the documents proved by him, establish that in some cases agreements signed in blank by the managing directors were left in Mr. Chester's hands, and were filled up, either by Mr. Chester himself or under his directions; and Mr. Aird also proves that he made the plan under the contract with the Plaintiff by the direction of Mr. Chester, and with the knowledge of at least one of the managing directors, and, as he believes, with the knowledge of the other.

The evidence which he gave in Court is this:—"Mr. Chester was in the habit of letting the land as the agent of the company; he was in the habit of dealing with parties with respect to the sale and purchase of land as the agent of the company. I know that that has occurred." Then he mentions several agreements [193] which were filled up in blank, and that he filled them up according to the instructions he received. He says, "I made that plan of the land, included in the contract made by Mr. Chester, according to the instructions I received. Some of the directors knew that I was doing this for Mr. Chester. Mr. Robinson Watson, and I think Mr. Jackson, the chairman, knew it."

Upon this, the company set up this defence:—That they are not bound, because the contract is not under the seal of the company, and because Mr. Chester was not appointed their agent by any instrument under seal. If the company are not to be bound by such a transaction as this, it is obvious that no one could safely have any dealings with the company, except by instruments under its corporate seal; and even

then, the company might afterwards allege that the officer who affixed the seal had no authority to do so, and that it was simply an unofficial act. I am of opinion that whenever a company, through their directors, hold a person of this kind out to the world as their agent for a particular purpose, and ratify his conduct as such (and so far as the evidence is before me they have not disputed his authority in any other case but this), they cannot afterwards dispute acts done by him within the scope of such countenanced agency. Here Mr. Chester acted apparently as the agent of the company to let and sell their lands. The directors knew it; they furnished him in some instances with forms of leases signed in blank, which he was to fill up; and in other cases they executed deeds conveying lands, of which Mr. Chester alone settled the terms and covenants. This appears to have been publicly known in the neighbourhood, and until this occasion, seems never to have been disputed in any way by the company. Mr. Chester then enters into this contract with the Plaintiff. It clearly binds [194] the Plaintiff, who could not dispute the agency of Mr. Chester, or resist a suit for a specific performance by the company. The two managing directors see this going on and take no steps to prevent it; they enter into negotiations with the Plaintiff for an exchange of this plot of land for another, which end in nothing, thereupon the company say, "Mr. Chester is not our recognized agent, and we are not bound."

In my opinion, it is not open to them, in this state of circumstances, to make any such defence. This case appears to me to come exactly within the case of *The London and Birmingham Railway Company v. Winter* (Craig & Phillips, 57); the only difference I can perceive between the two cases being that, in that case, the railway company were the purchasers instead of the sellers. There they entered into possession, here they put the Plaintiff into possession. In both cases they made works on the lands; in that case by reason of their ownership; in this case in pursuance of the terms of the contract.

If this company can be allowed to say, in its corporate character, that Mr. Thomas Bell, the engineer, had no proper authority to make the railway; that Mr. Aird their surveyor had no proper authority to make the survey or the plan; that the servants of the company, who conveyed hundreds of tons of the Plaintiff's machinery to the land and deposited it on it, had no authority to give him possession of the land, and did not so act under any authorized direction or orders of the directors, it is obvious that no such acts can ever bind the company towards a stranger. A stranger can never prove the authority of the company in such matters; he only acts with the persons who are known to be the [195] officers and servants of the company, as every other person has done. But the decision I have already referred to shews that this Court cannot allow a company to play fast and loose in such a case, and when they like the contract, bind the stranger dealing with them, but when their views or interests are altered in respect of it, to retire from it and inform the stranger that they are not bound by the act of their servants, and that the burden of proof of the agency lies on him (the Plaintiff). It is sufficient that they have so acted as to disentitle them to raise this defence, which, in my opinion, they have done in the case before me, and the consequence is, that a decree must be made for specific performance against them with costs of the suit.

NOTE.—Upon appeal, Lord Justice Knight Bruce thought that there were provisions in the agreement which were not then susceptible of specific performance, but the Lord Justice Turner held, that although the manager had not authority to enter into the contract for the company, still that there had been such a sufficient part performance and ratification by the company as to entitle the Plaintiff to its specific performance. The decree was therefore affirmed (10th January 1865). An appeal to the House of Lords is pending.

[196] EATON v. BENNETT. Jan. 17, 1865.

A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage he knew its contents and executed it under protest, and reserving his right to set it aside. Held, that he could not, after the marriage, sustain a suit to rectify the settlement.

A husband, by his bill, alleged that his wife, under the advice and assistance of the two trustees of the settlement, secreted and withheld moneys of the wife which ought to be paid over to him, the husband. The bill sought to recover those moneys. The trustees, who were made Defendants, demurred, and their demurrer was allowed.

This case came on upon a general demurrer to the bill.

In 1864 the Plaintiff Mr. Eaton married Mrs. Ruth Thomas, on which occasion a marriage settlement was executed, dated the 11th of February 1864. The Plaintiff, Mr. Eaton, by his bill alleged that, prior to the marriage, terms were agreed upon between him and his intended wife for the settlement of her property. That Mr. Bennett the brother of Mrs. Thomas, was adverse to the marriage, but, "not having succeeded in putting a stop to it, he determined to adopt means for depriving the Plaintiff of the life interest he was to take in the property agreed to be settled, and also for depriving the Plaintiff's wife of the power of disposition by will, which she was to have over the said property during her coverture, and for securing the greater part of the same for the benefit of his own children absolutely, in the event of Plaintiff surviving Ruth Thomas.

The brother induced her to employ his own solicitor (Mr. Onions) to prepare the settlement, instead of her own.

The bill then proceeded to state as follows:—"The Plaintiff, under the confident expectation that the terms of the intended marriage settlement were definitely fixed on, and that a settlement was being prepared by Mr. Onions in accordance therewith, continued to make [197] arrangements for the solemnization of the said marriage. A few days before the day fixed for the celebration of the marriage, Plaintiff received from Mr. Onions a draft of a settlement, being in fact the draft of the settlement hereinafter stated. The draft settlement was greatly at variance and inconsistent with the terms agreed on between Plaintiff and Ruth Thomas, and had been purposely prepared by Mr. Onions in such manner as to carry out the scheme, which the said Defendant had formed, of depriving and defrauding Plaintiff of the property rights, and to abridge and take away from Ruth Thomas the control of the ownership during the Plaintiff's life, and to secure the greater part of the same absolutely to his own children, in the event of Ruth Thomas dying in the Plaintiff's lifetime."

"The Plaintiff was exceedingly surprised at the contents of the said settlement, and at once perceived that a fraud had been practised on him. The Plaintiff had implicitly relied on the terms of settlement agreed on between him and Ruth Thomas being fairly and faithfully carried out, and under that impression, he had, not only continued to make and complete all arrangements for the said marriage, but had ordered his affairs in general in such a manner, that the postponement of the marriage would have occasioned him great loss and injury. Under these circumstances, and as he was also informed by the said Ruth Thomas, that the delay which had taken place in the celebration of the said marriage was seriously affecting her health, no other course seemed open to Plaintiff than to execute the said settlement, and he consequently agreed to execute the same, but before doing so, the Plaintiff distinctly informed Ruth Thomas, that the said settlement was contrary to the said marriage contract, and that he would apply to this Court to have the same rectified; and the said settlement was executed, [198] as well by Ruth Thomas as by Plaintiff, and the said marriage was solemnized between them, on the full understanding that Plaintiff would, after the marriage, take proceedings for that purpose."

Although Plaintiff saw, from the first, that it would be impracticable to get the said settlement properly altered, and that there was really no choice left for him, but either to submit to all the inconvenience and loss of breaking off the said

marriage contract, or to execute the said settlement as it stood, the Plaintiff, nevertheless, on the 6th February 1864, wrote and sent to Ruth Thomas a letter in the words and figures following, that is to say:—

“6th February 1864.—My dear Mrs. Thomas,—As I told you in my letter of yesterday, I have approved draft settlement and returned same to Messrs. Warren & Onions, although, as framed, it is quite at variance and inconsistent with the terms agreed upon between us. However, for peace’s sake only, at the present moment, and particularly as you say, in your letter of the 3d instant, that the business is not only becoming tiresome, but injurious to your health, I shall sign the same; but *I shall do so, on the understanding that it is strictly without prejudice to my equitable and legal rights and remedies* to apply to set the deed aside, if so advised at any future time, which is, in its present form, not only unjust and unreasonable, but at variance with your declared intention (both verbal and written) of settling certain property for our lives, viz., to your own separate use for life, and in case of my surviving you, then to me for life, and at my death the same to go as you might direct by will. I cannot believe that you are fully acquainted or understand the purport or effect of this deed. However, you have now an opportunity of having the same put right, and the same must [199] be altered by introducing a recital to the effect that you have paid the money standing in the Newcastle Bank over to me as agreed, and which you stated to be £1000. If you do not do so before signing the deed, it will be absolutely necessary and imperative upon me that I should afterwards apply to the Court of Chancery thereon, and which would be attended with considerable expense and unpleasantness to all parties. I, therefore, trust that you will at once see the necessity of seeing Mr. Onions, and instructing him accordingly, and I hope to hear from you in a day or two, informing me that you have done so, and saying which day I may expect your arrival in town.”

“Ruth Thomas, in pursuance of the suggestion contained in the last-stated letter, went to see Mr. Onions, taking the said letter with her, and she did see him and also Bennett, and shewed them the said letter, and spoke to them about altering the said settlement, but they both objected to have any alteration made in the said settlement, and no alteration was made therein.”

The settlement was accordingly executed by all parties in the terms of the draft, and Bennett and Onions were the trustees. The marriage was shortly afterwards solemnized.

The bill specified various particulars, in which the settlement was at variance with the terms of the agreement, such as, that it deprived the Plaintiff of a life interest, deprived his wife of the power of disposition, and gave interests to the brother’s children.

Another subject of complaint was, that the Plaintiff had received only £800, part of £1000 agreed to be paid to him on his marriage. As to this, the bill contained the following statement:—“Contrary to the agreement with Plaintiff, Ruth Thomas, on her marriage with Plaintiff, caused the sum £800 only (part of the said sum of £1000) to be paid to Plaintiff; but she has ever since the said marriage, with the advice and assistance of the Defendants John Bennett and John Henry Onions, *secreted and withheld from Plaintiff* the sum of £200, residue of the said sum of £1000.” And the Plaintiff charged, “that Bennett, Onions and Ruth Eaton ought to be compelled to discover everything in their power in relation to this sum £200, and what has become of the same.”

The bill prayed a rectification of the settlement in the matters complained of, and an inquiry as to what had become of the sum of £200, residue of the said sum of £1000, immediately before Plaintiff’s marriage standing in the Newcastle Bank to the credit of Ruth Thomas, and that it might be declared that the Plaintiff was entitled to the same for his own benefit.

To this bill Bennett and Onions demurred for want of equity.

Mr. Schomberg and Mr. Bevir, in support of the demurrer.

Mr. Selwyn and Mr. Swinburne, in support of the bill.

THE MASTER OF THE ROLLS [Sir John Romilly]. This demurrer must be allowed. The case made by the bill is a very singular one. The Plaintiff complains that, under the pressure of circumstances, he was compelled to marry a lady without

obtaining a sufficient portion of her property. But he admits that he was aware of the terms of the settlement; that he read the [201] draft and executed the settlement itself with his eyes open, and that he afterwards contracted the marriage. It is true that he gave distinct notice that he would apply to this Court to get it rectified; but he executed it and received the marriage consideration. If, upon varying the terms of this settlement, I could put the parties in the same situation as they were before the marriage, something might be made of the point of fraud; but that is impossible. Again, the Court in such cases as these only rectifies a settlement when both parties have executed it under a mistake, and have done what they neither of them intended. Here the Plaintiff examined the draft and the settlement prior to its execution, and was perfectly aware of its purport. I think that he cannot set it aside or alter it in this Court.

Upon the other part of the case, I at first thought that the Plaintiff might have some equity, if the fact had been that part of the wife's property, which, according to the settlement, belonged to the husband, were in the possession of and kept back by the trustees. Considering the relation of trustee and *cestui que trust*, I thought the Plaintiff might have had a right to come to this Court to recover the property. But, on looking at the bill, I find that the allegation is that the wife has secreted and withheld the £200, with the advice and assistance of Bennett and Onions. If they themselves were doing so by her desire, the Plaintiff might be entitled to make them Defendants, on the ground of their keeping back part of the trust property. But he cannot make persons, who merely instigate and advise another to keep back the money, parties to a bill, or compel them to answer.

The case fails in every respect, and the demurrer must be allowed.

[202] BRAITHWAITE v. KEARNS. Jan. 18, 1865.

Liberty given to read the affidavit of a witness, who had been prevented, by illness, from being cross-examined, but the Court intimated that little attention would be paid to such an affidavit.

An aged person had made an affidavit in the cause, and the opposite party had served the usual notice requiring him to be produced for cross-examination. He was unable and incapable by reason of paralysis to attend and be cross-examined.

Mr. Baggallay proposed to read the affidavit.

Mr. Southgate objected that "it could not be read as evidence, unless by the special leave of the Court;" 19th General Order of 5th February 1861.(1)

THE MASTER OF THE ROLLS [Sir John Romilly]. I must allow it to be read, and must judge of it. But I pay little attention to the affidavit of a person who has not, when required, submitted to a cross-examination.

[203] GALLOWAY v. THE CORPORATION OF LONDON. Jan. 19, Feb. 13, 1865.

[S. C. on appeal, 2 De G. J. & S. 639; 46 E. R. 523; and in House of Lords, L. R. 1 H. L. 34. See cases cited in note to S. C., 2 De G. J. & S. 213; 46 E. R. 356.]

In July 1862 the Corporation of London obtained Parliamentary powers for taking the Plaintiff's land for public purposes. But, prior thereto (June 1862) the Corporation had contracted to sell these lands to another company, not then empowered to purchase them. The Court held that the Corporation had so fettered their judgment and discretion, by contracting to sell that which they had no power to purchase, and that, to a company not then authorized to buy them,

(1) 30 Beav. 656, and see *Wightman v. Wheelton*, 23 Beav. 397; *Abadom v. Abadom*, 24 Beav. 243; *Morley v. Morley*, 5 De G. M. & G. 610.

that the Plaintiff was entitled to an injunction to restrain the Corporation from taking more of his land than they *bonâ fide* required. After this, another Act passed in 1864, which, after referring to the contract of 1862, provided that that Act should not prejudice the right of the company under that agreement, but that the covenants thereof should be as applicable to the said land, if purchased under the powers of this Act, as they would have been, if they had been purchased under the Act of 1862. Held, by the Master of the Rolls, that the last Act removed the objection to the agreement, and amounted to a declaratory enactment as to its validity, and that, consequently, the Plaintiff was not entitled to an injunction. The decision was affirmed, Lord Justice Turner *dissentiente*.

The only facts which are necessary to be mentioned to explain the matter in contest are as follows:—

On the 13th of August 1860 "The Metropolitan Meat and Poultry Act, 1860," passed (23 & 24 Vict. c. exciii.) for authorizing the Corporation of London to establish a new market at Smithfield, and for other purposes connected therewith.

Afterwards, on the 29th of July 1862, another Act, "The Metropolitan Meat and Poultry Market (Western Approach) Act, 1862," was passed (25 & 26 Vict. c. clxxiv.) to improve the western approach to this market. By this Act the Corporation was empowered to take the land of the Plaintiff for this purpose, and the powers of "The London City Improvement Act (1847)" (10 & 11 Vict. c. cclxxx. (The Model Act)) were extended to this Act.

On the 26th June 1862, and prior to the passing of this Act, the Corporation entered into a contract, by which the Corporation agreed to sell the Plaintiff's lands to the Metropolitan Railway Company, who, at that time, had no Parliamentary power to purchase it, for [204] £70,000. In May 1863 the Corporation served the Plaintiff with the usual notice to treat, and in January 1864, during the negotiations which took place as to the value of the Plaintiff's lands, the Plaintiff became acquainted with the fact of the agreement of 26th June 1862 having been entered into between the Corporation and the Metropolitan Railway Company. The Plaintiff thereupon, on the 8th February 1864, filed his first bill (*Galloway v. The Corporation of London*) relating to this subject, asking for an injunction to restrain the Corporation from taking his land, or only so much as was *bonâ fide* required for the purpose of the Act. On the 19th of February Vice-Chancellor Wood refused the injunction (10 Jurist, 552); but on appeal to the Lords Justices, they, on the 29th of April 1864, were of opinion that the Corporation of London, having contracted to sell the Plaintiff's land before they had the power to purchase it, and that, to a company not then authorized by Parliament to buy it, had so fettered their judgment and discretion, as to the quantity of land required by them for the purposes authorized by their Act, as to entitle the Plaintiff to an injunction until the hearing, to prevent the Corporation taking more of the Plaintiff's lands than they *bonâ fide* required. (10 Jurist, 552, and 10 Law T. 439; see the reason as stated more fully by the Master of the Rolls, *post*, 208.) Their Lordships, thereupon, granted an injunction until the hearing of the cause, restraining the Defendants from taking any proceedings for purchasing or taking any of the Plaintiff's property, until the portion thereof which they *bonâ fide* required for the purposes of the Act should have been ascertained.

The cause was heard in July 1864, when Vice-Chancellor Wood, in obedience to the view entertained by the Lords Justices, made the injunction perpetual.

[205] In the meantime, and on the 23d of June 1864, another Act, called "The Holborn Valley Improvement Act, 1864," was passed (27 & 28 Vict. c. lxi.) to authorize the Corporation of London to form a viaduct over the Holborn Valley, and to make new streets and improvements connected therewith. In this Act a clause was introduced (37), which the Defendants alleged was inserted with a view to provide for this case. The clause was as follows:—

"37. And whereas certain lands may be taken under the powers of this Act, which were delineated on the plans, and were described in the books of reference mentioned in the 4th section of 'The Metropolitan Meat and Poultry Market (Western Approach) Act, 1862,' and in respect of which lands an agreement was,

under the authority of that Act and the Metropolitan Railway Act, entered into between the said mayor, commonalty and citizens and the Metropolitan Railway Company; and it is expedient that the rights of the company under such agreement should be preserved: *Therefore, nothing in this Act contained shall prejudice or affect the rights of that company under the said agreement*, but all the covenants and provisions thereof shall be as applicable to the same lands, if purchased under the powers of this Act, as they would have been if they had been purchased under the powers of the said Metropolitan Meat and Poultry Market (Western Approach) Act, 1862."

Accordingly, on the 30th July 1864, a notice to treat, under this Act, was given by the Corporation to the Plaintiff, for all his land, and thereupon the Plaintiff filed the bill in this cause, on the 14th October 1864, praying, in substance, for the same injunction as had been granted in the former suit.

A motion was now made for an injunction to restrain [206] the Defendants from issuing any precept or commencing or prosecuting any proceeding for valuing any part of the Plaintiff's property in the bill mentioned, and from prosecuting any other proceeding, under the powers of "The Holborn Valley Improvement Act, 1864," for the purpose of purchasing or taking any of the Plaintiff's said property, until the hearing of this cause or until the further order of this Court, or until the portion thereof (if any) which they should *bonâ fide* require to purchase or take for the purposes of the said Act should have been ascertained, and they should have given the Plaintiff a proper notice of their intention to take the same under the said Act, and a proper opportunity of coming to an agreement with them as to the purchase-money or compensation to be paid in respect thereof.

Mr. Rolt, Mr. Selwyn and Mr. Bagshawe, in support of the motion, contended that the Corporation had no power under any of the Acts to take land, except for the purpose of making the new street, and then so much only as was properly and in the exercise of a fair discretion required for this purpose.

Sir Hugh Cairns and Mr. Swanston, for the Defendants, contended that they had a discretion under the London City Improvement Act of 1847 (10 & 11 Vict. c. cclxxx.), incorporated with the Holborn Valley Improvement Act (27 & 28 Vict. c. lxi.), and that they were, under the powers of that Act, entitled, at their discretion, to take all or any part of the land which was included in the schedule to the Act, and to resell such land or any portion as they might think fit, in order to pay for the expense of the improvement; and that even if this were not so, still that, under the 37th section of the Holborn Improvement Act, this express agreement between the Corporation and the Metropolitan [207] Railway Company had been sanctioned and made valid.

Mr. Rolt, in reply.

See *Webb v. The Manchester, &c., Railway Company* (4 Myl. & Cr. 116); *Stockton, &c., Railway Company v. Brown* (9 H. of L. Cas. 246); *Eversfield v. The Mid-Sussex Railway Company* (1 Giff. 153, and 3 De G. & J. 286); *Dodd v. The Salisbury, &c., Railway Company* (1 Giff. 158); *Flower v. The London, Brighton, &c., Railway Company* (2 Drew. & Smale, 330); *Cotter v. The Midland Railway Company* (2 Phill. 469); *Bentinck v. The Norfolk Estuary Company* (8 De G. M. & G. 714).

Feb. 13. THE MASTER OF THE ROLLS [Sir John Romilly]. This is an application for an injunction to restrain the Corporation of London from taking any part of the Plaintiff's property mentioned in the bill, or from taking any part of it, except so much of it as they shall *bonâ fide* require for the purposes of the Holborn Valley Improvement Act of 1864.

The motion was argued before me on the 19th of January last, and I have now to dispose of it. The question turns upon the proper construction of the Act in question, having regard to the situation and position of the parties themselves. I have carefully read and considered the pleadings and evidence in the cause disposed of by the decree of the Vice-Chancellor in July 1864, and also the various Acts of Parliament which bear on the subject passed previously to the filing of the bill in [208] that cause, and also the judgment of the Lords Justices, for the purpose of considering how far the decision then pronounced governs the question which I have to consider on the present occasion. What I understand to have been decided in that

case is, first, that the notice to treat, given to the Plaintiff in May 1863, was properly given, and would, if it stood alone, have authorized the Corporation to take the whole of the Plaintiff's land. That they were sole judges, in their discretion, whether the same was wanted for the purposes of the Act, that Act being for the purpose of making the new street from the proposed new market to Victoria Street, which involved two distinct matters, one to construct the street, and the other to obtain sufficient funds for that purpose, which funds were to be obtained in part by the purchase and resale of lands included within the schedule of that Act.

Secondly, that the agreement entered into by the Defendants with the Metropolitan Railway Company was invalid, for three causes, or for three reasons:—First, because, at the time that it was entered into the Metropolitan Railway had no power to purchase lands, though they had afterwards a power to do so by an Act which passed the Legislature and received the Royal assent a few weeks subsequently to the agreement. Secondly, because it could not be considered, that when Parliament gave the Corporation power to sell superfluous lands, the Legislature meant to give the power to sell to incapacitated persons, and the Metropolitan Railway had not in June 1862 any power to buy lands. And, thirdly, because the agreement having been entered into by the Corporation, conditionally and before the Act passed which authorized them to enter into any such agreement, they had, before the time arose when they were called upon to exercise their judgment as to [209] whether such lands were wanted or not for the purposes of the Act, fettered themselves by this agreement, so as to make it incumbent on them to take the lands and resell them, though, after the passing of the Act, they might, in the reasonable exercise of their discretion, have come to another and different conclusion. That, in fact, the meaning of the Act was, that the Legislature intrusted the Defendants with powers, to be exercised according to the *bonâ fide* judgment and discretion, but not influenced or fettered by any Acts or proceedings which had been done or adopted by the Defendants previously to the time when such discretion was vested in them.

This is, in substance, what I consider to have been decided in the former suit, and the only question I have now to consider is, how this decision, by which I am bound, is affected by the statute which was subsequently passed in the year 1864, called "The Holborn Valley Improvement Act" (27 & 28 Vict. c. lxi.).

The first thing that I have to observe is, that this Act, the object of which is to make the improvements there specified and which are there set out in the second section of the Act, gives for, that object, by means of the incorporation of the City Improvement Act of 1847 (10 & 11 Vict. c. cclxxx.), not merely the power to make the improvements in question, but also the power of taking and reselling lands, not absolutely required for the purposes of the street and viaduct therein mentioned, but for the purposes of raising money to defray part of the expenses required for that purpose, in like manner as if the schedule to the Act had comprised lands which could by no possibility fall within the line of any improve-[210]-ments contemplated by the Act itself, and which, therefore, could only have been inserted for the purpose of raising the funds requisite for the other purpose of the Act. That this is the effect of the City Improvement Act is expressly laid down by the Vice-Chancellor Wood, and is not, as I understand their judgments, in any respect questioned by either of the Lords Justices; and, upon carefully considering the Act in question in conjunction with the Holborn Valley Act, I entertain no doubt or question that the lands of the Plaintiff are included in the schedule to that Act. Accordingly, I am of opinion that the Defendants have that power as regards the lands included in the schedule to the Holborn Valley Improvement Act. The lands of the Plaintiff are included in the schedule to that Act, and, accordingly, if the matter stood here alone, unfettered by any previous transaction, it would, in my opinion, be plain that the Defendants might take the whole of the Plaintiff's lands, if they thought fit so to do, and to resell them, though no portion of such lands was actually required for the purpose of the improvement contemplated by the Act. If then I add to this state of things the agreement previously entered into by the City Corporation with the Metropolitan Railway Company, *simpliciter*, and omit the 37th section from this Act, the case then would be the same, or nearly so, as the question decided by the Lords Justices in April 1864. But I must take the Act as it stands, and the Legislature

having had before them, in 1864, the fact of this agreement having been entered into, has thought fit to introduce a clause which is in the words following:—"And whereas," &c. [see the clause set out, *ante*, p. 205.]

Now these lands include the lands of the Plaintiff, and, consequently, this section expressly applies to the [211] lands in question in this cause. The section goes on "and in respect of which lands an agreement was, under the authority of that Act and the Metropolitan Railway Act, entered into between the said mayor, &c., and the Metropolitan Railway Company." This, therefore, expressly points to the agreement of the 26th of June 1862. The clause proceeds, "and it is expedient that the rights of the company under such agreement should be preserved: therefore, nothing in this Act contained shall prejudice or affect the rights of that company under the said agreement."

I am of opinion that the effect of this is that the Legislature has pronounced an opinion, equivalent to a declaratory enactment, determining that the agreement is a valid agreement, conferring rights on the Metropolitan Railway Company prior to the passing of this Act. And to make this still more clear, the clause goes on thus, "but all the covenants and provisions thereof shall be as applicable to the said lands, if purchased under the powers of this Act, as they would have been if they had been purchased under the powers of the said Metropolitan Meat and Poultry Market (Western Approach) Act, 1862."

Now the Lords Justices determined that the lands in question were not purchased, and, under the circumstances of the case, could not be purchased, under the powers of the Act of 1862, or, at least, that no greater part of them could be so purchased than would be actually required for making the new street. With the knowledge of this before them, the Legislature gives powers to purchase these lands under the power of the Act I am commenting upon, viz., the Act of 1862. How is it possible for any Court to say that these powers shall not be exercised, and that, notwithstanding what the Legis-[212]-lature has declared, the Defendants shall not have the powers which the Act confers upon them. The discretion vested in the Corporation is subject to no control; this I understand to be the opinion of the Lords Justices, it is undoubtedly the opinion of Vice-Chancellor Wood, and it is undoubtedly my opinion. The Corporation have exercised their judgment on this subject since the passing of this Act, and have given notice accordingly. If this clause were struck out of the Act, the effect would simply be, that the Corporation might take the lands in their entirety and sell them afterwards to whomsoever they pleased. But the object and plainly expressed meaning of this clause is this:—"If you, the Corporation, think it necessary to take these lands under this Act of 1864, which we give you power to do, and of which necessity you are the sole judges, then and in that case, we bind you to abide by the agreement entered into with the Metropolitan Railway Company in June 1862, and that company are to have the benefit of this agreement, if they choose to do so."

There can be no doubt, therefore, that this Act removes the foundation of the decision adverse to the Defendants, for assuming it to be correct, that by the Act of 1862, the Legislature did not intend that the Corporation of the City of London should have vested in them these important powers, in order that they might exercise them after they had fettered their judgment by an agreement with third parties, still, in the Act of 1864, the Legislature, being aware that the city had so fettered their judgment by this agreement with third parties, expressly renews the powers entrusted to them of taking the land, and not only does this, but it also positively enacts that the Metropolitan Railway Company shall have the right to enforce that agreement if the lands are taken. So that the Legislature, having before it the judgment of [213] the Lords Justices, has given to the Corporation the unlimited powers to take these lands, although the Corporation had their discretion fettered by their prior agreement with the Metropolitan Railway Company, and besides this, bearing in mind the objection of Lord Justice Turner, which I have also noticed, that, at the time of the agreement, the Metropolitan Railway Company had no power to take lands, have removed this very objection, viz., the inability of the Metropolitan Railway Company to purchase lands in the month of June 1862, when the agreement was entered into.

That the Courts of law can go a great way in defeating Acts of Parliament by

nice distinction and subtle refinements is shewn by many long series of decisions in this Court, but, if I were to comply with the application of the Plaintiff, I should be going much further than any Court has yet gone and I believe ever will go, and expressly overrule what appears to be a plain distinct enactment of the Legislature. I cannot also but think that the Legislature, by this enactment, has relieved this Court from a very great, possibly an insuperable, difficulty. The Lords Justices thought the injunction ought to run in these terms, "until the portion thereof which they *bonâ fide* require to purchase and take for the purposes of the said Act shall have been ascertained." How is this Court to determine what "portion of the lands is *bonâ fide* required for the purposes of the Act?" Assume that all the members of the corporation who can exercise any voice in this matter declare that they *bonâ fide* require the whole land, can this Court say, you only require so much as is required for the width of the street, and you cannot *bonâ fide* require one foot beyond this. If the Court were so to hold, it would stop the whole improvement, for, without the requisite funds, no street could be made, as the [214] same principle must apply to all the other portions of land which they take from the owners, and the supplemental purpose of the Act, which supplies the corporation with funds, must be entirely rejected. But if the Court says that they are entitled to go beyond the mere width of the street required, where are they to stop? Can this Court go into the question of the expense incurred, the sums required and the propriety of money spent, and say, "If you had managed this economically you need not have taken this piece of land or that?" It is obvious that unless the Court took upon itself the whole management of the whole affair, it would be entangled in inextricable difficulties at every step.

It is one of the advantages of the new system adopted in Chancery that the Judges who pronounce the decree have also, what they never had before, an intimate knowledge and experience of the mode of working them, and are accordingly frequently obliged to frame a decree in such a form as will, though not in exact accordance with universal precedents, enable the parties to come to a satisfactory and not very long deferred conclusion, the want of which has frequently driven parties to a compromise, when the decree has been in a form which has been found practically impossible to work out within any reasonable time or at any reasonable expense; but I doubt whether the Court, under a decree, when the *bonâ fides* of the exercise of a discretionary power, by persons who have no personal interest in the matter, is to be made the subject of discussion and measured by evidence, would easily arrive at a conclusion satisfactory to itself or to the parties concerned in it.

I am, therefore, of opinion that the Legislature has wisely interposed to remove this question from the con-[215]-sideration of the Courts of Equity, and that this injunction must be refused, and that the costs of the motion must be costs in the cause.

NOTE.—Affirmed 9th May 1865, by the Lords Justices, *dissentiente* Lord Justice Turner. An appeal to the House of Lords is pending.

[215] HOPKINSON v. LUSK. Jan. 14, 15, 16, 1865.

[S. C. 10 L. T. 122; 10 Jur. (N. S.) 288; 12 W. R. 392. See *Howard v. Earl of Shrewsbury*, 1874, L. R. 17 Eq. 391; *Crompton v. Jarratt*, 1885, 30 Ch. D. 309; *In re Earl of Durham*, 1887, 57 L. T. 165.]

Leaseholds which were not specified in a deed, held not to pass by the general words, all other "property and effects."

By a deed executed by a trustee of a banking company on his retiring, he assigned three specified policies held for securing debts due to the bank and the debts themselves. He also assigned leaseholds X., mortgaged to him for securing a debt due to the bank, "and all other moneys, securities, property and effects" vested in him and four others as trustees for the company. Held, that leaseholds Y., belonging to bank absolutely and vested in the retiring trustee and the same other

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four trustees, but which were not referred to in the deed, did not pass under the above general words.

The question which arose on this special case was, whether some leaseholds in Lothbury passed under the general words of a deed of assignment. The question arose under the following circumstances:—

Mr. Oxenford was, in 1840, appointed one of the trustees of the Commercial Bank of London. In 1855 he became embarrassed in his circumstances and went to reside abroad. The bank became desirous of removing him from his trusteeship and of having their property which was vested in him transferred to new trustees, and accordingly, in 1860, a deed was executed for the purpose.

This deed, dated the 20th of December 1860, was executed by Oxenford. It recited two life policies in the Equitable and the Metropolitan, which were vested solely in Oxenford in trust for securing moneys due to the company. It next recited a life policy in the Palladium, vested in Oxenford and Hopkinson in trust for the bank absolutely, but which the bank had effected to secure moneys due to them from the Earl of Mountcashel. It then recited that certain leasehold property at Notting [216] Hill was vested in Oxenford and four other trustees (naming them) in trust for securing moneys due to the bank from a Mr. Ramsay. It then recited that Oxenford was desirous of retiring from the office of trustee, and that the directors had accepted his resignation, "and had requested him to transfer *the trust property* vested in him in the manner hereinafter contained."

By the first witnessing part Oxenford assigned the moneys due from the first two mortgages and the securities for the same, and "particularly" the first two policies and the moneys secured thereby, to the new trustees, "and all other moneys, securities, *property and effects* now vested solely in the said Edward Oxenford as trustee for the said banking company," to hold upon the existing trusts.

By the second witnessing part Oxenford assigned to the new trustees the debt due from the Earl of Mountcashel and all securities for the same, and the third policy "*and all other moneys, securities, property and effects* now vested jointly in Oxenford and Hopkinson" as trustees for the banking company.

By the third witnessing part Oxenford assigned to the new trustees the mortgage debt due from Ramsay and the securities for the same, "and particularly" the leaseholds at Notting Hill, "and all other moneys, securities, *property and effects* now vested jointly in" Oxenford and the four other trustees (naming them), "as trustees for the said banking company, or on which they have any lien, and all the estate and interest" of Oxenford therein: to hold to the new trustees upon the same trusts as they were then held.

This deed contained no reference to the Lothbury [217] property, in which the bank carried on its business, and which was vested in Oxenford and the same four other trustees in trust for the company absolutely. The bank having contracted to sell this property for £22,000, the purchasers required the concurrence of Oxenford in the conveyance, on the ground that this property did not pass by the deed of 1860. A special case was submitted to the Court on this single point.

Mr. Hobhouse and Mr. Jackson, for the Plaintiff, the public officer of the bank. The Lothbury property passed under the general words contained in the third witnessing part of the deed. The object of the bank, as appears from the recital, was to get the whole of the trust estate transferred, and the object of Oxenford was to retire and divest himself of all interest in the property of the bank which was then vested in him. The deed was not limited to securities held for the bank, because the third policy belonged to the bank absolutely.

The general words "and all other," &c., "property and effects," are sufficient to pass these leaseholds; they were *ejusdem generis*, and were vested in Oxenford and the four trustees named. The grant is to be construed most strictly against the grantor; and this, being the case of a bare trustee and not a conveyance for value, is to be construed less strictly in regard to the property passing under it.

Mr. Baggallay and Mr. Rendall, for the purchasers. This Lothbury property did not pass by this deed; it was either overlooked, or, being the absolute property of the bank, it was intended to transfer it by a separate deed, according to the usual

practice of conveyancers. It is impossible to believe that the parties intended that [218] this (the most important part of their property), which was of the value of £22,000, should pass by a deed which made no reference whatever to it, under these vague and general words, "and all other, &c., property," &c.

It is evident, from the recitals and the frame of the deed, that the intention was to deal merely with the securities belonging to the bank. The general words must therefore be construed with reference to that intention, and be held insufficient to pass this property.

Mr. Hobhouse, in reply.

Moore v. Magrath (Cowp. 9); *Rooke v. Lord Kensington* (2 Kay & J. 753), and *Walsh v. Trevanion* (15 Q. B. Rep. 733), were cited.

Jan. 16. THE MASTER OF THE ROLLS [Sir John Romilly]. The Lothbury property cannot, I think, be held to pass by this deed. The scope and object of it were obviously to convey to new trustees all the securities for debts due to the bank, which were then vested in Oxenford.

The general recital of the request made by the bank to Oxenford "to transfer the trust property vested in him," though including all the property, must have reference to what goes before and must mean all the trust property vested in him for securing debts due to the banking company.

[219] The property is assigned by three witnessing parts, the first and second only relate to securities for money, and I could not include leaseholds under the general words, in a case where the securities intended are carefully designated.

The third witnessing part assigns leaseholds, which are expressly specified, and the general words, which, it is to be observed, do not contain the words "all other leaseholds," cannot, I think, apply to the Lothbury property.

My conviction is that a conveyancer would have prepared two deeds, keeping the title to the securities and these leaseholds distinct.

If a second deed were now produced conveying the Lothbury property, the same argument might be used, that they passed by the first deed. What the parties really intended is specified, and the deed is a well-drawn deed for effecting their purpose, and although general words are introduced, they have reference to the property previously specified.

Judging of the intention, as shewn by the recitals, the witnessing parts, the state of the property, and the mode of dealing with it, I am of opinion that the Lothbury leaseholds did not pass, and I must, therefore, answer the special case in the negative.

[220] LUFF v. LORD. Nov. 25, Dec. 2, 7, 1864.

[S. C. 11 L. T. 656; 10 Jur. (N. S.) 1248; affirmed, 11 L. T. 695; 11 Jur. (N. S.) 50. See *In re Biel's Estate*, 1873, L. R. 16 Eq. 580; *Plowright v. Lambert*, 1885, 52 L. T. 653.]

A trustee for sale cannot purchase the trust property, but an ordinary trustee may purchase the trust property from his *cestuis que trust*, though the burden of proving the propriety of the transaction lies on the trustee.

A legacy was bequeathed payable as soon as legal proceedings connected with the fund out of which it was to be paid should be terminated. Held, that this was neither a reversionary interest nor a contingent legacy.

In 1862 a trustee purchased from his *cestuis que trust*, for £450, a legacy of £2000, payable on the termination of a litigation, which had been pending many years. The litigation ended in 1863. The Court supported the sale, though the vendor was in distressed circumstances, on the following grounds:—The vendor well knew his position and employed his own solicitor, the proposals for the sale proceeded from the vendor, after unavailing attempts to sell elsewhere, the trustee was an unwilling purchaser, and the sale was only completed upon threats of the *cestui que trust* to file a bill for the specific performance, the assets, out of which the legacy was to be paid, were in litigation and doubt, so as to make the property unmarketable, and the legacy was subject to the right of the vendor's wife to a settlement and to her right by survivorship.

This suit was instituted by Mr. and Mrs. Luff to set aside the sale by them to the Defendant Mr. Lord of a legacy of £2000, made in 1862, in consideration of £450. This legacy had been bequeathed to Mrs. Luff by Mrs. Lord (the wife of the Defendant), and was payable out of the estate of Dr. Cochrane. It is, therefore, necessary to refer, first, to the position of that estate, and then to the circumstances connected with the bequest and sale.

Dr. Cochrane died in 1831, leaving his widow, Margaret, and two sons, Peter and John, him surviving. John died without issue in 1835 and under twenty-five, and Peter became entitled to his personal estate. Peter also died without issue, and under twenty-five, in 1836. Margaret, the widow of John (who afterwards married the Defendant Mr. Lord), became entitled to a portion of his estate, which consisted (if realized) of his interests in the estate of Dr. Cochrane, the right to which became the subject of a long and tedious litigation, which was of the following nature:—

After the death of Dr. Cochrane in 1831, and in consequence of the terms of his will and of the death of his [221] two sons under twenty-five, intestate and without issue, a large portion of Dr. Cochrane's property was undisposed of, and, in determining who were the persons entitled to take it, it became necessary to ascertain the domicile of Dr. Cochrane at his death. This involved a great number of suits, and occasioned an enormous amount of costs. The first suit was instituted in February 1833 for the administration of his estate, and various other bills of revivor and supplement and the like were filed in 1834. Then a bill was filed in February 1851 by the executors (*Colvin v. Lord*), raising a question of Scotch domicile. In July 1852 a bill of review was also filed (*Lord v. Colvin*) asserting a Scotch domicile, in which the Plaintiff claimed as the representative of Mrs. Cochrane, and another suit of *Moorhouse v. Colvin* was instituted in April 1856, which raised the question of a French domicile, this was instituted by the daughter of Dr. Cochrane, who claimed to be legitimate, but who had since been determined to be a natural daughter.

In June 1860 Vice-Chancellor Sir R. Kindersley decided (4 Drew. 366) that the domicile of Dr. Cochrane was Scotch, and that Mrs. Moorhouse was not his legitimate daughter.

Mr. and Mrs. Moorhouse appealed to the House of Lords from this decree, which, however, was affirmed with costs on the 19th of March 1863. (10 H. of L. Cas. 272.)

In the meantime, on the 19th of April 1861, and pending the appeal, Mr. Lord obtained an order for payment of £60,934 out of Court, £7000 of which was to be carried to an account in a creditors' suit of *Gruggen v. Cochrane*, and the balance, which was [222] £54,000, was to be carried to the account of the three estates; that is to say, the estate of Margaret Douglas the widow of Dr. Cochrane, the estate of John and the estate of Peter, the two sons of Dr. Cochrane. An order was then obtained to stay the payment of that sum pending the appeal to the House of Lords; and accordingly Mr. Lord was only allowed to take the sum of £20,000 out of Court, upon giving sufficient security to repay the money in case he should at any time be required to do so.

Next, as to the gift of the legacy: it appears that Margaret, the wife of John Cochrane, as already stated, married the Defendant Mr. Lord, and she died in 1844. By her will she appointed her property, specified in two schedules, to her husband in trust. The second schedule comprised the property of Dr. Cochrane, to which his son was entitled, which she disposed of as follows:—

"And further, with regard to the property comprised in the said second schedule, upon trust that, as soon as proceedings in law and equity shall be terminated and the same shall come into his possession, that he (Mr. Lord) shall pay," &c., to each of my brothers and sister Mary Fuller (meaning the Plaintiff Mrs. Luff) the sum of £2000. And she appointed Mr. Lord her executor.

In June 1862 Mr. and Mrs. Luff sold the legacy of £2000 for £450 to Mr. Lord, who, at this time, filled the following characters: he was trustee and executor of his wife's will, and he was the legal personal representative of the widow and of the two sons of Dr. Cochrane. The sale was carried into effect by a deed dated the 9th of June 1862, whereby Mr. and Mrs. Luff, in consideration of £450, assigned the legacy of £2000, [223] and all interest, if any. The deed provided that if within twenty years the contingency should happen, otherwise than by compromise, upon which the

£2000 should be payable; it should be referred to two actuaries to ascertain what further sum should be paid by the Defendant in addition to the £450.

The appeal to the House of Lords being dismissed on the 19th of March 1863 (10 H. of L. Cas. 272), this suit was instituted on the 26th of June 1863, to set aside the deed of the 9th of June 1862.

It appeared from the evidence that, although Mr. Luff was in needy, if not distressed, circumstances, and although the consideration, in the events which had happened, seemed small, still that the first application to purchase proceeded from Mr. Luff, who had previously attempted in vain to find a purchaser. It was shewn that Mr. Lord was an unwilling purchaser, and that he had reluctantly completed his purchase under the pressure of the threats of the Plaintiff's solicitor to file a bill for specific performance against him. No misrepresentation on the part of the Defendant was shewn, and the Plaintiff seemed to have perfectly well known his position, for he had attended to the legal proceedings for many years, and, in the matter of the purchase, he had employed his own solicitor to act for him. As to the real value of the legacy, it is to be observed that the matter remained in litigation and doubt until the final decision of the House of Lords, there was no evidence of undervalue, and the equity of Mrs. Luff to a settlement out of the fund was still undetermined.

The cause now came on for hearing.

[224] Mr. Baggallay and Mr. Welford, for the Plaintiffs, argued that Mr. Lord, being the trustee and executor of the will of the testatrix and representative of the two sons of Dr. Cochrane, was placed in a fiduciary position towards the Plaintiffs. That he had peculiar means of knowledge as to the state of the litigation, and as to its probable success and the near approach of its termination. That the Plaintiff, who was poor and urgently pressed for money, was not on equal terms with the Defendant, and that he had been induced to enter into this imprudent contract by the pressure of his wants and from his alarm at the difficulties and delays in the litigation, which had been unduly magnified. That the Defendant had represented this legacy as "contingent," while in fact it was vested, though reversionary, and that the effect of the order for paying the £20,000 out of Court to the Defendant had not been explained to, and was not understood by, the Plaintiffs. They argued that the sum of £450 paid by a trustee in 1862 for the purchase of a legacy which became payable in the following year, either with interest or with a share of the accumulations, was so inadequate a consideration that the transaction ought to be set aside.

Mr. Selwyn and Mr. E. F. Smith, for the Defendant Mr. Lord. Though a trustee for sale cannot purchase, because he cannot properly fill both characters of vendor and purchaser, yet there is no rule of equity which prevents a trustee from purchasing directly from his *cestui que trust*; *Coles v. Trecothick* (9 Ves. 244); *Lewin on Trustees* (p. 337). The Defendant cannot be said to have a greater knowledge of the facts than the Plaintiff himself; the Defendant was not the executor of [225] Dr. Cochrane, whose estate was in litigation, and the Plaintiff himself had a full knowledge of everything relating to the suits. In this purchase the Plaintiff employed his own solicitor and acted under his advice, and thus placed himself at arms' length towards the Defendant.

It was the Plaintiff who first proposed the sale and pressed the purchase on the Defendant, who advised him not to sell. The Defendant was an unwilling purchaser, and only submitted to complete his purchase upon the threat of a bill for specific performance. If the Defendant had submitted to a decree for specific performance, no suit could afterwards have been instituted to set aside the contract; he has submitted to the threat, instead of going through the expensive process of a suit, which would have had the same result. There is no proof of any concealment or misrepresentation on the part of the Defendant, none is distinctly alleged, except as to the legacy being "contingent;" this the Plaintiff knew as well as the Defendant, and being a mistake of law it is immaterial.

As to the value, the clear "market value" was given; *The Earl of Aldborough v. Trye* (7 Cl. & Fin. 436); and was obtained after every effort to sell for more had failed. The value of the legacy depended on the uncertain result of long and expensive litigation; *Perfect v. Lane* (30 Beav. 197); and being a legacy to a married woman, not reduced into possession, it was subject not only to her equitable right to a settlement, but to her exclusive right to it by survivorship.

[226] They also cited *Knight v. Marjoribanks* (11 Beav. 322, and 2 Mac. & Gor. 10); *Ellison v. Elwin* (13 Sim. 309).

Mr. Davey, for Fuller, a trustee.

Mr. Baggallay, in reply.

Dec. 7. THE MASTER OF THE ROLLS [Sir John Romilly]. This suit is instituted for the purpose of setting aside a deed of the 9th of June 1862, carrying into effect the sale from the Plaintiff to the Defendant of a legacy of £2000 bequeathed by the will of Mrs. Lord. This sale took place pending the appeal to the House of Lords. For the purpose of the present question, it is necessary to look a little closely at the relation which existed between the parties at the time of the purchase. Mr. Lord, at this time, filled all these characters; he was appointee in trust of the fund under his wife's will, and was her legal personal representative: he was also the legal personal representative of Peter and John Cochrane; he was also the legal personal representative of Margaret the widow of Dr. Cochrane; but he was not the legal personal representative of the original testator Dr. Cochrane. In my opinion, therefore, a more complete relation of trustee and *cestui que trust* could not exist. That being so, it becomes the duty of the Court to look exceedingly closely and narrowly at the transaction, for the purpose of seeing what can justify a trustee buying from his *cestui que trust*, under those circumstances, for £450 a legacy of the value of £2000, not a reversionary legacy, but a legacy payable [227] at a future period, that is, "as soon as proceedings in law and equity should be terminated." I say it is necessary to examine the transaction for the purpose of seeing how far the trustee was justified, when the litigation was so nearly over, having got a final decree in his favour (although not from the ultimate Court of Appeal), in purchasing from his *cestui que trust* a legacy of £2000 for such a sum as £450.

It was very justly admitted by Mr. Baggallay that he could not say that this Court would, in all cases, set aside such a transaction, and hold that the simple fact of its being a dealing between trustee and *cestui que trust* would render it void, without looking into the merits. It is, however, clear where a trustee for sale sells the trust property, that he cannot buy it; he cannot perform the two functions, but a trustee may buy from his *cestui que trust*, where the *cestui que trust* chooses to sell him the property, though the burthen of proof lies on the trustee to establish the propriety of the transaction, and to shew that he has acted in such a manner that the purchase will stand.

I have read through all these papers, and although my disposition is to scrutinize very closely transactions of this description, still I think that Mr. Lord has discharged the duty which his position as trustee has imposed upon him, and has shewn that this is a transaction which he is entitled to maintain. In the first place, upon the question of value, it is to be observed that, when the legacy was purchased, nearly eighteen years of litigation had taken place since the death of the testatrix, and that there was then an appeal to the House of Lords pending. It is very easy to say, now that the appeal is over, "You were quite sure of success, no one doubted it;" but I am not at all clear that you can, [228] in any case in which counsel advises an appeal, be quite confident and certain as to what the result will be. The Vice-Chancellor had taken very great care and pains as to the decision he pronounced, and yet the case went to the House of Lords, and although the House of Lords did ultimately affirm his decision, still, at the period in question, and while the appeal was pending, it certainly was a matter of some doubt how the questions would ultimately be determined. If that doubt existed in the minds of professional gentlemen, I think the doubt must have been still greater in the minds of the parties to the suit, who were totally unable to understand the merits of the case in a legal point of view, and who, as to the merits of the points in question, could only know what they were told by their legal advisers. I think, therefore, that it must be admitted that the matter was still in doubt when this purchase took place.

Another thing is this:—Mr. Luff perfectly well knew his position, he had been attending to these legal proceedings for a great many years; he had employed a solicitor, Mr. King, who seems to have attended very carefully to the matter, and, as far as it was possible for an unprofessional person to understand the exact position of the matter, I am satisfied that Mr. Luff understood what that position was, and knew

exactly how the proceedings in the suits were going on. He was undoubtedly in distressed, or, at least, in needy circumstances. Mr. Lord, who was his brother-in-law in this sense, that he and Mr. Luff had married sisters, had voluntarily, and without asking for interest, lent him, from time to time, sums amounting altogether to £197. Mr. Luff thought that money would be of much greater value to him if he could receive it then, than if paid to him at a later period.

[229] Another matter is this :—The first application for the purchase came from Mr. Luff himself. It was very reluctantly acceded to by Mr. Lord, who was not desirous of making the purchase at all. Mr. Luff had also been applying in every possible direction to see if he could not sell this legacy; he applied to Messrs. Willoughby, Cox & Lord, who were the solicitors of Mr. Lord, not in the character of his solicitors, but simply in the character of professional gentlemen with whom he had become acquainted in the course of these legal proceedings, and he asked them if they could obtain a purchaser for him. They said they could not, and at last he said he would sell the legacy for £300, upon which they said that they thought it possible they might be able to do something for him. That was in January 1862. Mr. Luff at the same time was applying to Mr. Lord, and at last he sent to him to say that he might take it for £450 and such further sum as, when the legacy fell in, an actuary should say was a proper amount to be given. Mr. Lord, in his letter, says that he will agree to this, although he appears to have been very reluctant to do so, and after some time he seems disposed to back out of the agreement and avoid carrying it into effect. Upon that Mr. Luff is so much annoyed that, on the 1st March 1862, he makes his solicitor write to Mr. Lord and threaten him with a bill for specific performance, and thereupon, in June 1862, Mr. Lord completes the transaction and pays the balance of the purchase-money.

In a very short time after this the situation of the parties is much altered. In March 1863 the appeal to the House of Lords is dismissed with costs. Three months afterwards this bill is filed to set aside the transaction. I was much struck with the difficulty which a [230] trustee would be in, who enters into a contract with his *cestui que trust* to purchase trust property, if in the beginning of one year he is threatened with a bill for specific performance of the contract unless he completes it, and having completed it, he finds, twelve months afterwards, a bill filed against him to set that contract aside. That certainly is a difficulty which I do not remember to have met with in any case before. I think it but fair to assume that Mr. Lord really did complete the contract under the threat of a bill for specific performance being filed against him. This case was very forcibly put in argument :—Suppose there had been a decree for specific performance against Mr. Lord, could a bill have been afterwards filed to set aside a contract which he had been decreed to perform, or to the performance of which, upon a bill being filed, he had submitted? Then is not the case similar where a bill is threatened and the purchaser yields upon compulsion, without waiting till the bill is filed?

Being of opinion that Mr. Luff knew everything about the matter; that every possible species of precaution was taken by Mr. Lord with regard to it, that he was a most unwilling purchaser, and that he was induced with great reluctance to buy the legacy in question, and being also of opinion that the relation between them does not make the transaction absolutely void, but only voidable, I think it is difficult to say that it can be set aside, unless there was some concealment, some knowledge possessed by Mr. Lord which was not possessed by the vendor, which made the amount of the purchase-money inadequate.

Now upon that, it is important once more to consider what was the nature of the interest that was bought by Mr. Lord. In my opinion it was a legacy payable only [231] when the litigation had finally ceased and the property had come into the hands of Mr. Lord. That, no doubt, is a little vague, but although I am not sure I have ascertained accurately the nature of the proceedings that are still pending in the Scotch Courts, I am disposed to express my opinion that upon the dismissal of the appeal in the House of Lords, the litigation was at an end, at least so far as related to the establishment of a fund applicable to pay this legacy, and amply sufficient for that purpose. I think that interest on the legacy would only run from the time when the appeal in the House of Lords was dismissed. That was subse-

quently to the purchase of the legacy, and, therefore, the thing purchased was a mere sum of £2000, which might or might not be payable at some definite period. It was not, in my opinion, reversionary, and it is not to be affected by that series of rules which the Court of Chancery seems to have laid down with regard to the purchase of reversionary property, which rules may be said to be peculiar, and which in a great many cases have probably had the effect of being injurious to persons possessed of that species of property by making it difficult for them to obtain its real value. But I think this was neither a reversionary interest nor a contingent legacy, but that it was a vested legacy payable on the happening of a future event, which was somewhat uncertain.

In the next place, it is to be observed that although it is true that £450 only was given for a legacy of £2000, still it is clear that nobody else would buy it. Various attempts had been made to sell it, and no one would give £450 for it. It is not difficult to imagine, considering that the litigation had been going on for twenty years, and might still go on for as long [232] a period, that the property itself was of an unmarketable character.

Again, a very material consideration is this:—that this was a legacy bequeathed to a married woman, and it was subject to her right, unless she consented to its payment to her husband, to have the whole or a portion of it settled. Nothing is more common, where a husband has become bankrupt or has assigned his wife's legacy for value, than for the Court to direct the fund, if in Court, to be settled for the benefit of the wife and children, the wife not choosing to consent to its being paid to the assignee. Who could calculate the probability of Mrs. Luff's consenting to this legacy being paid to Mr. Lord when it became payable, and, if she did not, who could tell what portion of it the Court would think it proper should be settled on her? I express no opinion as to what the Court would do in such a state of circumstances, but it is obviously a very material ingredient in estimating the value of the legacy. Again, if Mr. Luff were to die before the legacy became payable leaving his wife surviving him, how would this deed of assignment, though she joined in it, bind her? That again is a very material consideration. I was therefore not only surprised at the Plaintiffs filing this bill, but at the Defendant resisting taking back his £450 and giving up his purchase. My judgment, however, assumes that the question of the wife's equity to a settlement is out of the case, and I have been considering the matter as if it were a legacy bequeathed to the husband and for which the husband could give a discharge. I express no opinion whatever whether any alteration is made by the fact of Mr. Lord being the legal personal representative, and that therefore a receipt given by him may not be a discharge or a discharge [233] *pro tanto* of the legacy. But upon the question as to the value of the legacy, I am of opinion that it was a thing that could not be sold; that no one could give anything for it; that it was a piece of kindness on the part of Mr. Lord in consenting to buy it, and that it was only when the appeal to the House of Lords had been dismissed, and the position of the parties became changed, that the Plaintiff supposed it to be for his interest to endeavour to set the whole thing aside.

It is to be observed also, that there is not a single witness brought forward to state that the value of the legacy was more than £450. It has been suggested, and with reason, that it was of so shadowy a description and subject to so many singular contingencies that it would be difficult, if not impossible, for an actuary to put a precise value on the legacy. I believe that, for this reason, it has been difficult to obtain evidence upon this subject; but this tells strongly in favour of the Defendant.

As the matter has been straightforward throughout, and as the whole pressure came from the Plaintiff, I am of opinion that he cannot now sustain a bill to set aside the transaction, and it must, therefore, be dismissed with costs.

NOTE.—Affirmed by Lord Westbury, L. C., 21st January 1865.

[234] LAWRENCE v. THE WEST INDIA RELIEF COMMISSIONERS. Nov. 11, 12, 1864.

[S. C. 11 L. T. 295.]

The West India Relief Act (2 & 3 Will. 4, c. 125), gives, for moneys advanced by the Commissioners on mortgage upon the application of a mere tenant for life, absolute priority over all existing charges.

By the 2 & 3 Geo. 4, c. 125, passed for the purpose of affording assistance to persons who had sustained losses in Jamaica, &c., by the late insurrection, a fund of £300,000 was provided to be advanced by the Commissioners to enable the owners to resume the cultivation of the estates by restoring the works and providing supplies and negroes.

By the 21st section, the persons to whom any sums should be advanced were previously to give mortgages upon the properties for which the advances should be applied for; and it was enacted, "that all such mortgages," &c., "should be good and effectual in the law," &c., and should, "whether registered or not in the said islands, have priority over all other mortgages, assignments, bonds, obligations, or other securities, charged or chargeable upon or affecting the properties, for the restoration of which advances" should be made, "any law, usage, or custom," &c., "to the contrary notwithstanding."

The 22d section was as follows:—

"XXII. And be it further enacted, that in case any persons to whom or for whose use any advance shall be applied for under this Act shall be entitled to an estate for life only, or other partial interest of and in the properties in respect of which such advance is required to be made, with any subsequent remainders, reversion, or limitations, in favour of other persons existing in or affecting the same properties, the said Com-[235]-missioners shall, in their discretion, have full power and authority to cause any mortgages, assignments, securities, bonds or obligations of and from such persons so partially interested to be taken, notwithstanding such remainders, reversions or limitations cannot be legally barred, conveyed or disposed of; and such mortgages, assignments or other securities, of or upon such properties shall be good and effectual in the law to all intents and purposes, and shall have priority over all such remainders, reversions or limitations."

In 1834 the Worcester estate in the island of Jamaica, under a deed of 1800, stood limited to trustees for 500 years, on trust to raise, by sale or mortgage, a sum of £20,000, and subject thereto, to Thomas Dehany Hall for life, with divers remainders over.

Thomas Dehany Hall applied, under the provisions of this Act, for an advance, and on the 20th of March 1834 he obtained an advance of £6750 upon a mortgage to the Commissioners of the Worcester estate.

In 1857 the Commissioners sold the estate, and one of the questions in the cause was, as to the priority, as between the Commissioners and the parties interested in the £20,000, in respect of a fund in Court arising from the estate.

Mr. Hobhouse and Mr. Cutler, for the Plaintiff, a stakeholder, stated the case, and asked for costs.

Mr. Southgate and Mr. Wolstenholme, for the Commissioners.

Mr. Higgins and Mr. H. R. Young, for persons interested in the charge of £20,000. The money [236] was advanced to the tenant for life, under the 22d section, and thereby the Commissioners obtained priority over those in remainder, but not over the claimants having priority over the tenant for life. It is impossible to conceive that power should be given to a tenant for life, to prejudice or destroy the interests of persons claiming under a term preceding his life-estate, and that, without their concurrence.

Mr. Selwyn, Mr. Fry and Mr. Lindley, for other parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Act is too strong, and that it is impossible to get over the express terms of it: the scope and object of the Act were to provide a large sum of money, which was to be advanced by

Commissioners for the assistance of the owners of estates in Jamaica, upon a security having an absolute priority over every other charge, mortgage or incumbrance whatever existing upon the estate. The Commissioners were at the same time to have a large discretion, so that they might advance the money, only where it would be beneficial to all those interested in the estate by improving it, and they were to take security that the money was laid out for the improvement of the property. The person borrowing the money could not spend it as he pleased, but was bound to lay it out on the property. In fact, the money was provided for the improvement and benefit of the island, very much in the same way as money is now borrowed, under the statute, for draining and improving an estate, to be repaid after a certain time; the estate is charged upon the assumption that the money will be applied in improving it in such a manner as to be beneficial to all persons interested in it.

[237] The object of the Act was to give to the Commissioners an absolute priority, and I entertain no doubt that they have it.

[237] MILLARD v. HARVEY. Nov. 18, 1864.

[S. C. 10 Jur. (N. S.) 1167; 13 W. R. 125.]

A contract entered into and paid for by a wife, without the knowledge, but for the benefit of her husband, is valid and binding when ratified by the husband.

A wife, unknown to her husband, requested her father to sell a field, to be paid for out of her savings. The father at first refused, but he received the money, and shortly afterward put the husband into possession. For ten years the money was retained by the father without payment of interest, and the field by the husband without payment of rent. The father then attempted to eject the husband, who, being made acquainted with the circumstances, insisted on retaining the field. Held, that the father was bound to convey it to the husband.

In 1841 the Plaintiff, Robert Millard, married Eliza, the daughter of the Defendant William Harvey.

In 1853 the Plaintiff's wife, unknown to him, took £150 out of her private savings, to the Defendant, her father, and asked him to sell a field of about two acres, for the purpose of pasturing her husband's horse. The Defendant said he would not sell it, but he received and retained the money, and shortly afterwards he let the Plaintiff into possession, telling him he might have it to put his horse in. The Plaintiff remained in possession, and the Defendant retained the money for ten years, during which time the Plaintiff paid no rent and the Defendant no interest. At the end of that time, disputes arose, and the Defendant in 1863 brought an action of ejectment to recover possession of the field. The Plaintiff's wife having then told him of the nature of the transaction, he instituted this suit against the Defendant, to restrain the action, and to compel the Defendant to convey to him the field in question.

Mr. Baggallay and Mr. Kay, for the Plaintiff, argued that there had been a part performance, which evidenced the contract; *Sutherland v. Briggs* (1 Hare, 26); *Surcome v. Pinniger* (3 De G. M. & G. 571).

[238] Mr. Stock, for the Plaintiff's wife.

Mr. Selwyn and Mr. Chitty, for the Defendant, argued that the father had never agreed either to sell or give the field in question. That there was no contract in writing, and no sufficient part performance to entitle the Plaintiff to a conveyance.

THE MASTER OF THE ROLLS [Sir John Romilly]. On the evidence, I think the Plaintiff is entitled to a decree. The Plaintiff's wife, without the knowledge of her husband, goes to the owner of the field with the money, and says, I want to buy it unknown to my husband. Now, if upon that, a written contract had been entered into between the Defendant and his daughter, by which the Defendant agreed to sell the fee to the husband, the Defendant could not have enforced the contract against the husband, who was ignorant of it, and whose wife had no right to enter into such a contract on her own behalf, but it was competent for the husband to adopt it if he pleased. But, in addition to the contract, the Defendant receives the purchase-money,

puts the Plaintiff into possession and allows him to retain it for ten years, during which period the Defendant retains the purchase-money. At the end of that term the wife informs the husband that she has bought this field for him, and paid for it out of her savings, and that it is his if he wishes. Thereupon the husband says, "I adopt the contract and will take to it." Now if the facts amounted to that, I am of opinion that there would be a perfectly good contract, and that when the husband adopted it, which he was entitled to do, he became entitled to the field.

If that be the law, do the facts of this case come up [239] to that point? It is admitted that Mrs. Millard, who wanted to buy the field for her husband in order that he might not be at the expense of buying hay for his horse, sent the money to her father to buy it, that the father took the money, but said he would not sell it. Within a few days after, the Defendant told the husband that he might have the field to put his horse in, the Defendant, when this took place, knowing that his daughter had paid him for the field. It is true that the Defendant had said he would not sell it, but he afterwards told the husband that he might have it, and he never received any rent and never resumed possession. Surely, the wife might naturally conclude that there had been a sale, nay, it is quite clear that she believed that the contract had been complete. But after ten years, the father holding the money all that time, and the husband being in possession of the land, the Defendant says, "I do not intend to sell it, it was intended as a mere present, and I thought that the interest of the money would be about equal to the amount of rent."

I do not think that after this, and the silence on the Defendant's part, it is competent for him to say there is no contract. If I held otherwise, it is clear that I could not replace the parties in the same position in which they were before the daughter paid the £150. It appears also that the Defendant, when asked for the title-deeds, did not say, "I have not sold the field," he only refused to give them up.

I think that this must be treated as a contract for purchase between the Defendant and his daughter, which her husband, when he knew of it, was entitled to adopt as his own, and having been in possession for ten years, and the Defendant having, during that period, [240] retained the purchase-money, I think there is such a contract as this Court will specifically perform, and that there must be a decree for a conveyance of the field to the Plaintiff.

[240] HARVEY v. TRENCHARD. Nov. 4, Dec. 5, 1864.

Under "The Lunacy Regulation Act, 1862" (25 & 26 Vict. c. 86), the Lord Chancellor has power to appoint persons to recover and receive funds of a lunatic without inquisition and in a summary manner, in the alternative either of his income being under £50, or his property not exceeding £1000 in value.

This Court cannot entertain an objection that an order was made by the Lords Justices in Lunacy in the absence of proper parties.

The Lords Justices made an order under "The Lunacy Regulation Act, 1862," which appointed two persons to receive from the Defendants (the trustees) and apply for his benefit the property of a prisoner acquitted on the ground of his lunacy. This Court, on bill filed, decreed the execution of the order.

This was a suit to enforce the execution of an order in lunacy, made by the Lords Justices, under the provisions of the 25 & 26 Vict. c. 86 (3 Chitty Stat. (3d edit.), 205). The case was argued by

Mr. Selwyn and Mr. Rowcliffe, for the Plaintiffs.

Mr. Southgate and Mr. Peck, for the trustees.

Mr. W. Pearson, for the wife.

THE MASTER OF THE ROLLS [Sir John Romilly]. By a settlement made on the 14th and 15th September 1840, on the marriage of Robert Rogers Harvey and Sarah Inman, the property of the wife was conveyed to the trustees of the settlement, in trust for such intents and purposes only as the husband and wife should appoint, and until such appointment into the proper hands of them the husband and wife, for their mutual use and benefit, and after the decease of such one of them as should die

first, for the survivor for his [241] or her life, and after the death of the survivor, amongst the children of the marriage.

The marriage took place immediately after the execution of the deed.

On the 8th of April 1851 the husband and wife separated, and a deed of that date was drawn up and executed between the husband of the first part, the wife of the second part, Trenchard and Hingeston, the trustees of the marriage settlement, of the third part, and Gibbs of the fourth part, by which, after reciting the agreement to separate, it was witnessed that in consideration of the covenant therein contained on the part of Gibbs, the husband, with the approbation of the wife and Gibbs, covenanted with Gibbs, that Trenchard and Hingeston should, and Trenchard and Hingeston respectively declared and agreed that they would, during the joint lives of the husband and wife, pay the rents, interest and dividends of the property of the wife settled on the marriage, and then vested in them, in the following manner:—viz., one-third to the wife for her separate use, one-third to the husband, and one-third to the wife to be applied by her in the maintenance and education of the children of the marriage. The husband then covenanted with Gibbs, to allow his wife to live apart from him; and Gibbs covenanted with the husband to indemnify him against the debts of the wife.

They have always lived apart since that time.

In 1855 the husband was tried at Exeter for shooting at the Rev. George Tucker, and was acquitted, on the ground that he was of unsound mind when he committed the act, and he has since been confined amongst criminal lunatics.

[242] In 1856, under a power contained in the deed of separation, Frederick Trenchard was appointed a trustee in the place of Hingeston, and Henry Trenchard and Frederick Trenchard have since been and are now the trustees of the property settled by the marriage settlement. The one-third of the rents was duly paid to the husband until he was placed in confinement. Since then, the trustees have occasionally advanced small sums for his benefit while in confinement, and have invested the residue of his third, which now amounts to about £200 stock and £63 in cash. The other two-thirds have been regularly paid to the wife for the support of herself and her four surviving children. The one-third of the income of the property settled amounts to about £55, and the husband has no property except what he derives under this settlement.

The brother and sister of the husband, in June 1863, presented a petition in lunacy, on which an order of the 10th and 11th of July 1863 was made to the following effect:—

William Rose Harvey and Elizabeth Jane Harvey were appointed to recover and receive from and give proper discharges on behalf of Robert Rogers Harvey, the husband, to Henry Charles Trenchard and Frederick Alfred Trenchard, or the trustees or trustee for the time being of the indenture of settlement, dated the 8th of April 1851, for the accumulation of income and for the future income of the said Robert Rogers Harvey payable to him under or by virtue of the said indenture. The amount was ordered to be paid into Court and invested, and the dividends were ordered to be paid to William Rose Harvey and Elizabeth Jane Harvey, and applied in the maintenance and for the benefit of Robert Rogers Harvey.

[243] This order was duly served on the trustees in August 1863. They refused to obey it, insisting that they had no sufficient notice of the petition, of which they had not seen any copy before the order was made, and also insisting that, under the 15th section of the Lunacy Regulation Act of 1862 (25 & 26 Vict. c. 86), the Lords Justices had no jurisdiction to make the order.

Thereupon, on the 27th of October 1863, this bill was filed by the brother and sister of the lunatic, and the lunatic himself by his brother as his next friend, to enforce the execution of this order, and to compel the trustees to account for the income of the property, and to pay over the accumulation of the one-third to the Plaintiffs (the brother and sister of the lunatic husband).

The Defendants resist the decree asked, on the ground, first, that the order was obtained by surprise, and that if they had been served with a copy of the petition they should have appeared before their Lordships and opposed the order; but as they have no *locus standi* in the lunacy they could not apply to have it discharged.

Secondly, that the power of their Lordships, under the 15th section of the Act, is to be read conjointly with the three preceding sections, and that by them, the jurisdiction of the Lords Justices is limited to cases where the income of the lunatic is under £50, or where the property is not worth more than £1000. Thirdly, that their Lordships have no power, under the Act, to appoint persons to recover and receive funds.

As to the first objection, I am of opinion that I am bound by the proceedings of the Lords Justices; they determine who are to be served, and I cannot control that or refuse to enforce any order on that account.

[244] With respect to the third objection, I am clear that the powers in the third clause are sufficient to enable them to appoint such persons.

The second objection is that on which I entertain the greater doubt. My impression is that the preamble and limitation contained in the first clause govern the whole four clauses; but in that event, the power is given to the Court, in the alternative, either if the property of the lunatic is under £50 per annum, or under £1000 in value. Here the income exceeds £50 per annum, but the Defendants have failed in satisfying me that the interest of the husband is not under £1000 in value. I must assume the order to be right unless shewn to be incorrect. I have no evidence of the age of the husband or of his wife. The value of a life annuity of £55 is probably less than twenty years' purchase. It is true that he has, under the settlement, a life interest in remainder expectant on the decease of his wife, but if he is older than his wife, this is probably of little or no value. I am of opinion that the Defendants have failed in so proving it, and as the clauses of the statute are remedial they must be construed liberally.

I must therefore make a decree, but I shall give no costs on either side, for the Plaintiffs, considering the arrangement between the parties, ought to have given the trustees a copy of the petition they presented to the Lords Justices, much of which was objectionable, and was refused by their Lordships, such as payment of the costs of the defence.

The result is that I must make a decree directing the order to be carried into effect.

[245] WAKEFIELD v. THE LLANELLY RAILWAY AND DOCK COMPANY.

Dec. 2, 5, 1864.

[Affirmed, 3 De G. J. & S. 11; 46 E. R. 542; 12 L. T. 509; 11 Jur. (N. S.) 456; 13 W. R. 823.]

A railway company gave to a leaseholder the usual notice to treat, and it was referred to arbitration to ascertain the value of the premises and the damages sustained by the execution of the works and the compensation to be paid by the company in respect thereof. The arbitrator awarded £2700 as the compensation to be paid for all the leaseholder's interest, of whatever nature, in the leasehold. Upon a bill by the leaseholder for a specific performance: Held, that the award was bad, and the bill was dismissed with costs. It is not absolutely necessary that the evidence before an arbitrator should be taken on oath, the parties may waive it.

This suit was instituted for the specific performance of a contract. The Plaintiff was entitled to and in possession of the Trafalgar Hotel and garden at Swansea for a term of ninety-nine years. The Defendants, the company, required these premises, and, under their compulsory powers, they on the 4th of July 1863 gave the Plaintiff the usual notice that they required the premises, and that they were willing to treat for the purchase and as to the compensation for the damages. On the 29th of July 1863 the Plaintiff and the company entered into articles of agreement, whereby they referred the ascertainment of the value of the premises, "and damages sustained, or to be sustained, by the Plaintiff, by reason of the execution of the works of the company, and the amount of compensation to be paid by the company to the Plaintiff

in respect thereof," to the arbitration of two named persons (8 & 9 Vict. c. 18, s. 25), and if they could not agree, then to Mr. Price as sole umpire.

The arbitrators disagreed, and Mr. Price made his award on the 26th of August 1863 whereby, after referring to his appointment as umpire, "to assess and award the value of Mr. Wakefield's interest in the leasehold property," the award proceeded as follows :—

[246] "I award Mr. Wakefield £2700 as the compensation to be paid by the above company to him, for all his interest, of whatever nature, in the above leasehold."

The witnesses were not examined on oath before the arbitrator (8 & 9 Vict. c. 18, s. 32).

This bill was filed on the 24th of December 1863 for the specific performance of the agreement.

The company, by their answer, alleged that they had not acted on the notice, and that it was now abandoned by them. They also, by their answer, insisted on the invalidity of the award; but they had taken no proceedings to set it aside.

Mr. Selwyn and Mr. Graham Hastings, for the Plaintiff. The Defendants having taken no steps to set aside the award it is final. The Court will direct its specific performance and lean to a construction which would render it certain and final; *Wood v. Griffith* (1 Swans. 52).

The company having given the usual notice to take, and the price having been ascertained, the contract is complete, and the Court will enforce it; *The Regent's Canal Company v. Ware* (23 Beav. 575). The case of *Mason v. The Stokes Bay, &c. Company* (32 L. J. (Ch.) 110) is precisely in point. There the Defendants gave notice, and the amount of purchase-money and of compensation had been ascertained by an umpire; the Vice-Chancellor Wood thereupon made a decree for the specific performance of the contract.

[247] Mr. Baggallay and Mr. Methold, for the Defendants. When the Court is called upon to make a decree for the specific performance of a contract depending on an award, it will look into the circumstances, and refuse relief where the valuation has not been made "with due attention and care," as in *Emery v. Wase* (5 Ves. 846, and 8 Ves. 504); or where the award is uncertain; *Hopcroft v. Hickman* (2 Sim. & St. 130).

This award, on the face of it, determines merely the compensation for all the Plaintiff's interest in the leasehold; but it takes no notice of the second subject of the reference, that is, of the damages sustained by the works; *In the Arbitration of Rider* (3 Bing. N. C. 874); *Martin v. Burge* (4 Adol. & E. 973). Secondly, the award is not final, and the evidence on which it is founded was not taken on oath.

Mr. Selwyn, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the Plaintiff fails in this case. Where a decree for the specific performance of a contract depends upon the result of an award, there are two modes by which it may be enforced, either the award may be made a rule of Court, and then the execution of the award may be compelled by attachment under the Common Law Procedure Act (17 & 18 Vict. c. 125, s. 17; 1 Chit. Stat. (3d edit.) 83), under which, if steps are not taken to set aside the award within a limited period, the attachment follows as a matter of course: or a bill may be filed for the specific performance of the agreement to sell property at a price ascertained by an award. In the latter case I am of opinion that it is open to the Defendants to point out any defects which appear upon the award itself.

In this case I am of opinion that the award is defective upon the face of it. It is one of the first principles that an award must be final, that it must not leave any part of the matters referred to be determined hereafter. In this case the reference to arbitration is to ascertain the value of the hotel and premises, "and the damages sustained or to be sustained by the Plaintiff, by reason of the execution of the works of the company, and the amount of compensation to be paid by the company to the Plaintiff in respect thereof."

There are, therefore, two things which the arbitrator is to find by his award, first, the value of the premises, and, secondly, the amount of compensation to be awarded in respect of the damages sustained or to be sustained by reason of the

works, and the amount of compensation to be paid by the company. The compensation applies to both, namely, the value of the property and the amount of the damages sustained.

But here the umpire awards £2700 as the compensation to be paid by the company to the Plaintiff "for his interest, of whatever nature, in the above leasehold." Now, suppose the Plaintiff had a large stock of wine and beer which must be removed, and must necessarily be damaged by the removal from the hotel to some other premises, how could that be said to be included in the words, "all his interest, of whatever nature, in the leasehold?" His interest "in the above leasehold" is the value of the hotel, outhouses and [249] premises for the residue of the term. But "the damage sustained" (whatever it was) "or to be sustained," and "the amount of compensation to be paid by the company to the Plaintiff in respect thereof," is wholly omitted from the award.

Suppose this had occurred—That the railway company had paid £2700 and had then taken possession, and that in the removal, with all possible care, of the furniture, stock-in-trade, &c., from the hotel, considerable damage had been sustained by the Plaintiff, and he had brought an action against the company for the amount of that damage, how could this award be set up as an answer to it? It is impossible that this award can be treated as having dealt with that matter.

It is expressly referred to the umpire to dispose of two things, and he has only disposed of one. I am therefore of opinion that this award is not binding and cannot be sustained as an award in accordance with the submission. The evidence also appears to me to confirm the view, and that the umpire considered the £2700 a fair sum to be allowed for the value of the house and land alone, apart from any compensation for damage, which is wholly omitted. In this state of things, I am of opinion that the award is altogether bad, and consequently that the specific performance of it cannot be enforced.

I do not found my decision upon the point that the evidence was not taken upon oath,⁽¹⁾ though I think it a serious objection. It is not absolutely necessary to take the evidence upon oath, but it is the ordinary practice, [250] and if taken otherwise, both parties must waive its being taken upon oath. Here nobody says that the Defendants waived it, all that is said is that the Defendants asked that it might be taken upon oath, but that the umpire observed that it was not usual, and it was not pressed. That of course is not a waiver. It is much more satisfactory to the parties to take the evidence on oath, for that makes it more trustworthy.

I am of opinion that the bill fails, and that it must be dismissed with costs.

NOTE.—The Plaintiff appealed, but the Lords Justices, on the 11th of May 1865, dismissed the appeal with costs.

[250] CHAPPELL v. GREGORY. Dec. 27, 1863; Jan. 15, 1864.

[Affirmed on point as to costs, 2 De G. J. & S. 111; 46 E. R. 317.]

Upon a treaty for a lease of a house, the lessor sent to the lessee a letter specifying the terms on which he would let it. The lessee immediately took possession, but he signed no contract. The lessor having instituted a suit for specific performance, the lessor insisted that, in addition to the terms contained in the letter, the lessor had verbally promised to put the house into thorough repair; this the lessor denied. The Court doubted whether the specific performance could be enforced, and gave the Defendant the option, either of a decree for specific performance on the terms of the letter, or a decree to deliver up possession and to pay an occupation rent. But if he refused to exercise the option, the Court directed a decree on the latter branch of the alternative.

In the absence of any agreement on the subject, a person who agrees to take a house must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for his living in.

(1) See *Ridoat v. Pye*, 1 Bos. & Pul. 91; *Eads v. William*, 4 De G. M. & G. 687.

This was a suit instituted by Mrs. Chappell against Mr. Gregory, for the specific performance of a contract, by which Mrs. Chappell agreed to let the Defendant a house in 15 Greville Place, Kilburn, for a period of twenty-one years from Christmas, 1861, determinable at the option of lessee, at the end of seven and fourteen years, paying a rent of 5s. for the first year and £90 for every succeeding year.

The questions were, whether the agreement con-[251]-tained a condition that the house should be put into a complete state of repair, fit for occupation, before the lease was executed, or whether the Plaintiff's agent promised, on his behalf, that the house should be put into a complete state of repair fit for occupation, and whether, upon the faith of that promise, the Defendant entered into the agreement.

The matter was negotiated, on behalf of the Plaintiff, by Mr. Chappell, a solicitor, on one side, with the Defendant personally, who was also a solicitor, on the other side. There was some dispute as to the facts, but both parties agreed on this:—that prior to the 4th December 1861 there was a treaty, by parol, respecting the letting of the house by the Plaintiff, and the taking of it by the Defendant. It also appeared that, prior to that day, the Defendant had twice visited and inspected the house which had been nearly built. On the 4th December 1861 Mr. Chappell wrote the Defendant a letter, and the Court considered that it embodied the whole of the terms on which the Plaintiff was willing to let the house, and that, until this letter was written, there was nothing to bind the Plaintiff. This letter contained no promise or undertaking that anything whatever should be done to the house. The Court also held "that this was an offer to let the villa simply, and must mean to let it as it stood, and that, as the Defendant had seen it, he must be taken to have been cognizant of the state and condition of the house."

The Defendant gave no answer in writing to this letter, he, however, asserted that he saw Mr. Chappell again, who promised him that the house should be put into thorough repair, if he would take it. Mr. Chappell positively denied that he ever made any such promise.

[252] On the 4th of December 1861, the day on which the letter was written, Mr. Gregory caused a piece of furniture, which required to be fixed to the freehold, to be taken into the house and fixed in its place, and on the 16th of December 1861 Mr. Gregory sent in his furniture and took actual possession of the house. On the 24th of December 1861 a draft lease was forwarded to Mr. Gregory for his perusal. It had never been approved of, for a subsequent correspondence had taken place between the parties, which, though much commented on, it is unnecessary to set out. Ultimately, this bill was filed for the specific performance of the agreement.

Mr. Selwyn and Mr. Jessel, for the Plaintiff, cited *Selwyn's Nisi Prius* (p. 1391); *Tildesley v. Clarkson* (30 Beav. 419); *Mundy v. Jolliffe* (9 Simons, 413, and 5 Myl. & Cr. 167); *Faulkner v. Llewelin* (9 L. T. 251, 557). As to part performance by the delivery and acceptance of possession, see *Sugd. Vend.* (ch. iii. s. 7); *Dart. Vend.* (ch. xviii. s. 6).

Mr. Southgate and Mr. Everitt, for the Defendant, cited *Mechelen v. Eliza Wallace* (7 Adol. & E. 49).

Jan. 15, 1864. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case it is necessary to point out a distinction which seems not to have been borne in mind. The distinction is this:—A promise by the lessor to put the house into a complete state of repair before the lease is executed, and upon the faith of which the lease is taken, is a distinct engagement which must be fulfilled [253] by him. But, in the absence of such a promise, a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, "This house is not in a proper condition, and you or your builder must put it into a condition which makes it fit for my living in."

Accordingly, in the present case, unless the preliminary promise by Mr. Chappell is established by Mr. Gregory, he must fail; for not only is there no implied warranty in the letting of a house, but in this instance the Defendant had, himself, previously inspected the house, and knew, or had the opportunities of knowing, what the condition of it was. The success of the Defendant, therefore, in this suit must depend on his establishing the former proposition, that is, on his proving the fact of such a prior promise or agreement having been made by Mr. Chappell, and, in my opinion, he fails in so doing.

Mr. Chappell very wisely put the terms on which he would let the house into writing in his letter of the 4th of December. After the receipt of this letter, the Defendant took possession, and he is entitled to have a lease on these terms, but on no others.

On the other hand, though my opinion is that the Defendant must be considered to have taken possession of the house on the terms contained in that letter, yet, having regard to his answer, having regard to what I have no doubt he believed—viz., that he was entering into the agreement upon the expectation that he was to have the house put into a state of repair which would satisfy him, and having regard also to the circumstance that no signature of his exists to take the case out of [254] the Statute of Frauds, and specify the terms of the taking of the lease as he understood them, I doubt whether I could, with propriety, enforce the specific performance of this lease upon the Defendant. If treated as a written agreement, the Defendant has not signed any contract; if treated as a parol agreement part performed, then I think that the Defendant did not consider the agreement to be the same as the written offer of Mr. Chappell, and his assent to that particular contract, *simpliciter*, cannot properly be established against him by the evidence in this case.

But, on the other hand, the Defendant has placed himself in this peculiar position:—he seems to have entertained a hope that, by his remaining in possession, and ever since the institution of this suit, by the instrumentality of the suit itself, that he might obtain specific performance of an agreement to let the house to him on the terms insisted on by him, which terms were and are denied by the Plaintiff. Accordingly, in his answer, he alleges his willingness to complete on these terms, he refuses to pay any rent until these, his demands, are complied with, he retains possession, and he does not even offer to leave the premises. The result of this has been that he has driven the Plaintiff to pray, in the alternative, “that the Defendant may be ordered to give up possession of the house to the Plaintiff, and pay her a fair occupation rent for the time he held and shall have held possession thereof until he gives up possession.”

In my opinion, this puts the Defendant in the wrong, there is no pretence for enforcing performance against the Plaintiff of any agreement, except that contained in the letter of 4th December 1861, and the retention of possession by the Defendant, who refuses to perform [255] that agreement and has no right, either at law or in equity, to anything else, cannot be justified in this Court.

The consequence is that, in my opinion, the course which it is proper for the Court to adopt is the following:—

I will give the Defendant the option of either of the following decrees:—I will either make a decree for the specific performance of the agreement according to the terms contained in the letter of the 4th December 1863, and refer it to Chambers to settle the terms of the lease, in case the parties differ about the same, and then direct the execution of it accordingly.

Or, I will direct the Defendant to deliver up possession of the house, on a day to be fixed, giving him a reasonable time to enable him to remove his family and furniture, and declare that he is liable to pay for the use and occupation of the house during the time he has been in possession, and refer it to Chambers to fix the amount with which he is to be charged; and in charging him with that occupation rent, I should proceed on this principle, viz., he has agreed to give £90 per annum for the six last years of a lease, determinable by him at the end of seven years, and I should consequently apportion the total amount payable during that time over the seven years, which, according to my calculation, would amount to £77 and a shilling or two over. I state this, in order to enable the Defendant to come to a conclusion as to the option which I thus give him. If he should, as undoubtedly he is entitled to do, refuse to exercise any option at all, and thus call on this Court to pronounce such decree as it may think fit, adversely to him, I then shall recite, in the decree, the option offered by the Court, the fact of the Defendant declining to exercise that option, and shall [256] make a decree in the terms of the latter branch of the alternative I have stated.

But in either event I am of opinion that this suit has been occasioned by the Defendant, and that he must pay the costs of it.

[256] *Re LITTLEHAMPTON STEAMSHIP COMPANY (LIMITED)*. Jan. 21, 1864.

[S. C. on appeal, 2 De G. J. & S. 521; 46 E. R. 477; 34 L. J. Ch. 237; 12 L. T. 8; 11 Jur. (N. S.) 211; 13 W. R. 420. See *In re Gold Company*, 1879, 11 Ch. D. 705.]

An order for winding up a company made, on the petition of the holder, by transfer, of scrip certificates, upon the Petitioner admitting his liability as a contributory.

In this case, the company had passed a resolution for winding up the company voluntarily. After this, the present petition for winding up the company compulsorily was presented by the holder, by transfer, of ten scrip certificates not fully paid up.

Mr. Baggallay and Mr. Roberts, in support of the petition, cited *Re Torquay Bath Company* (32 Beav. 51).

Mr. Jones Bateman, for the company. The Petitioner has no right to apply for a winding-up order. The statute (25 & 26 Vict. c. 89, s. 82), only authorizes "creditors" and "contributories" to apply, and this Petitioner is neither; he is a mere scrip-holder, who has never applied for shares, and who cannot be compelled to take them, so as to render himself liable to contribute towards the debts of the company; *Jackson v. Cocker* (4 Beav. 59). The Petitioner has neither signed the articles, nor is he a registered proprietor; he has entered into no contract with the company, and therefore no privity exists between him and the company.

Mr. Baggallay, in reply. The deed of settlement [257] (article 2) defines a scrip holder as a shareholder; and, by another article, when all the instalments have been paid, the company may issue full scrip certificates, declaring the holder to be the proprietor of fully paid-up shares.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will make the order for winding up, on the admission of the Petitioner that he is liable as a contributory.

NOTE.—On appeal the Lords Justices differed, and the order was affirmed (17 Feb. 1865).

[257] *AUSTIN v. AUSTIN*. Jan. 14, 18, 1865.

[S. C., on appeal, 4 De G. J. & S. 716; 46 E. R. 1098; 34 L. J. Ch. 499; 11 L. T. 616; 11 Jur. (N. S.) 536; 13 W. R. 761. See *Hawkesworth v. Hawkesworth*, 1871, L. R. 6 Ch. 543; *In re Scanlan*, 1888, 40 Ch. D. 212.]

The father of an infant of two and a half years, originally a Protestant, had died a Roman Catholic. His widow married again and was a Protestant. The Court refused to remove the child from the custody of the mother on the ground of her religious opinions.

This was an application, adjourned into Court from Chambers, for the appointment of a guardian to Mary A. Austin, an infant ward of Court, about two and a half years old, under the following circumstances:—

Mr. William Austin, the father of the infant, was educated as a Protestant, his parents being of that persuasion; but, in 1847, he became a Roman Catholic. In July 1861 he married a Protestant young lady, having about a week previously made his public profession as a Roman Catholic. The ceremony of marriage was performed both according to the Roman Catholic and Protestant forms, and his wife, during his life, had conformed to the worship of her husband's church.

In November 1861 Mr. Austin caused a draft of a will to be prepared, which, however, he never executed, in which he said, "And it is my wish, and I hereby direct, that all and every child and children of mine shall be educated and instructed in the principles and tenets of the Roman Catholic religion."

[258] The infant was born on the 14th of June 1862, and was baptized by a Roman Catholic priest, one of her sponsors, however, being a Protestant.

Mr. Austin died on the 27th of December 1862, and in October 1864 his widow married Mr. Seager, a Protestant gentleman, and she then became a Protestant.

The infant's father not having appointed a guardian. Cross-summonses for her guardianship were taken out, one by the mother, and the other by the father's brother John Austin, a rigid Roman Catholic.

The application of the brother of the deceased was, that he or some other proper person or persons might be appointed guardians "of the person and estate of the infant during her minority, or until further order, and that proper directions might be given as to her maintenance, residence and education during her minority."

His application was founded on the importance of the child being educated in the Roman Catholic faith, which was that of her father at his death. He stated in his affidavit, that "in the Roman Catholic faith, the education of a child, in matters of doctrine and belief, commences at the age of five years, or earlier, according to the capacity of the child." The brother also adduced evidence that the education of a Roman Catholic child commenced at an early age, and that, as soon as it was old enough to receive instruction, it was usually taught, in addition to the Paternoster, the sign of the cross, and the prayer called "Hail Maria." It appeared also that it had been stated, in a letter from the mother's solicitor to the uncle, but in answer to a rude and offensive letter, that the uncle or his friends [259] "would be allowed, at all reasonable times, to have access to the child, so long as no interference was attempted with regard to its liberty or religious instruction."

On the other hand, there was evidence that the child was "of very delicate constitution requiring the watchful and tender care of her mother." That "she was very backward in her articulation, and that she could only pronounce about six words, and those words in monosyllables."

The child's fortune was £4500 in possession, with a prospective increase on the death of her mother.

Mr. Baggallay and Mr. Bagshawe, in support of the brother's summons. We rest the application entirely on the necessity of securing the religious education of the child, for we fully admit that, apart from that, the Court would not take a child of so tender an age from the custody of her mother. But there are circumstances which distinguish this from an ordinary case, namely, the second marriage and the religious faith of the mother and her husband, which renders it impossible that she will, in matters of religion, be trained in the belief of her father.

This Court favours no religion, but having ascertained the faith of the father, it takes care (whether he shall have so directed or not), that his child shall be educated in the same faith. Here the religion of the father is proved beyond question, and his wishes are expressed in the will which he caused to be prepared, that all his children "should be educated and instructed in the principles and tenets of the Roman Catholic [260] religion." The mother is disqualified from accomplishing this.

Take the converse case, of the child of a Protestant father being brought up by her mother in the Roman Catholic faith, the Court would prevent it, for she would have no more right to instil into the child's mind Roman Catholic principles, than she would have to inculcate immoral ones. The evidence shews the absolute necessity of the child's being taught, from its earliest years, the form and ceremonies of the Roman Catholic faith, and which cannot be dispensed with, and if this application had been delayed, it might have been considered too late. The time, if not come, must be speedily approaching, when the child must be removed, for every week detracts from the perfection of her religious education, and increases the difficulty of securing a sound religious education; she ought, therefore, to be put under the guardianship of persons of the Roman Catholic faith. But the complete separation of the child from the mother is not for a moment contemplated, her right to see her child at all reasonable times must be preserved. The Court will not hold it to be a right course to leave this child in the custody of her mother, and the pain and distress incident on a separation, if it takes place now, will be less than if postponed to a later period. The child's uncle and another Roman Catholic relative are willing to undertake her guardianship, and to bear the whole cost of bringing her up.

Serjeant Talford's Act (2 & 3 Vict. c. 54) will perhaps be referred to, but that does not authorize the mother to retain the custody of the child "within the age of

seven years," when the mother is incapacitated, [261] by her religion, from instructing her child in that religion in which she ought to be brought up.

Mr. Selwyn and Mr. Kay, for the infant's mother. The object of Mr. John Austin in making this application is fairly and openly avowed, it is to take this child from the custody of her mother, and, upon the ground of religious education or of religious prejudice, to separate an only child, a female, under three years of age, and of a delicate constitution, from her mother against whom there is not the slightest imputation. No order ever made by this Court would exceed, in hardship and cruelty, such an order as the one asked.

The rule of law admits of no dispute, that if a father gives positive directions as to the religious education of his child, this Court will enforce the performance of such directions. Such was the case cited of *Davis v. Davis* (10 W. R. 245), where there was an express direction in the father's will. So if the marriage of the parents took place upon a distinct understanding that their children should be brought up in the religious faith of the father. Here the circumstances are widely different. The father was a man always "halting between two opinions," he was born of Protestant parents, was educated as a Protestant, and never made his public profession as a Roman Catholic until a week before his marriage. The ceremony of marriage was performed according to the rites of both faiths, and one of the sponsors of the infant was a Protestant. In this case, there was no expression of intention, the draft will, which is relied on by the other side, tends strongly to shew the very contrary intention, for the matter having been drawn distinctly to the father's attention, by the directions introduced into [262] his draft will, he neglects to execute it. The wishes, therefore, of the father must be taken to have been left doubtful and ambiguous, and in such a case this Court will not interfere with the surviving parent in the mode of educating and bringing up the infant. The matter being left uncertain, it must be assumed that the father, intentionally, left a wide discretion to the child's surviving parent.

But the real point for the consideration of the Court is, what will be best for the child, and the life and happiness of the child is to be considered before doctrinal points of religious education. Here the evidence shews that the child is of a delicate constitution, requiring the watchful care of a mother, and to separate them would be to destroy the happiness of both. The separation of the mother and child, and the religious instruction of the latter, are distinct questions, and the consideration of the latter is premature. To attempt to teach a backward child of less than three years of age the differences between the Roman Catholic and the Protestant faith provokes a smile, and the formalities spoken of are not even stated to be essential.

Mr. Baggallay, in reply.

Davis v. Davis (10 W. R. 245); *Hill v. Hill* (31 L. J. (Ch.) 505); *Stourton v. Stourton* (8 De G. M. & G. 760), were cited.

Jan. 18. THE MASTER OF THE ROLLS [Sir John Romilly]. The facts of this case are very simple, though it involves considerations of great importance.

[263] In these cases, the Court only considers what is most for the benefit of the infant. In the matter of religion, the Court holds that the Roman Catholic faith and the Protestant faith are, to this extent, equally beneficial to the child:—That it considers the hope of eternal salvation does not depend upon the circumstance whether she entertains one faith or the other, but upon the manner in which she fulfils her duties upon earth. But the Court, although it holds an equal hand between them, always gives a preponderance to the wishes and desires of the father, and, in the absence of other circumstances materially to the benefit of the child, it directs the child to be educated in the religion of the father. But all this is subordinate to the first and primary object, which is the welfare of the child, because, as I have already stated, the future salvation of the child does not, in the judgment of the Court, depend upon the faith which it entertains being either Roman Catholic or Protestant. No thing, and no person, and no combination of them, can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place. It is the notorious observation of mankind, that the loss of a mother is

irreparable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed, to induce this Court to take a child from the guardianship and custody of her mother. It is, in point of fact, only done where it is essential to the welfare of the child. There are cases of unnatural mothers, and of immoral mothers, where the Court is obliged to take away a child from the mother, finding that a bad mother is worse than no mother at all, but in those cases, it acts solely for the benefit of the child.

[264] Now, upon reading through the papers in the present case, there is not a suggestion of unfitness or of anything against the character of the mother. The case is put solely on the question of what faith the child shall be educated in, and what I have to consider is, whether the importance of educating the child in the Roman Catholic faith, because it was the religion of her father, is sufficiently urgent to deprive the child of the care of her mother. I am of opinion that it is not, and that it is impossible, for the benefit of this child, and for the sake of educating her as a Roman Catholic, that I can properly take her away from her mother. I should hesitate to do that in any case; but in this case I think the father of the child himself must have entertained considerable doubts upon the subject, and that unless he had entertained such doubts he would have executed the will which he had caused to be prepared a year before he died. He had the thing present to his mind, he had a draft prepared, in which he gave express directions to that effect, and yet, although very ill, and possibly believing that he was about to die, he gave no directions upon the subject.

That being so, I am of opinion that I must appoint Mrs. Seager, the mother, to be the guardian of the child; but I think it is proper, according to the practice which I almost always adopt in such cases, unless very peculiar and exceptional, to add a gentleman to act with her as a guardian, and, upon looking through the papers and taking the suggestion of her counsel into consideration, I propose to appoint Mr. Wood, the husband of her aunt. I shall give no directions respecting the education of a girl of three years old; I shall leave that entirely to the mother. But I shall expect, in the course of a few years, when the child becomes of an age to receive a more regular education [265] than she will do at present, to receive information from the mother and from the guardian as to the course of education which they propose to adopt with regard to her, and thereupon I shall give any further directions which I may think fit upon the subject.

Mr. Baggallay. Your Honor does not think it right to make any order as to the religious faith in which the child shall be brought up; you leave that to the mother?

THE MASTER OF THE ROLLS. I leave that entirely to the mother for the present, and I shall give no directions at all on the subject now.

NOTE.—Upon appeal, Lord Westbury, L. C., declared that the infant ought to be brought up and educated, when capable of receiving religious education, as a member of the Roman Catholic church; but that, having regard to her tender age and the condition of health, the Court deemed it requisite that the child should continue under the care of her mother, her husband and Mr. Wood (who were appointed guardians), until seven years of age, when application might be made to the Court respecting the guardianship, the education and religious instruction of the child.—27th May, 1865.

[266] SWIFT v. SWIFT. Jan. 18, 23, 1865.

[Varied on appeal, 4 De G. J. & S. 710; 46 E. R. 1095; 34 L. J. Ch. 394; 12 L. T. 435; 11 Jur. (N. S.) 458; 13 W. R. 731. See *Hamilton v. Hector*, 1871, L. R. 13 Eq. 511; L. R. 6 Ch. 705.]

A contract, by which a father deprives himself of all his parental control over his child, is contrary to the policy of the law, and void; but such a contract is valid, if the conduct of the father towards his child is so gross that the Court would remove the child from his custody.

A father who had criminally assaulted his infant daughter, executed a separation deed, giving the sole control of his children to his wife. It was enforced in equity.

Mr. and Mrs. Swift had two children, a son and a daughter, both of whom were infants of tender age.

On the 10th of June 1863 Sarah Ann, one of these children, then a child of seven years old, told her mother that her father had criminally assaulted her. On the 11th of June (the following day) the mother took the child to a surgeon, who resides five miles off from the husband's farm, in order to ascertain if there was any foundation for such a charge. The child reiterated the charge to the surgeon, who examined her person, and found that the offence had been committed by some one. They returned home, and on the following day the Defendant left his house where he and his family were then residing, and went to another farm he had in his possession, and the parties had not since met.

Mr. Newton, the solicitor of the family, was communicated with; and on the 13th of June he wrote on the subject to the Defendant's father, and he communicated both with the Defendant and his father. On the 15th and 16th of June, the terms of a deed of separation were negotiated between Mr. Newton and the Defendant's father. No charge was made against the Defendant before any magistrate; but, in the meantime, the Defendant assigned his property to his father, "until" (as the father expressed it) "the matter was settled." The [267] father, on the 20th June, in a letter of that date, stated "that his son, as an injured innocent man, determined to see himself righted;" but, on the same day on which this letter was written, viz., on the 20th of June, the Defendant executed a deed of separation, the same having been fully explained to him, and he having understood the full effect and purport of it.

This deed was dated the 20th of June 1863, it was made between Mr. Swift of the first part, Mrs. Swift of the second part, and a trustee of the third part, and thereby Mr. Swift covenanted with the trustee that his wife might live separate and apart from him, and that their two children should, at all time thereafter, be *under the sole care, management and protection of Mrs. Swift*. Mr. Swift also covenanted to pay Mrs. Swift an annuity for the support, &c., of herself and the two children, and the trustee entered into the usual covenant of indemnity against the wife's debts.

Upon the execution of this deed, Mrs. Swift left her husband's house with her two children, and she continued to live separate from him. He, at first, had made payments to her in accordance with the terms of the separation deed; but in March 1864 Mr. Swift endeavoured forcibly, but ineffectually, to obtain possession of his daughter, and he then contested the validity of the deed.

In consequence of this, the present suit was instituted, on the 4th of April 1864, by Mrs. Swift, against her husband and the trustee, praying for an injunction to restrain Mr. Swift from removing from, or prosecuting any proceedings to obtain the two children from her custody, or interfering with her in their management, [268] care and protection. It also sought to recover the arrears of the annuity.

The child was not examined as a witness in the suit.

The Defendant denied on oath the truth of the charge made against him, and he retaliated by charging his wife with habitual intoxication and with acts of adultery with one of the farm servants, who was the only witness who testified to the adultery.

Mr. Baggallay and Mr. W. Morris, for the Plaintiff. We admit that, in an ordinary case, a covenant by which a child is deprived of the superintendence and protection of his parent is void; *Vansittart v. Vansittart* (4 Kay & J. 62, and 2 De Gex & J. 249). But where a parent's conduct is such as to render it necessary, this Court will interfere for the protection of the child, and deprive a father from the custody and all interference with and control over his child. In such a case, it cannot be unlawful to secure, by contract, that protection for a child which this Court would adversely enforce. Here a crime is proved to have been committed, and the guilt of the Defendant is shewn by his acts and conduct when accused, by his acquiescence in the charge, instead of courting an investigation, and by his submission to the terms necessarily imposed upon him on the supposition of his guilt.

Mr. Selwyn and Mr. Bromhead, for the Defendant. No bill will lie for the specific

performance of an agreement for separation; *Hunt v. Hunt* (1); and every [269] case of a contract by a parent which deprives him of his parental power and authority is absolutely void; *Vansittart v. Vansittart* (4 Kay & J. 62, and 2 De G. & J. 249); *Hope v. Hope* (22 Beav. 357, and 8 De G. M. & G. 731); *Walrond v. Walrond* (Johns. 18). Such a contract is contrary to public policy.

[THE MASTER OF THE ROLLS. But can it be repugnant to public policy to secure a child from the interference of a parent whose conduct towards his child is such as to corrupt her morals and ruin her in mind and body. Surely, in *Wellesley v. Wellesley* (1 Dow. & Cl. 152, and 2 Bli. (N. R.) 124), if Mr. Long Wellesley had, after his misconduct, entered into a covenant, by which his children had been placed in the custody of the persons to whose care they were ultimately committed by the Court, such a covenant could not have been considered as contrary to any principle of public policy.]

Here there is no proof of such conduct, the only evidence against the father is a story, not on oath, of a mere child. His acts and conduct may be accounted for; he, like many others, was deprived of his reason and judgment by the enormity of the accusation, and naturally shrunk from publicity.

With respect to the prayer for the recovery of the annuity it is a proper subject for an action at law, and not for a suit in equity; *Seagrave v. Seagrave* (13 Ves. 439).

[270] Mr. Bagallay, in reply.

Jan. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit to enforce the performance of a deed of separation between husband and wife. There is a sufficient consideration for it, and it is executed by the trustee. It is contested on the ground that the covenant entered into by the husband binds him not to see or interfere with the management of his children, and it is said that such a covenant is in itself void and that it vitiates the whole deed.

There is no doubt as to the rule of law which is laid down in *Vansittart v. Vansittart* (4 Kay & J. 62, and 2 De G. & J. 249), that a covenant by a father that he will abstain from seeing and exercising any control over his children, is bad, because it is against the policy of the law, which holds that it is desirable that a father should exercise superintendence over his children, and that he cannot therefore by contract deprive himself of this inherent right and duty imposed on him by nature. But although this is the general, I might almost say the universal rule, both as regards law and morals, there occasionally exist cases, where the control of the father is injurious to the child, and in such case, equity will interfere to prevent that injurious control, and will, in some cases, remove the child from its father; not that equity acts contrary to the policy of the law, but that it holds that this particular case is an exception to the general rule, and that, in such case, the principle is inverted. As a general and almost universal rule, a father should superintend the education of his children, [271] but a particular case may occur, in which it is not for the benefit of the child that this superintendence should exist. It is an exception to the rule. This policy of the law is derived from what is most for the benefit of the child. In this case it is inverted, and the policy of the law in this particular case is, to take the child away from the father and put her under the care of others. The advantage and benefit of the child is the foundation of both the rule and the exception. The reason why a covenant to this effect is bad is, because it is found, both by nature and the policy of the law which follow it, to be beneficial to the child that such influence and superintendence should be exerted; but if a case occur, in which this is manifestly the reverse, and when it is plain that it would be destructive to the child's life or morals that such superintendence should exist, then, in my opinion, the same policy of the law which renders such a covenant bad in all other cases makes it good in the particular case supposed.

It must, no doubt, be a very strong case which can justify the Court in applying such a principle, and the question is, whether such a case exists here?

(1) 31 Beav. 89. [4 De G. F. & J. 221; 45 E. R. 1168.] This case has been heard on appeal by the House of Lords, but no judgment has as yet been given, in consequence of the death of one of the principal parties.

[His Honor here recapitulated the facts of the case, as before stated, and then proceeded as follows:—

On behalf of the Defendant, it is argued that there is nothing in the evidence to induce the Court to believe that the Defendant is not a fit person to have the care of his child. I wish that I could conscientiously have arrived at that conclusion. It is said that the conduct of the Defendant in shrinking from investigation at the time and executing the deed in question is attributable to the horror which every rightly judging man would feel at so atrocious an accusation, and which deprived him of the power of acting judiciously. I believe that [272] there is not another father who would not, if such a charge had been made against him, have insisted on the fullest investigation; the Defendant also had his father to advise him. It is said that the child has not given and cannot give any testimony on this matter, and that her evidence has not been taken in this suit, and that if it had been, it must have been rejected. It is very fit and proper that the child has not been made to repeat, in an affidavit, the statement she made to her mother and to the surgeon. It would have been very improper had it been done; but her evidence, if she understood the nature and obligation of her oath, could and would have been taken on this subject in any Court of justice throughout the kingdom in a criminal charge against the father.

The offence on the child had been committed by some one. By whom? The child said it was the Defendant, and I am asked, in this state of circumstances, on the simple denial of the Defendant, after nine months' acquiescence in the charge, to dismiss this bill, to make the mother or the next friend pay the costs of it, and deliver over the child to the care and treatment of the father. If, in that state of things, any Court can be found in this country which will deliver up this unfortunate child to the care of this Defendant, I am very happy to say that it will not be by me, and that the future calamities which might result to this child from such an order will not rest on my responsibility.

In answer to this bill, and this evidence, the Defendant makes charges against the Plaintiff; he imputes her habitual intoxication and adultery with one of her servants. I have carefully considered the evidence on both these charges, and I am of opinion that the first [273] charge, that of intoxication, is disproved; and that the second charge, which rests solely on the evidence of a man who asserts that it was with him the adultery was committed, and which is positively denied by the Plaintiff, is falsely made and that the witness who swore to it is perjured.

The result is that, in my opinion, the case of the Defendant wholly fails, and that, for the reason and in the circumstances detailed in the early part of these observations, I have come to the conclusion that it is my duty to make, and I shall thereupon accordingly make, a decree for the Plaintiff as asked, and I shall order the Defendant to pay the costs of this suit. I will direct an injunction and account.

[273] HIRD v. PINCKNEY. Jan. 25, 1865.

The testatrix directed her residuary estate "to be divided equally" between her two granddaughters on the youngest attaining twenty-one. She added, if they both marry a relation of J. D., then the residue is to be divided between my nephews and nieces. The granddaughters having attained twenty-one and being still unmarried, the Court declined deciding the validity of the gift over, but held that they were entitled to payment, subject to any future question.

The testatrix, by her will, gave all her estate and property to executors, in trust to convert, invest and accumulate. She then proceeded as follows:—

"And to stand possessed of the said original and accumulated securities, in trust for my two granddaughters, Sophia Elizabeth Hird and Mary Catherine Hird, *to be divided equally between them when the youngest of them shall attain the age of twenty-one years*: Provided that in case either of my said granddaughters shall die under the age of *twenty-one leaving no issue*, the other of them shall then be entitled to the whole of the said securities on obtaining the age of [274] twenty-one years; and in case both of my granddaughters should die under the age of twenty-one and without issue, then

the whole of the said securities shall be divided in equal parts between my several nephews and nieces who shall be living at the death of the survivor of my said two granddaughters.

"If either of grandchildren marry any relation of Joseph Dingwall's, everything belonging to me is to go to the other grandchild, and if both marry a relation of the said Joseph Dingwall, everything belonging to me is to be divided between my nephews and nieces."

The testatrix died in 1856.

Sophia Elizabeth Hird and Mary Catherine Hird had now both attained twenty-one, and neither of them had ever been married.

They instituted this suit in 1864 against the executors and the testatrix's nephews and nieces, insisting that having attained twenty-one, and being still unmarried, they were absolutely entitled to the clear residue, which amounted to £4221.

Mr. Baggallay and Mr. Hardy, for the Plaintiffs, contended that the proviso was void, in consequence of its unlimited character, and of its being inconsistent with the absolute interest previously given. Secondly, that the event on which the forfeiture was to take place must happen, either in the life of the testatrix or before the legatees attain twenty-one. That, in any event, the Plaintiffs were entitled to the money in the meantime.

Mr. G. L. Russell, *contrà*, insisted that the clause [275] giving over the property to the nephews and nieces was perfectly valid, and would operate if the granddaughters should marry relations of Joseph Dingwall.

W—— v. B—— (11 Beav. 621); *Poole v. Bott* (11 Hare, 33), were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, I think that it is not necessary for me to express any opinion on the question at the present time. I am however of opinion, that the Plaintiffs are entitled to have the money paid over to them without any fetter, and if the event should hereafter arise and the nephews or nieces should claim the property, then I, or one of my successors, may have to determine the question which has been raised.

I must direct the transfer of the fund to the Plaintiffs, without prejudice to the claims of the nephews and nieces, if, at any future time, the Plaintiffs should marry relations of John Dingwall; but, in the meanwhile, the Plaintiffs are entitled to have the money to use as they may think fit.

[276] MILNER v. MILNER. Jan. 25, 1865.

[See *In re Heathcote's Trusts*, 1873, L. R. 9 Ch. 48 (n.).]

Leaseholds were, by deed, conveyed to trustees, in trust for the settlor for life, and after her decease in trust to assign them to Thomas, his executors, &c., "absolutely." But if Thomas should die without leaving any child living at the time of his decease, then in trust to assign to Phillip, &c., &c.: Held, on the context, that the death referred to was not confined to a death in the life of the tenant for life, and that Thomas did not, upon the death of the settlor, become absolutely entitled to the leaseholds.

By a deed, dated in 1830, Hannah Cleaver Cross assigned some renewable leaseholds to Pentecost Milner and Edward Tull, upon trust to pay her the rents for life, and afterwards upon the following trusts:—

"And from and after her decease, upon trust to assign and transfer the said trust premises unto Thomas Cross Milner" [describing him], "his executors, administrators and assigns absolutely. But if the said Thomas Cross Milner shall die without leaving any child or children, lawfully begotten, living at the time of his decease or born in due time afterwards, then upon trust to assign and transfer the said trust premises unto Philip Splidt Milner, his executors, administrators and assigns absolutely. But if the said Philip Splidt Milner shall die without leaving any child or children lawfully begotten living at the time of his decease or born in due time afterwards, then," &c. Then followed similar gifts and directions in the same terms, *mutatis mutandis*, in

favour of three other children, viz., Christian Splidt Milner, Henry Milner and John Milner the son.

The deed then proceeded thus:—

“But if the said John Milner the son shall die without leaving any child or children lawfully begotten living at the time of his decease or born in due time afterwards, then the said trust premises shall remain and be in trust for the said Pentecost Milner and Hannah Tull, for their joint lives, and after the de-[277]-cease of either of them, in trust for the survivor of them her executors, administrators and assigns absolutely.

“Provided always and it is hereby declared and agreed, that after the decease of the said Hannah Cleaver Cross and during the minority or respective minorities of such of them the said Thomas Cross Milner, Philip Splidt Milner, Christian Splidt Milner, Henry Milner and John Milner as shall, for the time being, be entitled in possession, to the said trust premises, subject to the aforesaid executory bequests over in the events before mentioned,” the trustees were to invest the rents, which were “to accumulate by way of compound interest, and all such investments and the accumulations thereof shall be transferred to the person or persons who, upon the ceasing of the accumulation hereinbefore directed, shall be entitled, in possession, to the said leasehold premises or to the receipt of the rents and profits thereof.”

Powers were given to the trustees to surrender and renew the lease and to raise money by mortgage for that purpose. There were also powers of leasing and of appointing new trustees.

Hannah Cleaver Cross died in 1843.

By this bill the Plaintiff Thomas Cross Milner, who was a bachelor, insisted that on the death of Hannah Cleaver Cross he became entitled to have an absolute assignment and transfer of the leasehold premises executed to him by the trustees.

The Defendants, however, insisted that the Plaintiff's interest in the premises was subject to an exe-[278]-cutory trust, in the event of his dying without leaving any child or children living at his death; but the Plaintiff charged that such executory trust was only to take effect in the event of his so dying in the lifetime of Hannah Cleaver Cross.

Mr. Selwyn and Mr. Archibald Smith, for the Plaintiff. This is the case of a deed, but the rules for its construction are the same as those adopted in the case of wills. Here, the death referred to is death in the life of the tenant for life; *Edwards v. Edwards* (15 Beav. 357); *Johnson v. Cope* (17 Beav. 561); *Re Allen* (3 Drew. 380); *Re Anstice* (23 Beav. 135); *Jarman on Wills* (vol. 2, p. 739). Therefore, on the death of the tenant for life, the Plaintiff became absolutely entitled, and this is made clear by the direction to assign the property to him absolutely, which is quite inconsistent with there being a continuing trust for Philip.

There would be great inconvenience attending an opposite construction, for the ownership of the estate would remain in contingency all the life of the legatees, and could never be conveyed as directed. Besides, the property would go over, although they might leave any number of grandchildren, but no son. The powers to accumulate, &c., were necessary in order to provide against cases of infancy.

Mr. Jessel and Mr. Kay were not called on.

[279] THE MASTER OF THE ROLLS [Sir John Romilly]. I entertain no doubt as to the meaning of the settlor, and I think she has used words sufficient to express her intention. What she meant to do was this:—There were five children, and she intended Thomas to take for life, but if he died without leaving any children surviving him, the property was to go to Philip, and so on to the others in succession. But if Thomas left any child at his death, then he was to have the absolute power of disposing of the property. The settlor says, if you have a child living at your death, you shall dispose of it as you think fit; but if not, it shall go over to your brother. The argument is that there is a direction, after the settlor's decease, to “assign and transfer” the property to Thomas “absolutely.” But I think that if such an assignment had been made, the only effect of it would have been to make Thomas a trustee for the purposes I have stated.

I think that the settlor intended the trust to continue, and that this intention is expressed in the deed, and can only be got over by a complete alteration of the words

of it. The accumulation was to take place "during the minority or respective minorities" of the five children as should, for the time being, be entitled to the rents. The words shew that the settlor anticipated that there might be more minorities than one, and if so, it does away with the argument that the first legatee was to take the property absolutely. The accumulations are to be transferred to the person "for the time being entitled" to the leaseholds, "subject to aforesaid executory bequests over in the events before mentioned." True it is that this was not, technically speaking, a "bequest," but the settlor thought fit so to call it, and the direction is equally valid. Again, the property cannot be "subject" to [280] the executory bequests over, if the first estate is absolute and nothing is to go over on the termination of the life of the person first to take. The other parts of the deed also point to the continuation of the trust until it is vested in one of the five persons absolutely, by his death leaving a child living at the time of his decease.

I do not mean to impugn the authority of *Edwards v. Edwards*, but I am not clear that this case does not come within the second rather than the fourth class of cases there referred to. But all general rules of construction are subject to this:—That a testator or a settlor may, if he pleases, exclude these rules, by the use of exact words to denote his intention, and this, I think, he had done here.

I will make a declaration accordingly.

[281] DARLOW v. COOPER. Jan. 27, 1865.

The Defendant borrowed money of the Plaintiff, and he gave his promissory note for the amount with interest at £60 per cent. together with an equitable charge on copyholds as a collateral security for the note. The Plaintiff sued at law on the note, and, by mistake, he claimed and recovered interest at £5 instead of £60 per cent., which was paid. Held, that the Plaintiff could not afterwards sue in this Court upon the mortgage to recover the deficiency, and his bill for that purpose was dismissed with costs.

On the 13th of October 1863 the Defendant, Cooper, borrowed £550 from the Plaintiff, Darlow, for which he gave his promissory note as follows:—

"£595

13th October 1863.

"Three months after date, I promise to pay Mr. Frederick Darlow or his order, the sum of £595 for value received; and should not the same be paid within one week after it falls due, the sum of £5 per cent. is to be charged upon the entire amount, for every month or part of a month, as long as the said amount or any portion of it shall remain unpaid.

"WILLIAM WHITE COOPER."

By a memorandum of even date, the Defendant charged some copyhold premises "with the payment of the sum of £595 on the 16th of January 1864, and in case of default in payment thereof on that day, then to be and remain a charge, not only for the said sum of £595, but for interest thereon, after the rate and in the manner provided by the promissory note."

The Defendant made default in payment on the 16th of January 1864, and on the 13th of June 1864 the Plaintiff commenced an action against the Defendant upon the said promissory note, by issuing against him a writ of summons under "The Summary Procedure on Bills of Exchange Act, 1855," in which action he claimed £620 for principal and interest and £3, 3s. for costs, and on the 25th of June 1864 he signed judgment in the action for £624 debt and costs.

[282] On the 1st of July the Defendant's solicitor tendered to the Plaintiff's solicitor the amount of the judgment debt and costs; but he refused to accept the same, and stated that the writ of summons had been, by a mistake on his part as to the real contents of the promissory note, endorsed with a claim for £620 only for principal and interest, and that he would not accept, in satisfaction of the said judgment, anything less than £773, 10s. for principal and interest, and £27, 9s. 8d. for costs.

On the 11th of July 1864 the Plaintiff issued execution, under which the Defendant, on the 21st of July, paid £625, 10s. 3d. for principal and interest, and £4, 8s. costs.

In the meantime, on the 5th of July, the Plaintiff instituted this suit against the Defendant to recover the amount due on the mortgage, and in default for a sale of the premises.

The Court, upon the evidence in the cause, came to the conclusion that the equitable mortgage was a collateral security for the amount due on the promissory note.

Mr. Selwyn and Mr. Graham Hastings, for the Plaintiff, argued that as the whole of the debt due from the Defendant to the Plaintiff had not yet been paid, the Plaintiff was now entitled to enforce his other security, and recover, by means of his mortgage, the amount still remaining unpaid.

Mr. Henry C. Phear, for the Defendant, argued that the debt having been recovered at law, the Plaintiff had no claim in equity.

[283] THE MASTER OF THE ROLLS [Sir John Romilly]. Upon the evidence, I think that the equitable mortgage was a mere collateral security for payment of the amount due on the promissory note.

There is nothing more clearly settled than this:—That a mortgagee may, at the same time, proceed on all his securities. He may file a bill of foreclosure, and at the same time he may sue the mortgagor on his covenant; but if he obtains payment upon the covenant, he cannot go on with his foreclosure, for nothing being due, the foreclosure suit necessarily comes to an end.

The question here is, has the promissory note been paid? for, if not, the Plaintiff may take any proceedings he may think fit to recover what is due on it.

The facts are these:—The Plaintiff, on the 13th of June, commenced an action at law on the bill of exchange, in which he claimed £620; and he obtained judgment for that amount on the 25th of June. On the 1st of July a tender of the amount was made to the Plaintiff's solicitor, who refused to accept it. On the 5th of July the Plaintiff filed this bill; and on the 11th of July he issued execution on the judgment, which was satisfied on the 21st of July by payment of the full amount of principal, interest and costs due on judgment obtained on the promissory note.

I am of opinion that the promissory note is paid, and that nothing can now be recovered on it; and if that be not so, then that the matter can only be set right in a Court of Common Law, to which the Plaintiff may apply if necessary.

[284] The equitable charge on the copyhold property was a mere collateral security for the payment of the promissory note, and that having been paid, I am of opinion that the Plaintiff cannot come here for a foreclosure of his mortgage. If he has made a mistake at law he cannot throw the consequences of it on the Defendant.

I must dismiss the bill with costs.

[284] BEDBOROUGH v. BEDBOROUGH (No. 1). Jan. 30, 1865.

A testator devised his Upton Park estate to his five daughters and his grandson, as tenants in common, for their respective lives, with remainders over. By a codicil he devised to his son Alfred and his heirs "the like share he had given to his five daughters in the Upton Park property, in every respect whatever." Held, that Alfred took one-seventh in fee.

The testator gave and devised his Upton Park estate to his five daughters and his grandson (naming them), "for their respective lives, as tenants in common, and on their respective deaths, he gave and devised to the elder son then living, or in default of a son the eldest daughter, the share of my daughter, &c., so dying, and to his or their heirs for ever, as tenants in common. And in the event of either of his daughters dying, not leaving any son or daughter her surviving," then he gave his said daughter's share to such nephew of his said daughters as she should by will appoint, and in default of such appointment, the said share was to merge into the other shares.

By a codicil, the testator gave as follows :—

"I give to my son, Alfred Bedborough, *and to his heirs*, the like share I have given to my five daughters in the ultimate disposal of my Upton Park property, in every respect whatever."

[235] The question was what interest Alfred took in the estate.

Mr. Southgate and Mr. Waller, for the Plaintiff.

Mr. Hobhouse and Mr. W. W. Cooper, for Alfred Bedborough.

Mr. Eddis, Mr. Pemberton, Mr. Ellis, Mr. Colt, for other parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. With respect to the devise to Alfred Bedborough, I am of opinion that it gives him one-seventh part of the Upton Park estate, in fee. I think that the words used by the testator, viz.: "the like share I have given to my five daughters," apply only to the extent of this share, and not to the limitation affecting the share. The shares were given to the daughters for life, with limitation over, here the share is given to Alfred and "his heirs." The introduction of him into the class of devisees diminishes the share of each from one-sixth to one-seventh, and the shares are all alike; but the mode in which each share is limited is different, and is specified in the will and codicil.

[236] BEDBOROUGH v. BEDBOROUGH (No. 2). Jan. 30, 1865.

A bequest of an annuity to a married woman, "in the event of the death of or her separation from her present husband," was followed by a right to reside in the testator's house "in the event of the death of her husband, or her separation from or living apart from him." She was separated from him, not by any legal separation, but by reason of his infirmity. Held, that she was entitled to the annuity.

The testator, amongst other things, bequeathed as follows :—

"I further direct my said trustees to pay to my daughter Sarah Clode, *in the event of the death of or her separation from her present husband*, the clear annual sum of sixty pounds, payable quarterly." The testator also gave to two of his other daughters the free use and occupation of his present residence, and so much of the furniture therein as they should select for furnishing their permanent residence, "subject to the right of my daughter Sarah Clode jointly occupying the said residence of my said daughters, in the event of the death of her husband, or her separation from or living apart from him."

The testator's daughter Sarah Clode was separated from her husband, not by any legal separation, but by reason of his infirmity. The question was, whether the annuity was now payable.

Mr. Southgate, Mr. Waller, Mr. Hobhouse, Mr. W. W. Cooper, Mr. Colt, Mr. Ellis, for different parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. A question arose on the annuity of £60 to the testator's daughter Sarah Clode. It is given to her in the event of the death of her husband, or of her separation from him. She is, in fact, separated from him, not by [237] any legal separation, but by reason of his infirmity of health. I am of opinion that this is a specie of separation which is included in the word "separation," used by the testator, and that the annuity is payable to Mrs. Clode.

The testator has himself, in my opinion, put his construction on this word by the direction, which gives Mrs. Clode the right of residence with her sister, "in the event of the death of her husband or her separation from or living apart from him."

[287] BANISTER v. BIGGE. Jan. 31, 1865.

[S. C. 11 Jur. (N. S.) 276; 13 W. R. 379.]

Injunction to prevent the user of a volunteer rifle range for ball practice, until it had been rendered free from danger.

The Plaintiff was the tenant of a farm at Willesden, and the Defendants, Colonels Bigge and Corrie, were the commanding officers of the Middlesex volunteer corps. The Defendants had obtained a lease of a rifle range and butts at Willesden, near the Plaintiff's farm. The line of fire of this range, after passing the butts, crossed the highway at a distance of about 450 yards from the butts, and it then entered the Plaintiff's meadows, through which it passed for a very considerable distance. The range was laid out and the butts erected early in 1861 at a cost of £300, and the sanction of the War Office having been obtained, it was opened in June 1861, and had since been constantly used. Precautions were taken to prevent accidents, by keeping two look-outs to signal when any person passed along the road or across the fields in the line of fire. No complaint appeared ever to have been made prior to July 1864; but about that time serious inconvenience had been occasioned to the Plaintiff by the rifle firing. Rifle balls then constantly passed over into [288] the Plaintiff's grounds, and upwards of fifty of them had been picked up in his meadows. In July 1864 a rifle ball had struck the dwelling-house on the Plaintiff's grounds (which was 600 yards from the butts, and 200 yards out of the line of fire) within twelve inches of the window which a woman was cleaning. In October 1864 one of the Plaintiff's cows had been struck in the hip by a rifle bullet, and bullets were repeatedly heard whizzing over the lands, and some were seen to fall on the earth and were dug out by the farm servants.

The Plaintiff instituted this suit in December 1864, and prayed that the Defendants might be restrained "from using the said rifle range or permitting the same to be used for ball practice, or, at all events, from using or permitting the same to be used for that purpose, until the same should have been rendered perfectly safe and free from danger to the Plaintiff, his family and workmen." The bill also prayed that damages might be awarded to the Plaintiff.

A motion was now made for the injunction.

The defence made was that every possible precaution had been taken to prevent accident and annoyance; that the stray shots, which had latterly entered the Plaintiff's grounds, had been caused by the ricochet of shots, which struck some hard gravel recently laid down in front of the targets; but the Defendants said they were proceeding to make alterations by raising the butts twenty feet, by removing the gravel, and by altering the slope of the ground, which they believed would render the range perfectly safe and free from danger. The Defendants also stated that it was not their intention "to use the range for firing, before the above-mentioned works had been completed to the [289] satisfaction of the proper Government officer, and the proper certificate had been duly obtained."

Mr. Southgate and Mr. Haynes, for the Plaintiff, relied on *Raphael v. Wigram* (M. R., 25th July 1864).

Mr. Selwyn and Mr. Ware, for the Defendants, argued that the acquisition and user of rifle ranges had been sanctioned by the Legislature, "The Rifle Volunteer Grounds Act, 1860" (23 & 24 Vict. c. 140), and that it was necessary, for the safety of the kingdom, that artillery and ball practice, at ranges approved of by the authorities, should not be stopped, where, as in this case, every precaution had been taken to prevent accident and annoyance. That the butts and range had the sanction and authority of the proper Government officer, and that steps were now in progress to prevent all future mischief, and that, at the utmost, it was merely a case for damages, and not for an injunction.

They also relied on the acquiescence of the Plaintiff's landlord prior to the Plaintiff's tenancy.

THE MASTER OF THE ROLLS [Sir John Romilly]. I have no doubt that the Plaintiff is entitled to the injunction.

This case has been argued, as if I were asked to stop the use of the butts altogether, which it is not my intention to do, for I believe, and the Defendant's witnesses believe, that they can be rendered free from all danger to the Plaintiff, his family and workmen; and I [290] am of opinion that the Defendants are bound to do so. All that my injunction will do will be to restrain the use of this rifle range, until it shall have been rendered free from all danger to the Plaintiff, his family and his workmen.

It is impossible to say that there has been any acquiescence in this case. It is true that the firing has been going on for three years before the Plaintiff came to the farm, which he did a year and a month ago. He then knew nothing about the effect of the firing, and assumed that it was free from danger, which no doubt it ought to have been. But afterwards he had a cow injured, then a ball struck the house where the wife of his managing man was cleaning one of the windows, about twelve inches from the window frame; another ball was seen to enter the ground by a boy who dug it out, and upwards of fifty bullets have been picked up in the Plaintiff's fields. It is impossible to say that this is safe now, though the Defendants themselves say that it can be made safe. Whether they have made it safe or not now, I do not know; if they have made it safe, they will not violate this injunction by going on with the firing, but if they have not, then they must do so before the range is used.

This is not a case in which the Court would have granted an *ex parte* injunction, because the Plaintiff ought to have come much more speedily; but the motion being made upon notice, I think that the Plaintiff is entitled to an injunction to prevent the use of the rifle range, in the terms of the first paragraph of the prayer of the bill, "until the same shall have been rendered free from danger to the Plaintiff, his family and workmen," omitting the word "perfectly," which adds nothing to the meaning.

[291] LINFORD v. THE PROVINCIAL HORSE AND CATTLE INSURANCE COMPANY.
Nov. 11, 1864.

[S. C. 10 Jur. (N. S.) 1066; 11 L. T. 330.]

An ordinary local agent of an insurance company is not, without special authority, authorized to bind the company by a contract to grant a policy. The London agent of a county insurance company received the Plaintiff's proposal for an insurance. The Plaintiff paid the annual premium to the agent, who promised that he should have the policy. The agent retained and misapplied the money and never forwarded the proposal to the company. Held, in the absence of proof of special authority to the agent, that the company were not bound to grant the policy.

The head office of the Provincial Horse and Cattle Insurance Company was at Nottingham, but they had a London branch, at which Webb was their agent. This branch was carried on at Webb's own offices, at the entrance door of which he had affixed a plate, with the words "National Provincial Horse and Cattle Insurance Company," thus changing the title from "Provincial" into "National."

On the 23d of July 1863 the Plaintiff called at the London office, and proposed to ensure three cows for £42, and he signed the usual printed form of proposal and declaration, which was partly as follows:—

"I propose the above stock for insurance, according to the company's rules and conditions, and agree to pay the amount of premium when the policy is presented to me," &c. The Plaintiff, at the same time, paid 10s. on account. Webb, on the 30th of July following, inspected the Plaintiff's cows, and he informed him that the insurance should be effected, and, thereupon, the Plaintiff paid Webb 25s., the rest

of the insurance, and Webb gave him a receipt for the "sum of 35s. for insurance for cows."

The Plaintiff lost a cow, and not having received his policy, he, on the 28th of September 1863, applied for it to the company at Nottingham, and was informed that Webb had obtained the money by false pretences, that no proposal had reached that office, and that [292] no policy had ever been applied for. The company, in September 1863, discharged Webb from his agency, and subsequently repudiated all liability in regard to the Plaintiff, who, thereupon, instituted this suit against the company, praying a specific performance of their alleged agreement to grant him a policy.

The company admitted that Webb was their agent, but said that his duties were to canvass for insurances and obtain proposals, and to receive a deposit of one-fourth of the probable premium, to get the cattle inspected by the company's veterinary surgeon and his declaration signed, and that, on the receipt of the proposal at Nottingham, it was accepted or declined.

There was no evidence that Webb had any special authority either to grant or to agree to grant policies.

Mr. Caldecott, for the Plaintiff. The Defendants, the company, are bound by the acts of their agent, in the same way as an individual would be; *Thorn v. The Commissioners of Public Works* (32 Beav. 490). Webb was held out to the public as the general agent of the company, and as such he was authorized to do all acts necessary for and incidental to their business.

This general authority could not be controlled by any secret instructions not communicated to the public; *Story on Agency* (sect. 17, 126); *Whitehead v. Tuckett* (15 East, 400); and see *Collen v. Gardner* (21 Beav. 540).

The receipt by Webb of the full premium, and his [293] promise that the insurance should be effected, therefore constituted a valid contract binding on the company, and which they are now bound to perform.

Mr. Selwyn and Mr. L. Field, for the company, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly] was of opinion that there was no contract binding on the company. That Webb, the agent of the company, was competent to do all acts within the scope of the ordinary duty of an agent of an insurance company; but that it was not the ordinary duty of such an agent to grant, or contract to grant, policies of assurance, and that no special authority had been proved. That what the Plaintiff had done was to make a proposal, with a deposit, which the company was entitled either to accept or reject, and the company never having accepted it, was not bound.

He dismissed the bill with costs, with this addition, "but the Plaintiff is to be at liberty to bring such action against the Defendants as he shall be advised."

[294] *Re LOMAX. Feb. 11, 1864.*

[Followed, *In re Wilkinson's Estate*, 1868, 37 L. J. Ch. 384. See *In re Rectory of Gedling*, 1885, 53 L. T. 245.]

Compensation money was invested in consols, and an application was afterwards made to reinvest it on a mortgage security: Held, under the Lands Clauses Consolidation Act that the company must pay the costs, but that, in regard to future costs, it must be considered as a permanent security.

Lands were compulsorily taken by a railway company, and the compensation money had been paid into Court and invested in consols. The company had paid the costs of this proceeding.

It was now proposed to sell the consols and invest the money on a mortgage security; and the question raised was, whether the company ought to bear the costs.

Mr. Stiffe Everett relied on the decision of the Master of the Rolls in *Reading v. Hamilton* (5 L. T. 628).

Mr. Ostler, *contrà*. The company are not liable to pay these costs. The 69th

section of "The Lands Clauses Consolidation Act" (8 & 9 Vict. c. 18), authorizes the investment of the money in land, &c., and the 70th section authorizes an *interim* investment in Government or real securities; but the 80th section only renders the company liable to pay the costs of one *interim* investment. This is not like the case where the temporary investment is paid off, but it is an attempt to make the company pay for a second voluntary investment of the compensation money.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Petitioner is entitled to have this fund invested [295] on real security, but I think that, in regard to future costs, this must be treated as a permanent investment, there having already been one *interim* investment in consols. The title must be approved of in Chambers, and the company must pay the costs according to the Act.

[295] MILLER v. MACKAY (No. 2). Jan. 12, Feb. 12, 1865.

[See *Hancock v. Heaton*, 1874, 30 L. T. 595.]

The Plaintiff and Defendant were partners, they were joint owners with Baines of some ships, as to which Baines acted as ship's-husband, but the duties were principally performed for him by the Defendant. There being no agreement on the subject between the parties, it was held, that Baines was entitled to the profits derived as ship's-husband, and that the Plaintiff was not, as partner, entitled to participate in any share of them received by the Defendant, by arrangement with Baines.

The case, reported *ante* (31 Beav. 77), now came before the Court upon an adjourned summons, the Plaintiff still claiming to participate in the profits derived by the Defendant from acting as ship's-husband for ships, in which the Plaintiff and Defendant were part-owners with other persons. The circumstances under which the question arose are fully detailed in the judgment of the Court.

Mr. Selwyn and Mr. Hardy, for the Plaintiff.

Mr. Baggallay and Mr. Druce, for the Defendant.

Feb. 12. THE MASTER OF THE ROLLS [Sir John Romilly]. This case, which is a summons adjourned from Chambers, requires me to decide, what, in the absence of any written or expressed agreement on the subject, is proper to be allowed, in respect of the services performed as ship's-husband for nine ships belonging to the [296] Black Ball Packet Line, and to whom the sums allowed ought to be paid.

The Plaintiff and Defendant were partners as builders and repairers of ships for seven years from 1st of January 1846. They are also the sole owners of three ships, for which they acted as ship's-husbands and ship's-brokers.

Besides this, they were joint owners with James Baines in nine other ships, which are the ships in question in this case; and were joint owners together with James Baines and with Harrison in three other ships.

All these twelve ships were engaged as packet ships to Australia, and constituted what was called the Black Ball Line.

The business of James Baines is that of a ship's-broker, and the business of Harrison was the baker of biscuits to supply vessels, but he occasionally acted as ship's-husband. The partnership between the Plaintiff and Defendant was dissolved by deed on 4th August 1853. The terms of the dissolution were, that Miller was to retire, and Mackay was to wind up the concern under the inspection of Mr. Beloe. In order to settle accounts of Miller & Mackay, it became necessary to go into the accounts between Miller & Mackay on the one side, and James Baines on the other, in respect of the ships engaged in the Black Ball Line in which they were joint owners.

The Plaintiff was dissatisfied with the course of proceedings, and in November 1860 he filed his bill against Mackay and Beloe for taking the partnership accounts, and also for special inquiries as to the employment by [297] the Defendant of the ships in which the Plaintiff and Defendant were jointly interested with Baines and Harrison, and praying that the Plaintiff might share with the Defendant in any

profits derived by him from acting as ship's-husband or ship's-broker to any of the ships in question. At the hearing, I directed an inquiry—

First. Whether there was any agreement entered into between Miller & Mackay, on the one side, and James Baines on the other, as to who was to perform the duties of ship's-husband and ship's-broker, and as to the remuneration to be paid for past services.

2dly. By whom such duties were performed.

3dly. What rate of commission ought to be allowed.

A separate certificate was made, to the effect that no agreement was come to on this subject, and the two latter branches of the inquiry have been prosecuted in Chambers, and the question I have to determine now is, what answer ought, on the evidence, to be given to these inquiries, viz., by whom such duties were performed, and what is proper to be allowed in respect of them.

The evidence on the subject as to the persons by whom those duties were actually performed is, in my opinion, quite clear and distinct. They were performed in the office, and by the clerks of James Baines, partly under the superintendence and by the direction of James Baines, but principally under the superintendence, and the special direction of Mackay. The evidence of Jaffray and others is clear, that the business was principally done by Mackay, that he was the life and soul of [298] the business, that he was always in Baines's office attending to it, and that it occupied his whole time or nearly so.

The first question to be considered is, in what character was this business done by Mackay. In the first place, Mackay swears that he did the business on account of Baines, and solely to assist Baines in his business. The accounts of Jaffray, as ship's broker, were sent sometimes to Miller & Mackay, and were by the direction of Mackay entered in the books of Baines, sometimes sent direct to Baines, and regular charges made therein accordingly. The correspondence with Jaffray on the subject was usually conducted by Mackay, but occasionally by Baines, and the letters were written on paper belonging to Baines's office, headed "James Baines & Co." Mackay and Baines entered into partnership shortly after the dissolution of the partnership of Miller & Mackay. The exact date of the beginning of the partnership I have been unable to find, but they were certainly partners in the beginning of 1854, and possibly much earlier. This is a short outline of the result of the evidence.

In this state of things, I am of opinion that the proper answer to the first inquiry is, that the business of ship's husband was performed by the firm of James Baines & Co., and that the remuneration, whatever it is, which is to be awarded in respect of it ought to be and must be paid to Baines, or what is the same thing credited to him in the accounts to be taken between him and the firm of Miller & Mackay. It is, in my opinion, quite clear, that if Mackay performed the duties for Baines and by his permission, that this is a matter with which Miller has no concern, beyond this: that he was entitled to stop it, and say to Mackay, you must not neglect the [299] business of Miller & Mackay, in order to conduct the business of another firm. But if Miller made no remonstrance on this subject, or if he did, and did not enforce the discontinuance of such services, he could not prevent Baines, who had no interest in the firm of Miller & Mackay, from receiving exactly what he would have been entitled to receive, if A. B., a stranger, had performed these services, instead of Mackay. What arrangement, if any, there was between Baines and Mackay is an affair between them, which Miller is not entitled to interfere with, or participate in. Whether Mackay was paid nothing, or whether he was paid a proportion of the commission charged, or whether he was paid by a salary, or whether he was paid by a share of the profits of the business of Baines & Co., is what, in my opinion, Mackay cannot complain of, and he has no right to share in such payments, unless indeed he can make out that he was either a partner in the firm of Baines & Co., or that there was an arrangement by which he or his firm was to participate in the partnership trade, by acting as the ship's-husband to the ships in question.

It has been properly stated, that it has been already determined that there was no express agreement between the parties as to the person who was to perform the duties of ship's-husband, and the remuneration to be paid for them, and this is true to this extent: that there was no written or, indeed, expressed, agreement to that effect.

But the intention of the parties and the duties they were to perform and the remuneration to be received must be gathered from their acts. Baines carried on the business of a ship's-husband and ship's-broker, and no other business; Miller & Mackay were shipbuilders and ship repairers as well as ships'-husbands; but it does not appear that they acted as ship's-hus-[300]-band for any vessels but their own. From the beginning of the arrangement and the joint ownerships of these vessels, the repairs were made by and were charged by Miller & Mackay, from the same beginning the duties of ship's-husbands to these ships were all performed in Baines's office, and entered in Baines's books. This appears to me to have been an understanding acquiesced in by all parties, binding all parties, and equivalent to an agreement to that effect. If Baines thought fit to enter into partnership with Mackay, and divide his profits of the business of ship's-husband with him, Miller could not, on that account, claim any portion of such profits, because his partner, although without his consent, had thought fit to enter into such a partnership: the fact that Miller was, in respect of his firm, a co-owner in such ships does not, in my opinion, entitle him to participate in what Mackay received or was entitled to receive, any more than he would have been entitled to receive any part of the profits as salary earned by Mackay, if he had done the business of ship's-husband for Baines in respect of ships the separate property of Baines and in which Miller had no concern. If Baines had become bankrupt, Mackay might have been injured, but Miller would not have been affected by it. Miller could not have been made liable for any losses incurred by Baines, neither is he entitled to share in any profits made by Baines, any more than Baines would have been entitled to share in the profits earned in building or repairing the ships, if he or one of his clerks had been constantly at the yards of Miller & Mackay, and had employed his time in superintending such construction or repairs. I am clear, upon the evidence, that Miller would not have been entitled to participate in the profits of the ship's-husband to the ships, if Mackay had not performed any portion of the duties, and had never set his foot in Baines's office. [301] I am equally clear that Miller is not entitled to participate in any share of the profits, or of the commission which may have been allotted to Mackay, or which ought to have been paid to him in respect of the services so performed by him. It would have been very different if the duties of ship's-husband had been performed by the firm of Miller & Mackay for the nine ships or any of them, as they were for their own three ships; but this is not even alleged. The only question, therefore, is whether Miller is entitled to participate in what Mackay received or ought to have received from Baines, in respect of his services so performed by him, and I am, for the reasons I have stated, of opinion that he is not.

I shall, therefore, in the certificate, find that the duties of ship's-husband to the ships jointly owned by him and the firm of Miller & Mackay were performed by James Baines & Co.

[301] HUNT v. PULLEN. *March 24, 1865.*

Whether, when a party is ordered to pay the costs of suit, it is necessary to specify the costs of a cross-examination in Court under the 19th General Order of Feb. 1861, *quære*.

This was a suit by an equitable mortgagee for foreclosure.

The Defendant having denied having executed the mortgage security, the Plaintiffs required her to attend for cross-examination. At the hearing, the Plaintiff obtained the usual decree with costs. The question was, whether the Plaintiff would have the costs of the cross-examination, allowed in the taxation, unless specifically mentioned, under the 19th Order of the 5th February 1861. The order says that "such ex-[302]-penses shall ultimately be borne as the Court shall direct."

Mr. Baggallay and Mr. A. Miller, for the Plaintiffs, submitted the point.

THE MASTER OF THE ROLLS [Sir John Romilly]. I should have thought that when a Plaintiff obtains a decree with costs without specifying those of the cross-examination, he would be entitled to them. But, at all events, he is entitled to them in this case, and they may be mentioned in the decree.

[302] BETHELL v. GREEN. March 6, 1865.

[See *Hensman v. Fryer*, 1866, L. R. 2 Eq. 633; *Gibbins v. Eyden*, 1869, L. R. 7 Eq. 374.]

Since the Wills Act (1 Vict. c. 26), the residuary devised real estate of a testator is applicable towards the payment of the testator's debts before his specifically devised real and his specifically bequeathed personal estate.

The testator, George Green, by his will dated 1864, devised and bequeathed his real and personal estate to his wife during her widowhood, and afterwards to his children. He then made specific devises in fee of four freehold properties, and proceeded in these terms:—

"And as to and concerning all that his messuage or dwelling-house in Grant's Lane in Wedmore aforesaid, in which he then resided, with the offices, outbuildings, lawn, garden, orchard and premises thereto belonging, and *all the residue of his real estate and all his personal estate*, from and after the decease or marriage of his said wife and in default or failure of children, as aforesaid, he gave, devised and bequeathed unto and to the use of his said nephew the Defendant Edward Norman, his heirs, executors, administrators and assigns, abeo-[303]-lutely. And he appointed his wife sole executrix of his will."

The testator died in 1864 without having had any issue.

This was a creditors' suit, and the general personal estate being admitted to be insufficient to pay the testator's debts, the question was whether, since the Wills Act (1 Vict. c. 26), the residuary real estate was applicable, before the specifically devised real estate and the specifically bequeathed personal estate, to the payment of the testator's debts.

Mr. Fry, for the Plaintiff, a creditor, called the attention of the Court to the conflicting authority of *Rotherham v. Rotherham* (26 Beav. 465); *Dady v. Hartridge* (1 Drew. & Sw. 236); *Pearmain v. Twiss* (2 Giff. 130).

Mr. Jessel, for Edward Norman, the residuary devisee and legatee, argued that the old rule still prevailed, and that the authorities cited to the contrary did not apply. Thus, in *Dady v. Hartridge*, there was a residuary gift of real and personal estate after a bequest of legacies, whereby the legacies were charged on the real estate; *Bench v. Biles* (4 Mad. 187); *Mirehouse v. Scaife* (2 Myl. & Cr. 695); though the debts were not so charged; and so in *Rotherham v. Rotherham*, the debts were only charged on the real estate by virtue of the statute, which prescribed no priority of liability. But that, in this case, there were no legacies given. That it was a question of intention, and that it could never be the intention to [304] create a primary charge on one portion of an estate, in a case where the whole real and personal estate was given, in the first instance, to one for life, &c. That the whole thus given to the widow constituted residue, and remained so after her death.

Mr. Kenyon and Mr. W. W. Cooper, for a specific devisee, and Mr. Baggallay, Mr. Eddis and Mr. Southgate were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. I disagree with Mr. Jessel on both points. Take the instance of a person possessing nothing but real estate, and who devises Whiteacre to A. and the residue to B. Though he knows that the statute directs the payment of his debts out of his real estate generally, still he has expressed an intention that A. shall take Whiteacre so far as possible discharged from every liability, and that B. shall take only what remains. That is the plain meaning of such a will.

I dissent also from the argument that there is no residuary devise where there is a gift to A. of the whole property, in the first instance, for life, and afterwards, a devise of Whiteacre to B. and of the whole of the residue to another person. This last person is as much the residuary devisee as B. was in the case first suggested.

Here the whole is given to the widow for life; it is immaterial to her out of what part of the property the debts are paid. The whole is given to her for life, and after her death certain specified parts of the real estate are devised to certain devisees,

B., C., and D., and the residue is devised to E. The debts must be [305] paid at once, and this will diminish the widow's estate, but they must be paid out of that part which does not on her death go to the specific devisee.

DECREE.—Declare that the residuary real estate of the testator is liable to the payment of the debts and funeral expenses in priority of the specifically devised real estate and specifically bequeathed personalty.—Reg. Lib. 1865, A. fol. 598.

[305] GLAHOLM v. BARKER. March 22, April 24, 1865.

[Affirmed, L. R. 1 Ch. 223. For subsequent proceedings, see L. R. 2 Eq. 598.

See *London and South-Western Railway v. James*, 1872, L. R. 8 Ch. 251.]

Under "The Merchant Shipping Amendment Act, 1862" (25 & 26 Vict. c. 63, s. 54), the liability of the owners of a ship wrongfully occasioning loss of life to the "crew" of another ship is limited to £15 and not £8 per ton.

The question raised in this suit, upon the Shipping Acts, was as to the extent of the liability of shipowners in damages, for the loss of life to the crew of another ship, which had been sunk in a collision. It arose under the following circumstances:—

In the month of February 1864 the brig "Edith Murray," being in ballast, ran into and sank a collier, named the "Thomas Barker," laden with coal, and having no passengers aboard, whereby the crew of the latter, with the exception of two, perished. The number of the crew which so perished was eight, and their representatives commenced actions at law against the owner of the "Edith Murray" to recover compensation, under the provisions of Lord Campbell's Act.

The owners of the "Edith Murray" thereupon instituted this suit, under the 17 & 18 Vict. c. 104, s. 514, "for the purpose of determining the amount of such liability and for the distribution of such amount rateably among the several claimants," and for an injunction to stay the actions.

The Plaintiffs insisted either that the right of the representatives of the deceased "crew" to bring such action was put an end to altogether, or that the whole [306] liability of the owners, in respect of the loss by the collision, was limited to £8 per ton, according to the tonnage of their ship.

The Defendants, on the contrary, insisted that they were entitled to recover from the shipowners to the extent of £15 per ton. The question depended on the several Acts of Parliament regulating this matter, to which it is necessary to refer.

The liability of shipowners for the defaults of their servants was originally unlimited. But, by the 7 Geo. 2, c. 15, their liability for any loss or damage, by reason of any embezzlement, &c., by the master or mariners, of any goods shipped, "or for any act, matter or thing, damages or forfeiture done, occasioned or incurred," by the "master or mariners," was limited to "the value of the ship or vessel with her appurtenances, and the full amount of the freight."

In 1846 Lord Campbell's Act (9 & 10 Vict. c. 93) passed, whereby the families of persons killed by "wrongful act, neglect or default" were enabled to maintain actions for compensation.

In 1854 "The Merchant Shipping Act, 1854," passed (17 & 18 Vict. c. 104), which, by Part IX., limited the liability of shipowners, the 504th section, among other cases, providing that no shipowner should, "(4) where any loss of life or personal injury is, by reason of the improper navigation of such sea-going ships aforesaid, caused to any person carried in any other ship or boat" . . . "be answerable in damages to an extent beyond the value of his ship and freight," &c., "subject to the following proviso (that is to say), that in no case where any such liability, as aforesaid, is incurred in respect of loss of [307] life or personal injury to any passenger, shall the value of any such ship and the freight thereof be taken to be less than £15 per registered ton."

In the same year (1854), "The Merchant Shipping Repeal Act, 1854," passed (17 & 18 Vict. c. 120), which repealed all the Acts set forth in the first schedule

thereto, "and all such provisions of any other Acts, or of any charters, and all such laws, customs and rules, as are inconsistent with the provisions of 'The Merchant Shipping Act, 1854.'"

The statute of the 7 Geo. 2, c. 15, was included in the schedule, but Lord Campbell's Act was not.

In 1862 "The Merchant Shipping Amendment Act, 1862" (25 & 26 Vict. c. 63), passed, whereby, by sect. 2, and the schedule, the 505th section of the 17 & 18 Vict. c. 104, was repealed, and by the substituted clause (sect. 54), it is enacted that ship-owners shall not "where any loss of life or personal injury is, by reason of the improper navigation of such ship, as aforesaid, caused to any person *carried* in any other ship or boat," &c. . . . "be answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage of ships, boats, goods, merchandize, or other things, to an aggregate amount exceeding £15 for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandize, or other things, whether there be, in addition, loss of life or personal injury or not, to an aggregate amount, exceeding £8 for each ton of the ship's tonnage."

Mr. Hobhouse and Mr. Druce, for the Plaintiffs.

[308] Mr. Osborne and Mr. Haddan, for the Defendants.

Nixon v. Roberts (1 John. & Hem. 739); *Hill v. Audus* (1 Kay & J. 263); *Straker v. Hartland* (34 Law J. (Ch.) 122); *Re Fusilier* (12 W. R. 968, and 13 W. R. 592).

Mr. Hobhouse, in reply.

The arguments are fully stated in the judgment, *post*, page 311.

April 24. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a question on the construction of the Merchant Shipping Acts, so far as regards the liability of the owners of a vessel, which has wrongfully run down another, to make compensation for the loss of life thereby occasioned.

The history of legislation on this subject is one of considerable interest, and an instructive picture of the progress of legislation, as adapting itself to the wants of society. Before 9 & 10 Vict. c. 93, commonly called Lord Campbell's Act, no action was maintainable against any person who, by his wrongful act, had caused the death of another. Injury to person only created a right of personal action, and if the injury was fatal, the right of action perished with the person injured. Lord Campbell's Act gave a right of action against the wrongdoer, to the legal personal representative of the person killed, for the benefit of the wife, husband, parent or child of that person.

The effect of this statute, on cases of collisions at [309] sea, became immediately one of great importance. Prior to this it had been found necessary to limit the liability of the owners of vessels, in respect of the injury done by one vessel, which had, through the fault of its master, injured another. Accordingly a statute was passed in the reign of Geo. 2 (7 Geo. 2, c. 15), whereby the liability of the owners of the vessel, which (to use the metaphorical expression common in such cases) was the wrongdoer, in respect of the damage done to the cargo and vessel injured, was limited to the value of the ship that had done the wrong, and its freight. But to personal injuries no limit was affixed by the statute, the liability in respect of them remained, as theretofore, limited only by the extent of the damage done. The reason why no such limit was imposed was this, viz., that such actions were extremely rare, inasmuch as the injuries done to persons by collision at sea were usually fatal.

In 1846 Lord Campbell's Act was passed, which gave a right to the representatives of the person killed to bring an action for the benefit of the near relatives. This Act imposed no limit as to the extent of damages to be recovered, and accordingly, in cases of collision at sea, the liability of the owners of the vessel in the wrong was measured by and limited to the extent only of the injury inflicted.

The consequence of this was, that in 1854, when the Merchant Shipping Act of the 17 & 18 Vict. c. 104 was passed, it was by the sect. 504, in Part IX. of that Act, enacted, that the liability of the owner for loss caused to goods, or merchandize, or for loss of life or personal injury, should be limited to the value of the ship and freight, with this proviso:—That if a passenger was killed or injured, the value of the ship [310] and freight should not be taken to be less than £15 per ton.

Subsequently, in the same session, another Act (cap. 120) was passed, which, by sect. 4, repeals the Acts and parts of Acts set forth in the schedule, "and all such provisions of any other Acts or of any charters, and all such laws, customs and rules, as are inconsistent with the provision of the Merchant Shipping Act" above mentioned.

In 1862 the Merchant Shipping Amendment Act was passed (being the 25 & 26 Vict. c. 63). By the 54th section of which it is enacted (*see ante*, p. 307). By this, therefore, the liability of the owners, in case of loss of life, either alone and together, with loss or damage to anything else, is limited to £15 per ton. In addition to which, by the 2nd section, it repeals all the enactments described in Table A of the schedule to the Act, amongst which is included the sect. 504 of the Merchant Shipping Act, 1854, which I have stated fully in the outset.

In this state of the circumstances, the Plaintiffs contend that either the right of the representatives of deceased seamen to bring such action as is referred to in sect. 504 of the Merchant Shipping Act is put an end to altogether, or else that it is limited to £8 per ton of the vessel in the wrong.

Before I examine the argument of the Plaintiffs, I may state that one thing is to my mind quite obvious, viz., either that the right of action is altogether taken away, or that the liability of the owners is extended to £15 per ton.

[311] The argument of the Plaintiffs, as I understand it, is this:—1st. That by sect. 504 of the Merchant Shipping Act a right of action is given in case of loss of life, not being that of a passenger, extending to the value of ship and freight. 2dly. That by the 4th section of the Act, c. 120, of the same session, all Acts inconsistent with any of the provisions of the Merchant Shipping Act are repealed. 3dly. Lord Campbell's Act is inconsistent with this sect. 504, and consequently, that it is repealed, so far as regards collisions at sea. 4thly. The Act of 1862, which repeals the sect. 504, does not therefore revive Lord Campbell's Act on this subject, because, by 13 & 14 Vict. c. 21, s. 5, it is enacted, that an Act repealing an Act which repealed a prior Act does not revive the Act first repealed. In addition to which, the Act of 17 & 18 Vict. c. 120 remains still in force; and the Plaintiffs contend that the fair and necessary consequence of all this is, that no action in respect of any collision at sea can be brought under Lord Campbell's Act.

I dissent from this reasoning. In the first place, I am of opinion that the Act of the 17 & 18 Vict. c. 120, s. 124, does not, in any respect, repeal Lord Campbell's Act. That section repeals the provisions of any Acts which are inconsistent with the provisions of the Merchant Shipping Act; but I am of opinion that neither Lord Campbell's Act, nor any one of the provisions contained in it, is inconsistent with the provisions of the Merchant Shipping Act.

Lord Campbell's Act merely gives the right of action, it says nothing about the amount to be recovered, and the Merchant Shipping Act limits the amount to be recovered to the value of the ship and freight of the wrongdoer. How is this inconsistent? I have care-[312]-fully read through Lord Campbell's Act, and I am unable to find a single word or sentiment that ought to be struck out, in order to enable the provisions of the Merchant Shipping Act to have full force and effect; on the contrary, the clause 504 seems to be, in a great measure, founded upon the right which is given by Lord Campbell's Act. If there had been a clause in Lord Campbell's Act which enacted that, in every case, the liability of the wrongdoer should be to the full extent of the injury done to the family of the person killed, then that clause, so far as it extended to collisions at sea, would have been repealed by the 4th section of the 17 & 18 Vict. c. 120; and if that meaning is properly attributable to Lord Campbell's Act as it stands, exactly as if a clause expressing it in precise words had been introduced into it, then, to that extent and to that only, is it repealed by the Act of 17 & 18 Vict. c. 120: but the right of bringing the action remains unrepealed and in full force—this right was never touched by any subsequent statute; and by the 54th section of the last Act of 1862, the liability in respect of actions so brought, as regards collisions at sea, is limited to and fixed at £15 per ton of the vessel causing the injury, as the maximum.

I think also that the Plaintiffs cannot get out of the dilemma suggested by the counsel for the Defendants. Either the case of the Defendants falls within the provisions of the Act of 1862, or it does not. If it does, the sect. 54 is distinct in fixing

that liability at £15 per ton. If it does not fall within the provisions of the Act 1862, then there is no liability at all; the clause (514), under which the Plaintiffs come into equity, to avoid the multiplicity of suits and to fix the amount of their liability, has no application. This objection can properly be taken at law, and the [313] action ought, as far as this Court is concerned, to be allowed to proceed.

But, in truth, on looking at the provisions of the Merchant Shipping Act of 1854, it appears to me, that even if the Plaintiff's contention were correct, and if Lord Campbell's Act were wholly repealed, still, a distinct right of action is given by the Act itself, by the section which remains unrepealed.

Sect. 506 is in these words:—"The owner of every sea-going ship, or share therein, shall be liable, in respect of every such loss of life, personal injury, loss of or damage to goods, as aforesaid, arising on distinct occasions, to the same extent as if no other loss, injury or damage had arisen."

The sections which follow specify the mode of procedure. By section 511, the executor or administrator of any deceased person, who is dissatisfied with the amount of statutory damage, may bring an action on his own account. And, by section 54 of the Act of 1862, the liability is fixed at £15 per ton; and it is under the 514th section of the Merchant Shipping Act of 1854 that this bill is filed.

In my opinion, therefore, the Plaintiffs fail in this contention; their liability extends to and is measured by the sum of £15 per ton on the register of the vessel the "Edith Murray," and I will make a declaration to that effect.

NOTE.—Affirmed 13th January 1866.

[314] THE GENERAL ROLLING STOCK COMPANY (LIMITED). Feb. 11, 1865.

A creditor of a limited company petitioned for a compulsory winding-up order. This was objected to by the company and by a considerable body of creditors, who supported a voluntary winding up. Held, that the Petitioners were entitled to a compulsory order.

Principles on which this Court proceeds in such cases stated.

This was a limited company incorporated pursuant to the Joint Stock Companies Acts, 1856, 1857.

The company was indebted to the Petitioners, The Metropolitan Bank, in the sum of £1283, to recover which the bank brought an action on the 4th of January 1865.

After the commencement of the action the bank discovered that, since the 18th of January 1865, writs of *fiery facias* had been issued against "The General Rolling Stock Company (Limited)" on four judgments, recovered against that company by Mr. Hickie, for sums amounting to about £8000 in the aggregate; and that the only things found to satisfy those judgments were the furniture and effects in the company's offices, of the value of £150 or thereabouts. That, in order to avoid a sale of these, some of the directors of the company had given a personal undertaking to be answerable for their value. That, on the 24th of January 1865, Hickie's writs of *fiery facias* were (except as to these articles) returned "*nulla bona*." There were also outstanding judgments against the company for many thousand pounds, and the company owed its bankers a sum exceeding £50,000, and was in fact insolvent.

Under these circumstances the Metropolitan Bank, on the 1st of February 1865, presented this petition to wind up the company.

[315] Creditors of the company, to a very considerable amount, opposed a compulsory winding up, and wished it to be wound up voluntarily, and a meeting of shareholders for that purpose was convened on the 16th of February. It was stated by the manager and secretary that it would be more beneficial to the company and to its creditors that it should be wound up voluntarily.

Mr. Jessel and Mr. Bruce, for the Petitioners.

Mr. Southgate, for judgment creditors, supported the petition.

Mr. Baggallay, Mr. Selwyn, Mr. De Gex, Mr. Heming, Mr. Eddis, for other

creditors, opposed the order. They asked that the petition might stand over until after the meeting, and contended that it would be much more beneficial to the creditors to have the affairs of the company wound up out of Court.

Mr. Druce, for the company, took the same line of argument.

Re Factice Parisien Co. (34 L. J. (Ch.) 140, and 11 Law T. 556) was cited, but the application in that case was by shareholders.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Petitioner is entitled to the order he asks.

I will explain the principle on which I proceed in these cases. Where a creditor applies to wind up one of these companies, especially a limited one, and the company say, "If you will allow this to stand over we [316] will supply funds to pay the debt," I am disposed to grant that indulgence. So, where a shareholder who applies for the order, and the company says, if you allow it to stand over, the remaining shareholders are ready to advance the necessary money, I usually allow it to stand over. But here it is admitted that the company must be wound up, and the only question is, whether it is to be voluntarily or under the Court. I do not know what advance of money can be obtained; I do not know how money can be advanced if the company is to be wound up: the case is very different where it is to be carried on.

As matters stand I am of opinion that a case is made by the Petitioners, who are creditors of the company, which entitles them to the order. It is not pretended that the company is able to pay the Petitioners, and all that is stated by the officers of the company is, that more will be obtained by a voluntary winding up than one under the Court. They are not to be the judges of this.

There will be one winding-up order, without qualification on both petitions, and the conduct of the order will be given to the first Petitioner.

[317] HEYWOOD v. HEYWOOD. Feb. 27, March 7, 1865.

[S. C. 34 L. J. Ch. 317; 12 L. T. 168; 11 Jur. (N. S.) 633; 13 W. R. 514.]

On her marriage a lady, seised in fee *ex parte maternâ*, executed a settlement in 1860, the ultimate limitation in which was, to the person who would, on her decease, have become entitled to the estate "in case she had died intestate and without having been married." Held, that under this limitation, her heir *ex parte maternâ* was entitled.

In 1860 Isabella Frederica Eliot married Baron D'Huart. At the time of her marriage she was seised in fee *ex parte maternâ* of the Ballygrubany estate.

By the settlement made previous to her marriage, dated the 20th of August 1860, she conveyed this estate to trustees and their heirs, on trust for her, "her heirs and assigns until the solemnization of the intended marriage," and afterwards, in trust for her for life, with remainder to the children of the marriage, who, being sons, should attain twenty-one, and being daughters should attain that age or be married with consent, equally in fee. The settlement proceeded:—

"But in case there should be no child of Isabella Frederica Eliot by her intended husband who, as to a son, should live to attain the age of twenty-one years, or, as to a daughter, should live to attain that age or marry with such consent as aforesaid, then it was thereby declared that, from and after the decease of Isabella Frederica Eliot and such failure of her issue as aforesaid," the trustees should stand seised of the estate "in trust for Isabella Frederica Eliot, *her heirs and assigns*, in case she should survive her said intended husband; but if she should die in his lifetime, then from and after the decease of Isabella Frederica Eliot and such failure of her issue as aforesaid," in trust for such person as Isabella Frederica Eliot by her will should appoint, "and in default of such direction or appointment and so far as any such, if incomplete, [318] should not extend, in trust for the person or persons who would, on the decease of Isabella Frederica Eliot, have become entitled to the hereditaments and premises aforesaid, in case she had died intestate and without having been married."

Isabella Frederica Eliot (the Baroness D'Huart) died in March 1861, without having had any issue and without having executed her power of appointment, and the ultimate limitation thereupon took effect.

The question in the cause was whether, under the terms of the settlement, the heir *ex parte maternâ* or the common law heirs *ex parte paternâ*, were entitled to the Ballygrubany estate.

The Plaintiff, Sir Benjamin Heywood, was her heir *ex parte maternâ*, and the Defendants, Mrs. James and Mrs. Harkness, were her heiresses at law *ex parte paternâ*, being her half-sisters.

THE ATTORNEY-GENERAL (Sir R. Palmer) and Mr. T. Stevens, for the Plaintiffs. The estate was held *ex parte maternâ*, and the *persona designata* in the ultimate limitation in the settlement is the Plaintiff, unless the course of descent has been changed under the provisions of the 3 & 4 Wm. 4, c. 106, s. 3. But that statute has no operation where a person takes by purchase, or to a settlement in which there is no limitation to the heir but to a *persona designata*; *De Beauvoir v. De Beauvoir* (3 H. of L. Cas. 524).

Secondly, if the heirs *ex parte paternâ* take under this limitation, they take for life only, for their estate [319] is not commensurate with that of the trustees; *Holliday v. Overton* (15 Beav. 480). There is then a resulting trust of the fee in favour of the heir *ex parte maternâ*.

Thirdly, the settlement is not in accordance with the contract and ought to be rectified.

Mr. Selwyn and Mr. Homersham Cox, for the co-heirs *ex parte paternâ*. The first limitation in the settlement is in favour of the baroness, "her heirs and assigns, until the solemnization of the intended marriage." It is clear, therefore, that if she had died before the marriage, the estate would have descended to her common law heir. The same words are subsequently used in the limitation to her upon a failure of children, and if she survived her husband. So far, therefore, the descent was clearly broken. The ultimate limitation must be construed in the same manner, and the person pointed out as *persona designata* must be the heir who would take under the previous limitation; *Davis v. Kirk* (2 Kay & J. 391). The limitation in question is either to the baroness herself, or it amounts to a limitation to her heirs, and the statute applies. The expression here used is similar to that used in the ultimate limitation of personalty. In the one case, it is a gift in favour of the settlor's or testator's heirs; in the other, of his next of kin. The Plaintiff's construction would require the introduction into the limitation of these words:—"In case the settlement had not been executed."

Secondly. The settlement cannot be rectified at the instance of mere volunteers; *Pullen v. Ready* (2 Atk. 587); *Lord Irnham v. Child* (1 Bro. C. C. 92).

[320] Mr. Hobhouse and Mr. Busk, for Baron D'Huart.

Mr. J. H. Palmer and Mr. J. Napier Higgins, for the trustees.

THE ATTORNEY-GENERAL, in reply, cited *Walker v. Armstrong* (21 Beavan, 284, and 8 De Gex M. & G. 531).

March 7. THE MASTER OF THE ROLLS [Sir John Romilly]. By the settlement made on the 5th of January 1815, on the marriage of Mrs. Eliot, and under the will of the testator, Serjeant Heywood, an estate in Antrim, called the Ballygrubany estate, was settled on Mrs. Eliot for life, remainder as she should by will appoint, and in default to the right heirs of her father. She was the sole heiress at law of her father, and took therefore the ultimate reversion in fee. She died intestate as to this property. It therefore devolved on her only daughter, the Baroness D'Huart, in fee. She has also died intestate as to this property and the question is to whom it descends.

If there were nothing more in the case, the estate would go to her heirs *ex parte maternâ*, or, in other words, the persons who, at her death, were the heirs of Serjeant Heywood, all his lineal descendants having failed. But the baroness settled her property on her marriage, and the common law heirs of the Baroness D'Huart, under the statute of 3 & 4 Will. 4, are two half-sisters, the daughters of her father by a previous marriage; and the question I have to determine is, whether the settlement made on the marriage of the [321] Baroness D'Huart, has interrupted the line of

descent and created a new seisin in the baroness, so as to vest the estate in her heirs at common law, instead of her heirs *ex parte maternâ*. This depends on the combined effect of the settlement and the 3d section of the Act of the 3 & 4 Will. 4, c. 106, intituled "An Act for the Amendment of the Law of Inheritance."

The settlement on the marriage of the baroness bears date the 20th of August 1860, it was made between the baroness by her maiden name, Isabella Frederica Eliot, of the first part, Baron D'Huart of the second part, and two cousins of the lady, her trustees, of the third part. By it the Ballygrubany estate was conveyed to the trustees in trust for the lady, her heirs and assigns until the solemnization of the marriage, and after the marriage, upon trust for the baroness for her life, for her separate use without power of anticipation, and after decease of the wife, in trust for children of the marriage and their heirs, equally divided between them as tenants in common. But in case there should be no child of the marriage, then, after the decease of the baron and such failure of issue, in trust for the baroness, her heirs and assigns, in case she survived her husband, then (omitting the words in the limitation which relate to her appointment by will, which power was not exercised) in the words following, viz. :—

But if she should die in his [the Baron's] lifetime, then, from and after the decease of the said Isabella Frederica Eliot, and such failure of her issue as aforesaid, "in trust for the person or persons who would, on the decease of the said Isabella Frederica Eliot, have become entitled to the hereditaments and premises aforesaid, in case she had died intestate and without having been married."

[322] Now the words of the 3d section of the Inheritance Act (3 & 4 Will. 4, c. 106), which alone can have application to this case, are as follows :—

That "when any land shall have been limited by any assurance executed after the 31st day of December 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

Now the Ballygrubany estate is, if the baroness had died before the marriage, limited to her and her heirs, and so also, if the baroness had survived her husband, the estate is limited to her and her heirs; and as she had no child, it is quite clear that if either of these events last mentioned had occurred, the baroness would have taken the estate as purchaser, she would not have been entitled thereto as in respect of her former estate, and consequently the heirs at law, viz., her half-sisters, would have taken.

But neither of these events occurred; what has occurred is this :—That the baroness has predeceased her husband and has not disposed of the estate, and the question is, who takes under the words "the person or persons who would on the decease of Isabella Frederica Eliot have become entitled to the hereditaments and premises aforesaid, in case she had died intestate and without having been married?"

In the first place, it is clear that this is not a limitation to Isabella Frederica Eliot and her heirs. [323] The persons to take under these words take as purchasers and not by descent. I think, therefore, it is clear that the words of the 3d section of the statute do not apply, because that is limited to the case where the land is limited to the person, or to the heirs of the person who conveyed the land. Isabella Frederica Eliot conveyed the land, but this is not a limitation to Isabella Frederica Eliot, or to her heirs. The statute merely alters the nature of the estates, but the person who conveys takes under the ultimate limitation; but here it is obvious that the baroness who conveys takes no estate at all in the hereditaments, the persons who do take take as purchasers, and are described by these words :—viz., "The person or persons who would, on the decease of Isabella Frederica Eliot, have become entitled to the hereditaments and premises aforesaid, in case she had died intestate and without having been married."

On their construction, the question is to whom these words refer, do they refer to the person who would have taken under this settlement, in case the baroness had died before the marriage took place, or do they refer to the person who would have taken in case this settlement had not been executed?

I think, upon the plain meaning of the words, that they refer to the persons who

would have taken, in case the settlement in question had never been executed. Besides which, I look at it in this light:—Unless this section of the statute applies, the persons who take are those who would have taken according to the old law, that is, the persons who would have taken in case the settlement had not been executed. But the statute does not apply, because that only provides for the case of persons who take by descent, and then it alters the descent from the heir *ex parte maternâ* to the heir [324] at common law, and the persons here specified do not take by descent, but as purchasers.

In my opinion, therefore, according to the true construction of this settlement, the Plaintiff, who has established that at the death of the baroness he was the heir of Serjeant Hayward, the grandfather of the baroness, is entitled.

Having come to this conclusion, it becomes unnecessary to consider the question, much discussed at the hearing, whether, in the event of the Court determining the construction adversely to the Plaintiff, a case has been made out for rectifying the settlement.

[324] D'HUART v. HARKNESS. Feb. 27, 1865.

[S. C. 34 L. J. Ch. 311; 11 Jur. (N. S.) 633; 13 W. R. 513; 5 N. R. 440. See *In the goods of Huber* [1896], P. 213. Considered, *Hummell v. Hummell* [1898], 1 Ch. 642. Followed and approved, *In re Price* [1900], 1 Ch. 442. See *In re Scholefield*, 1905, 21 T. L. R. 676.]

Personal property was held, under an English will, in trust for such person as an English lady should, by her last will in writing duly executed, appoint. She afterwards married a Frenchman, and died domiciled in France, having appointed the property by an unattested will, valid according to the law of her domicile, and admitted to probate in this country: Held, that this will was a valid execution of the power.

Under the will of Anne Eliot, who died in 1857, a sum of £2205 consols stood in the name of trustees, in trust for her daughter Isabella Frederica Eliot, for her separate use for life, and after her decease on the following trusts:—

“In trust for such person or persons, and for such intents and purposes, and in such parts, shares and proportions, manner and form, as her said daughter, *by her last will and testament in writing, duly executed*, or any codicil thereto, should, notwithstanding coverture, direct or appoint; and in default of such direction or appointment, in trust for such person or persons as should be the next of kin of her said daughter at the time of her death, and so as not to include any husband of her said daughter who might happen to survive her.”

Isabella Frederica Eliot was an Englishwoman by [325] birth and parentage, but she had resided in France from 1837 until her death.

In August 1860 she married Baron D'Huart, a domiciled Frenchman, and she continued, down to her death in March 1861, domiciled in France.

She made her will, dated January 1861, in the holograph form, but which was not attested. She thereby bequeathed the sum of consols in question to her husband. This will was valid according to the law of France, and, though unattested, probate of it had been granted in this country by Her Majesty's Court of Probate.

The sisters of the half-blood of the baroness, who were her next of kin, insisted that the will was not a valid execution of the power of appointment given to her by the will of Anne Eliot.

This bill, filed by Baron D'Huart, prayed a declaration that the will was a valid execution of the power.

Mr. Hobhouse and Mr. Busk, for the Plaintiff Baron D'Huart. The power is to appoint by will duly executed. The due execution depends, as to personal estate, on the domicile, and this will, having been executed according to the formalities required by the domicile of the testatrix, and having been admitted to probate in England, is conclusively proved to be her last will duly executed. It is, therefore, a valid execution of her power.

Mr. Selwyn and Mr. Homersham Cox, for the next [326] of kin of the baroness. An unattested will is not a due execution of this power. The power was created by an English instrument, and must be construed according to the English law. If so, the will "duly executed," which was contemplated, must have been one executed according to the formalities required by the law of England, that is, one executed and acknowledged by the testatrix in the presence of and attested by two witnesses. (1 Vict. c. 26, s. 9.) No change of domicile can dispense with the formalities required by the original instrument, or with the protection of having two witnesses to the instrument executing the power. Though the rule is that *mobilia sequuntur personam*, yet it does not apply to property subject to a power. *Tatnall v. Hankey* (2 Moore, P. C. C. 342), and *In the goods of Alexander* (29 L. J. (Prob.) 93), which overrule *Crookenden v. Fuller* (1 Swabey & Tr. 454), shew that a will executed according to the English form is a due execution of a power, though the requisites of the law of the testator's domicile are not complied with.

The probate is conclusive that this is a will, but not that the formalities of the power have or not been complied with; no such issue could be raised in the Probate Court. Notwithstanding the grant of probate, this Court has jurisdiction over the property which is subject to a power and has the right of determining to whom it belongs, and of construing the instrument; *Thornton v. Curling* (8 Sim. 310).

Mr. J. Hinde Palmer, Mr. J. Napier Higgins and Mr. T. Stevens, for trustees.

[327] Jarman on Wills (vol. i. p. 5); Sugden on Powers (8th edit. p. 467); Story's Conflict (chap. ix.), were also referred to.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this a clear case.

It is true that the effect of probate is not conclusive as to what this Court must hold to be its construction as to the rights to the property disposed of by the will, but it is conclusive to this extent, that the instrument admitted to probate is the will of the testator. But the will admitted to probate may be the last will, without being a due execution of a power of appointment. It is, therefore, necessary to refer to the original instrument creating the power to see if the formalities required have been followed in the instrument purporting to execute it.

Here I find this:—A sum of money is given simply to such person as the baroness shall, by her last will duly executed, appoint. What does that mean? it means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive, that it is good according to the English law.

The English law admits two classes of wills to probate, first, those which follow the forms required by the 1 Vict. c. 26, s. 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed.

[328] When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will, which, according to the law of this country, is valid, though it does not follow the forms of the statute.

The case cited (*In the goods of Alexander*, 29 L. J. Prob. 93) merely shews that an appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the law of the domicile. The law takes a liberal view, and where the instrument creating the power directs it to be executed by will, in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicile. That is, where the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicile.

I am of opinion, therefore, that the probate is conclusive that this is the last will. I am of opinion that the word "duly" does not add anything to it, because it is "duly executed" if entitled to probate.

I must declare that the will of the baroness "is a valid execution of the power of

appointment," and "is a valid disposition of the £2205 Bank £3 per cent. annuities."

Reg. Lib. 1865, A. fol. 528.

[329] RIDLEY v. RIDLEY. Feb. 8, 1865.

Liberty given under the 19th General Order of Feb. 1861, to use the affidavits of persons who, by death and lunacy, could not be cross-examined, saving just exceptions.

The XIXth Order of 5th of February 1861, after providing for the mode of cross-examining a party who has filed an affidavit, proceeds:—"And unless such deponent or witness be produced accordingly, such affidavit or examination shall not be used as evidence, unless by the special leave of the Court."

In this case, after making their affidavit, and the Defendant had given notice to cross-examine them, one deponent had died, and the other had become insane before they could be cross-examined.

Mr. Selwyn and Mr. Colt applied, under the above order, that their affidavits might be used.

Mr. Eddis, *contra*, submitted that if any order should be made, it must be with a saving of just exceptions.

THE MASTER OF THE ROLLS [Sir John Romilly] gave liberty to use the affidavits, saving just exceptions.

NOTE.—See *Wightman v. Wheelton*, 23 Beav. 397; *Abadom v. Abadom*, 24 Beav. 243; *Tanswell v. Scurrah*, 11 L. T. 761; and *Braithwaite v. Kearns*, *ante*, p. 202.

[330] *Re THE LANCASHIRE BRICK AND TILE COMPANY.* March 18, 20, 1865.

[S. C. 34 L. J. Ch. 331; 11 Jur. (N. S.) 405; 13 W. R. 569.]

The holder of fully paid-up shares in an insolvent company is not entitled to a winding-up order, but where it is solvent and other shareholders have not paid up in full, he may have a winding-up order, upon shewing a proper case, in order to enforce contribution.

This was a petition presented by Mr. Mellor, the holder of thirty paid-up shares in this company, for a winding-up order.

The Petitioner alleged that the company had executed a bill of sale of the machinery and plant, &c., in favour of two of the directors, and that they had advertized them for sale. That the company had ceased to carry on its business. That the Petitioner was desirous that the circumstances under which the bill of sale had been executed should be investigated. That various unsecured debts were due from the company, and that a considerable sum was due for unpaid calls, and that payment ought to be enforced, and the amount applied in payment of the debts, and the surplus and the assets ought to be divided among the contributories.

This petition was verified only by an affidavit of the Petitioner in the form of the Act, on belief.

Mr. E. K. Karslake, in support of the petition.

Mr. Baggallay, for the company, opposed. He argued that the Petitioner was not a contributory, and that he had proved no sufficient case to entitle him to a winding-up order. He cited *Re The Patent Artificial Stone Company* (*ante*, p. 185).

[331] March 20. THE MASTER OF THE ROLLS [Sir John Romilly]. The Petitioner has not made out a case for winding up the company.

The principle on which the Court proceeds is this:—When a shareholder in a limited company has paid up the full amount of his shares, it is obvious, if the

company is perfectly insolvent, that he has no interest at all in the matter, and is not entitled to have the concern wound up. But a person who has fully paid up his shares is interested to this extent:—If it appears that the debts are inconsiderable, that the business has stopped, and that it is not intended to carry it on, and the debts are thrown on the Petitioners and two or three other persons, to the exoneration of the general body of shareholders, then I think he is entitled to come for a winding up, on the principle that equality is equity, and that he is entitled to compel the other shareholders to contribute towards the payment of the debts of the concern. Thus, if the Petitioner has 100 shares which he has fully paid up, and there are debts of £1000, the whole of which have been paid out of his contribution, while there are, perhaps, two or three hundred other shareholders who have not paid a penny on their shares, he is entitled to compel those other shareholders to contribute towards the payment of the debts of the company, and to exonerate him from all beyond his due share of the liability. The same rule would apply to an unlimited company.

I do not intend to lay down as a rule that in no case can a shareholder in a limited company, who has fully paid up his shares, call for a winding-up order; but if he does apply, he must make out such a case which I [332] have stated, and the greater or less weight of the facts proved is then to be considered by the Court.

Here the Petitioner has not made out such a case as it is incumbent on him to make out. I am therefore of opinion that the petition must be dismissed with costs.

[332] *In re THE LONDON, BIRMINGHAM AND SOUTH STAFFORDSHIRE BANKING COMPANY (LIMITED).* Jan. 19, Feb. 11, 1865.

[S. C. 34 L. J. Ch. 418; 12 L. T. 45; 11 Jur. (N. S.) 316; 13 W. R. 446.]

A banking company, by its articles, had a first and paramount lien upon the shares of any shareholder, "for all moneys due to the company from him." The bank held bills of a shareholder for a debt due to the bank: Held, that the amount of the bills was, before they arrived at maturity, "moneys due to the company," for which it had a lien on the shares, though the remedy for recovering the amount was postponed, and that, therefore, the lien of the bank had priority over a charge created on the shares by the shareholder before the bills arrived at maturity.

The facts of this case raised a question, whether, under the special clause in the articles of association of this banking company, the company had a lien on the shares of Nathaniel Hitchin Palmer, for the payment of sums of money which the company claimed to be due to them at the time when a transfer of the shares to another person was applied for.

The clauses affecting this question were in these words:—

"XIV. The company shall have a first and paramount lien upon all the shares of any shareholder for all moneys due to the company from him alone or jointly with any other person.

"XXI. The company may decline to register any transfer of shares whilst the shareholder making the same is either alone or jointly with any other person [333] indebted to the company on any account whatsoever, or unless the transferee is approved by the board."

The facts which raised this question were as follows:—On the 29th of April 1864 the bank discounted two bills of Palmer's, one for £2000, and another for £1000, at three months, which became due on the 30th of July 1864.

Afterwards, the bank renewed these bills before they became due, by another bill for £3000, drawn by Palmer, and discounted by the bank on the 28th of July 1864. This bill would become due on the 31st of October 1864.

On the 19th of July 1864 Palmer became a shareholder in the banking company for twenty-five shares of £100 each.

On the 27th of July 1864 Mr. Hankey advanced to Palmer £650, secured by his bill at three months, which became due on the 30th of October 1864, and also by the deposit of the certificates for the twenty-five shares.

On the 4th of September 1864 Palmer stopped payment.

On the 7th of September 1864 Mr. Hankey received the deed of transfer of the twenty-five shares, of which the certificates had previously been deposited with him, and which deed of transfer was executed by Palmer, as regarded the transferee, in blank; but the [334] name of Hickie, a clerk of Mr. Hankey's, was afterwards inserted. It bore date the 30th of July 1864.

On the following day, viz., the 8th of September, the deed was lodged with the bank for registration.

On the 31st of October 1864 the bill for £3000, which became due, was presented and dishonoured; and on the 7th of November 1864 Hickie called at the bank for the new certificates of the shares being registered in his name. Thereupon the directors stated that they had refused to permit the registration of the shares in the name of Hickie, because the bank were creditors of Palmer before the deed of transfer was executed or given to Mr. Hankey.

Mr. Hankey now moved, under the 35th section of the Companies Act, 1862, that the register of the company might be rectified by entering therein the name of Mr. Hickie, instead of the name of Mr. Palmer, as the holder of the twenty-five shares.

Mr. Baggallay and Mr. Prendergast, argued that no "moneys were due to the company" until the bills arrived at maturity, and that therefore Hankey's charge had priority over the bank.

Mr. Selwyn and Mr. Surragé, for the bank, argued that the debt subsisted from the time of the advance of the money, and that payment alone was postponed by the bills. They also argued that the deed of transfer executed in blank was void; *Hibblewhite v. M'Morine* (6 Mees. & Wels. 200); *Taylor v. The Great Indian Peninsula [335] Railway Company* (4 De G. & J. 559); and that the bank had an unlimited discretion in permitting any transfer.

Mr. W. Morris, for Palmer.

Mr. Baggallay, in reply.

Feb. 11. THE MASTER OF THE ROLLS [Sir John Romilly]. The question I have had to determine is simply whether the banking company were creditors of Palmer on the bills of exchange I have mentioned, before the sum became due. The bank contends that they were creditors from the 29th of April 1864, for the £3000, and Mr. Hankey contends that there was no debt due until the bill was dishonoured.

In the argument before me, two other grounds of defence were raised on the part of the bank. One was, that the banking company had an unlimited discretion to refuse the transfer to any transferee, which discretion could not be controlled; and the next was, that the deed of transfer was executed with the name of the transferee in blank, and that this avoids the deed. I think it unnecessary to go into these two latter defences, because on the first I am of opinion that there was a debt existing in July and September, due from Palmer to the bank, to which the clause in the articles which I have read applies.

It is expressly laid down in Williams' Saunders (vol. 2, p. 103 b.), that if a bill be taken on account of a debt, and [336] nothing be said at the time, the original debt still remains, but the remedy for it is suspended until the instrument has attained maturity. The cases of *Kearslake v. Morgan* (5 Term Rep. 513); *Packford v. Maxwell* (6 Term Rep. 53); *Tapley v. Martens* (8 Term Rep. 451); *Stedman v. Gooch* (1 Esp. N. P. 5); *Atkinson v. Hawdon* (2 Ad. & El. 628), all establish that, unless the bill is accepted under an agreement that it should be a discharge of the debt, and if the bill did not turn out to be productive, the original debt remains in full force, although all right of suing for such debt is suspended until it be ascertained whether such bill is or is not productive, to use Lord Kenyon's expression in one of the cases referred to.

The same principle is very clearly laid down by Lord Langdale in the case of *Sayer v. Wagstaff* (5 Beav. 423). The words used by him are as follows:—

"The debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied." But, in the absence of any special circumstances throwing the risk of the note upon the

creditor, his receiving the note in lieu of present payment of the debt is no more than giving extended credit, postponing the demand for immediate payment, or giving time for the payment on a future day in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, [337] payment of the debt may be enforced as if the note had not been given."

I do not think that the fact of the renewed bills being taken by the company in lieu of the old ones affects the case, or the principles to which I have referred. A question might possibly arise, if the old bills had been retained by the company, whether they could, in case of the second set of bills not being paid, have sued on the old bills; as to this there is no evidence. But whether they could or could not, they could have sued on the original debt, which subsisted during the whole time, but the remedy for the recovery of which was only suspended during the running of bills, and was not discharged unless and until the bills were paid.

I think, then, that these were moneys due to the company from Mr. Palmer, at the time when the deed of transfer was presented for registration, and they, the company, under the claim, have and are entitled to enforce a lien thereon.

The motion must be refused with costs.

[338] SCARLETT v. LORD ABINGER. *March 4, 1865.*

Property was, by will, limited to the Defendant, on condition of his settling some Scotch estates within a limited time on trusts, the validity and effect of which were doubtful. The Defendant settled the estates within the time, in general terms, on the persons on whose behalf the condition was imposed. Held, that this was a sufficient compliance with the condition.

The second Lord Abinger, by his will, made in the English form and dated in 1861, gave his real and personal estate to trustees, in trust for the Defendant, the third Lord Abinger, but upon this condition:—"Upon condition, nevertheless, that, within two months after my death, my son do enter into a deed of trust, settling my estate in Inverness-shire, upon the heirs to the peerage of my father in succession; and in order to compel the performance of this condition, my trustees shall have the power of retaining my lands in England, for the use and benefit of my brothers, until this condition shall be complied with."

The testator signed a holograph but unattested paper annexed to his will, dated the 23d of June 1861, and purporting to be a codicil thereto, which was in the words and figures following:—"I desire my said trustees and executors to use the powers given to them in my will, and I request my son's consent to the same, to have the estate of Inverlochy and the fisheries settled upon my daughter Frances Mary, after the failure of the peers and the heirs to the peerage, for her own use and benefit, but under condition to pay £10,000, in equal shares, to Mary Augusta Currey and Elliot Currey, my sister Louise's children, and under condition of repaying to any daughter of my son the fortune she received or is to receive from my estate."

The testator died on the 24th of June 1861.

[339] On the 16th of August 1861 the Defendant, Lord Abinger, executed a deed in the Scotch form, and with due formalities, whereby, after reciting the will and patent of peerage, and the doubts which existed as to the legal effect of the will, he gave, granted and disposed to and in favour of "the trustees and their heirs," all the Scotch property, "in trust, as for such parts as were the subject of any condition imposed by the will and holograph writing, for the use and behalf of the person or persons in whose favour such condition is imposed, and as to the residue, if any, in trust for the Defendant, his heirs and successors."

By the Scotch law, this deed effectually vested the Scotch property in the trustees, for the purpose of fulfilling the condition imposed by the will, according to the interpretation which might be put upon it by the proper tribunal.

Questions had arisen as to the true construction of the condition, and whether the deed was a sufficient compliance with it.

This bill, filed by the trustees, after stating the circumstances, and referring to the "Act for the Amendment of the Law of Entail in Scotland" (11 & 12 Vict. c. 36), and that they had been advised that the estate could not now be settled on the heirs of the peerage in perpetuity, prayed a declaration that the deed was a sufficient performance of the condition, and if not, then that the Defendant might be ordered to execute proper deeds.

Mr. Hobhouse and Mr. G. O. Morgan, for the different parties, submitted that the Defendant had sufficiently complied with the condition by declaring the [340] trusts by reference without naming persons or defining the estate and interests which they were to take.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Defendant has done all that he was under any obligation to do.

[340] WILLIS v. WILLIS. Feb. 21, March 6, 1865.

[S. C. 34 L. J. Ch. 313; 13 W. R. 533.]

A marriage settlement, "in order to make some provision for" the intended wife, in case she should survive her husband, settled some of the husband's copyholds after his death, on her for life. Held, that she was not thereby barred of her freebench in other copyholds, of which the husband died intestate.

This was a special case for the opinion of the Court, under the 13 & 14 Vict. c. 35, which stated to the effect following:—

On the marriage of Edward Willis with the Defendant, then Harriot Till, spinster, a settlement was executed, dated the 14th of October 1854. It was made between Edward Willis of the first part, Harriot Till of the second part, and two trustees of the third part; and thereby, after reciting that Edward Willis was seised of the copyholds after described for an estate of inheritance in fee-simple, at the will of the lord according to the custom of the manor of Wargrave, and reciting that, upon the treaty for the intended marriage, Edward Willis proposed and agreed to settle and assure these copyholds to the uses thereafter expressed: It was witnessed, "that in pursuance of the said agreement, and in consideration of the intended marriage, and of the premises, and in order to make some provision for Harriot Till, in case she should survive her said intended husband, and also for the nominal consideration therein mentioned," Edward Willis covenanted with the trustees to surrender a cottage at Crazy Hill, and seven cottages or tenements at the Holt, all holden of the manor of War-[341]-grave; to hold the same unto the trustees to the use of Edward Willis until the marriage, and after the solemnization thereof, to the use of Edward Willis for life, without impeachment of waste, and after his decease, to the use of Harriot Till and her assigns for life, without impeachment of waste; and after the decease of the survivor of them, to the use of Edward Willis, his heirs and assigns for ever.

The settlement contained powers of leasing, sale and exchange to be exercised by Edward Willis and Harriot Till in manner therein mentioned.

There was no issue of the marriage, and Edward Willis died intestate in March 1863, leaving the Plaintiff his customary heir according to the custom of the manor of Wargrave.

In addition to the copyholds comprised in the settlement, Edward Willis was, at the date thereof and at his death, seised of another copyhold, called "The Queen Adelaide Public-House," which was held of the same manor.

The annual income of the copyholds comprised in the settlement was £40, and the annual income of "The Queen Adelaide Public-House" was £24.

In the manor of Wargrave the following custom prevailed:—

"A woman, not being a widow before her marriage with the copyholder of this manor, after the decease of her husband, being a copyholder, may hold the copyhold lands which were her husband's, so long as she keepeth herself sole and chaste."

[342] The question for the opinion of the Court was whether, having regard to the settlement and to the above facts, the widow was entitled to hold The Queen Adelaide Public-House, in addition to the settled property, so long as she kept herself sole and chaste.

Mr. Waller, for the customary heir. According to all the authorities, the provision made for the widow by her marriage settlement bars her right to freebench. In *Dyke v. Rendall* (De Gex, M. & G. 209), a settlement was made on the wife, upon her marriage, "for providing a competent jointure and provision of maintenance" for her; this was held by Lord St. Leonards to bar her dower. So in *Garthshore v. Chalie* (10 Ves. 1), where the settlement was for making some provision for her in case she should survive him. In a previous case of *Vizod v. London* (Kelynge, 17, and cited 3 Atk. 8, and 1 Ves. sen. 65), a bond was given before marriage for the livelihood and maintenance of the wife if she should survive her husband. This Lord King held to bar her dower. So in *Hamilton v. Jackson* (2 Jones & Lat. 295), where, by marriage articles, it was stipulated that if the husband should die in the life of his wife, she should have one-half of his real and personal estate, the Court held that her dower was barred.

Mr. Casson, for the widow. There is no intention apparent in this settlement to deprive the widow of her right to freebench in any part of the copyhold, as to which her husband might die intestate. A general provision for a wife is not a bar; *Tinney v. Tinney* (3 Atk. 8); and to exclude her dower there must be clear words, or a clear and manifest implication; *Birmingham v. [343] Kirwan* (2 Sch. & Lef. 444); *Power v. Sheil* (1 Molloy, 296). In *Couch v. Stratton* (4 Ves. 391), the husband, for making some provision for his wife and her issue, covenanted to pay a sum of money to the wife if she survived and had no issue. This was held not to bar the dower.

Here the clear intention was to provide some certain and indefeasible provision for the intended wife during her widowhood, and not to bar her of any uncertain rights which she might possibly acquire by the death of her husband intestate.

Mr. Waller, in reply.

March 6. THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case is, whether the following provision in a deed executed before marriage bars the wife of her freebench in the descended copyholds of her predeceased husband. [His Honor stated it.]

It is argued, on the authority of many cases, to which I shall presently refer, that such a covenant in a deed will bar dower; and it may, I think, be stated generally, that the settlement of a jointure made before marriage upon the wife will bar the wife's dower. *Garthshore v. Chalie* (10 Ves. 1); *Hamilton v. Jackson* (2 Jones & Lat. 295), and many other cases.

Many cases were cited for the purpose of shewing [344] that when the provision was stated to be for the purpose of providing for the wife's livelihood and maintenance, it would bar her dower. But, in all these cases, it is an inference to be drawn from the settlement and the provision thereby made for the wife, and in considering this inference, it is important to bear in mind the distinction which arises between dower and freebench. If the right to dower once attached to the freehold, the husband could not sell the land; but this is not so in copyholds. The wife has no title to freebench by reason of her marriage, as she has to dower; she is only entitled to her freebench in case the husband dies seized of the copyhold.

So regarding it, it is important to observe that no intention that the wife's right to freebench should be barred is expressed in the settlement, and I am of opinion that no such intention can be properly deduced by implication from the settlement.

The husband had always the power to bar the wife's freebench by a surrender, and cannot therefore be supposed to have made the settlement for the purpose of acquiring any greater power over the remainder of his copyhold estates, as would have been the case with respect to freehold lands of inheritance. The object and purview of the settlement appears to me to have been merely to restrain the husband from alienating this particular copyhold during his life, leaving it free to him to alienate all the rest of his copyholds: but the event of the husband's dying intestate, and without having barred his wife's freebench by surrender, was not contemplated, and was not provided for.

This principle is illustrated by the decision of Lord [345] Redesdale in *Birmingham v. Kervan* (2 Sch. & Lef. 444). There the testator gave a house and demesne to his wife for life, with a direction that she should pay for it 13s. per acre, and keep the place in perfect repair. Lord Redesdale held that this disposition was inconsistent with the intention that she should have dower out of this same estate, but that this disposition could not bar her of her dower in the rest of his real property.

Here, if the settlor had intended to deprive the wife of her freebench, he might have done so by disposing of the copyholds, or by expressing in the deed that the provision was in lieu of freebench; but he has done neither, and the consequence is that, in my opinion, the wife is entitled to the provision made for her by the settlement, and also to her freebench in the copyholds descended.

[345] *HOLE v. DAVIES.* Feb. 16, 1865.

A testator bequeathed his real and personal estate in trust to pay, for the benefit of his son (a lunatic), an annuity, until he should be able to manage his affairs, and if he ever returned to a sound mind, then he directed he should "divide" his residuary estate with his sister. The testator then gave the whole residue (subject to the contingency of his son's becoming of sound mind) to his daughter for life, and afterwards as she should appoint. Held, that the daughter took the whole, subject to the annuity and to the contingency; but that if the son recovered his reason, he would be entitled not only to one-half of the capital but to one-half of the income from the testator's death.

The testator gave and bequeathed all his real and personal estate unto his trustees, upon the following trusts:—

"Upon trust to pay an annuity of any sum, not exceeding £400 a year, to be secured on any part of my estate which my executors and trustees may think best, to or for the benefit of my only surviving son Algernon [346] John Brewer, for his life or until he is enabled to manage his own affairs. If he ever does return to a sound mind, then I direct that he shall divide my residuary estate with his sister Frances Jane."

And after bequeathing some legacies, he proceeded:—

"And all the rest and residue of my real and personal estate (subject to the contingency of my son becoming of a sound mind), I give to and direct that the same shall be held by my trustees and executors, upon trust for my daughter, Frances Jane, for her sole and separate use during her life, and after her decease, for such person and persons as she shall give, direct or appoint absolutely."

The testator died in 1857, his son Algernon John Brewer, although not found a lunatic by inquisition until 1864, had been of unsound mind ever since the year 1846, and he still continued to be a lunatic.

The residuary personal estate exceeded £36,000.

Questions had arisen whether the daughter was entitled to the whole income of the testator's residuary real and personal estate, after payment of the annuity of £400 so long as the son continued to be of unsound mind, or whether, until he should die or should be restored to reason, the trustees ought to hold one moiety of the real and personal estate, and of the income thereof, in trust for the daughter and her appointees, and the other moiety in trust for the son, and to abide the contingency of his being restored to reason, and ought, pending such contingency, to accumulate the surplus income of the second moiety for the benefit of whoever should ultimately prove to be entitled to the [347] principal of such moiety, or who was entitled to the surplus income of the second moiety pending such contingency, and how the same surplus income ought to be dealt with by the trustees during such contingency.

This suit was instituted by the testator's daughter against the executor and her brother and his committee to have the rights and interests declared.

Mr. Hobbouse and Mr. Jenkinson, for the Plaintiff, argued there was an absolute gift to her, subject to the contingency of the son's recovery, and that, until that event happened, the whole income belonged to the Plaintiff.

Mr. Southgate and Mr. Bathurst, for the brother and his committee, argued that a moiety of the income must accumulate until the event either happened or failed; *Genery v. Fitzgerald* (Jacob, 468). That the income of the real estate must either accumulate or go to the heir at law; *Hodgson v. Earl of Bective* (1 Hem. & M. 376; 10 H. of L. C. 656).

Mr. Miller, for the executor.

THE MASTER OF THE ROLLS [Sir John Romilly]. I read this will thus:—I give £400 a year to my son, and the whole residue to my daughter for life, and afterwards as she shall appoint. But if my son ever recovers his senses, he is to “divide” the residuary estate with his sister. She must, therefore, in that event, transfer to him one-half, and account for the income of it from the time of the testator’s death.

[348] I am disposed to make a declaration that the whole capital and interest is given to the daughter, subject to the contingency of the son’s returning to a sound mind.

If the Plaintiff can give an undertaking that the *corpus* shall abide any order which the Court may make in respect of past income, I will order the whole income to be paid to the Plaintiff.

Reg. Lib. 1865, fol. 1518.

[349] HODGE v. FOOT. April 26, 1865.

[See *In re Bowman*, 1889, 41 Ch. D. 529.]

The rule, as settled by modern authorities, is that the word “survivor” is to be construed strictly, and is not to be read “other,” unless the rest of the will should render the more liberal and less literal construction essential, for the purpose of carrying into execution the objects expressed by the will.

A testator gave one-third of his real and personal estate to each of his three daughters for life, and after their respective deaths, to their respective children. But in case any or either of the three daughters should die without leaving any child, or if all should die under twenty-one, then the share of the daughter “so dying should be for the separate use of the surviving daughter or daughters and their children *per stirpes*.” Held, that “surviving” ought to be construed “other.” Consequently, one having died leaving children in 1803, and a second in 1837 leaving a child, and the third in 1864 leaving no child, it was held that the share of the last was divisible *per stirpes* among the children of the two former.

The question on this petition was as to the construction to be put on the will of William Chappell, formerly of Devonport, which bore date the 16th of July 1798, by it he gave his freehold and his residuary personal estate in trust to pay one-third of the income to his daughter, Christian Hambly Chappell, for life, with remainder to her children as tenants in common, when and as they should severally attain their ages of twenty-one years, with such benefit of survivorship among such children, and such maintenances out of the rents and profits, interest and dividends of the said one-third part, until they should attain the age of twenty-one years, as was usual in such cases; and one other third part in like manner to Ann Chappell, with remainder to her children; and the remaining third part in like manner to Harriet Chappell, with remainder to her children; and the will then proceeded as follows:—

“I declare it to be my will and meaning that, in case any or either of my said three daughters should happen to die without leaving any child or children, or leaving such, all of them should happen to die under the age of twenty-one years, then the share or shares of the daughter or daughters so dying shall be for the separate [350] use of the *surviving daughter or daughters and their children per stirpes*.” And the testator directed his trustees “to release, convey, transfer, assign, pay, apply and dispose of the same share of the rents, issues and profits, dividends and proceeds thereof, for the benefit of such surviving daughter and daughters and their children,

in the same manner as was thereinbefore by him directed concerning the original share or one-third part of such daughter or daughters and their children."

The testator died in 1801.

Christian married Mr. Hodge, had two children, who attained twenty-one, and died in November 1803.

Ann married Mr. Croad, and she died in January 1837, she had only one child, a daughter, who married Mr. Gennys, who were both Co-plaintiffs.

Harriet married Mr. Hall, and died in November 1864, without leaving any issue surviving her.

The question was, to whom Harriet's share was to go under the gift over "for the separate use of the surviving daughter and daughters and their children *per stirpes*."

Mr. Baggallay and Mr. Freeman, for the Petitioners.

Mr. Hobhouse, Mr. Rawlinson and Mr. W. Morris, for the Respondents.

April 26. THE MASTER OF THE ROLLS [Sir John Romilly]. If the word "surviving" is to be read "other," then [351] it would probably follow that the word "and" must be read "or," in which event the children of Mrs. Hodge and of Mrs. Croad would divide Mrs. Hall's share equally between them, and each family would take a moiety.

The decisions on this subject are very conflicting, although the rule as settled by modern authorities is, that the word "survivor" is to be construed strictly, and is not to be read "other," unless the rest of the will should render the more liberal and less literal construction essential, for the purpose of carrying into execution the objects expressed by the will; the exception to the strict construction of the word cannot be reduced to any definite rule, and must depend upon the words of each will itself.

In the present case the scope and object of the will taken together, coupled with two cases which nearly approach the present, induce me to hold that the proper construction in this particular case is the wider and less literal construction, which will let in the children of a predeceased daughter.

It is clear that the testator did not intend the children of a surviving daughter to take conjointly with the mother, but that they were intended to take either after a life-estate in the mother, or in substitution for their mother. Even if no question had arisen as to the effect of the word "surviving," as, for instance, if Mrs. Hall had died without issue before either of her sisters, still the surviving sisters would have taken for life, with remainder to their children, according to the express words of the direction contained in the subsequent part of the will as regards the accrued share. It is, I think, the scope of this will, to make this apply to every share, and that the circumstance of the death of a [352] daughter having issue, before the death of one without issue, was not intended to interfere with this design. This only can be carried into effect by holding the word "surviving" to mean "other." Besides this, it would lead to an intestacy as to this share, which is a result the Court would very reluctantly find itself compelled to arrive at.

The same view seems to have been taken by the Court in two cases, which cannot well, I think, be distinguished from the present, one is *Harman v. Dickenson* (1 Bro. C. C. 91), which, however, is a very short case, and is in these words:—"A bequest to two daughters of the testator, and if one should die without issue, then to the surviving daughter and her issue. One of the daughters married, and died leaving issue, then the unmarried daughter died. Lord Chancellor held that the money went to the issue of the married daughter, although she did not survive her sister."

It has been stated that little reliance can be placed on a case so short, where the words of the will are not set out, and little discussion seems to have occurred, and where, by construing the word "surviving" to mean "other," the gift would have been too remote, as arising after an indefinite failure of issue, in which case the Courts never construe the word "surviving" to mean "other."

But I have caused the registrar's book (1) to be examined for that case, and I have extracted the words of the will, which shew that the word "issue" in that will is restricted to "children," and consequently that the de-[353]-cision cannot be

(1) Reg. Lib. 1780, A. fol. 611. See 1 Bro. C. C. 91 (5th ed.), where the facts are set out from the registrar's book.

impeached on the ground that, by construing "surviving" to mean "other," a gift over after an indefinite failure of issue was created. I think, however, that the rule so referred to, viz., that the Court will never construe the word "surviving" to mean "other," when by so doing it creates an intestacy, which is a sound one, rather helps the construction in this case, and the construction may be said to apply, because if the Court will not read "surviving" to mean "other" where it defeats the will and creates an intestacy, *e converso* it derives a strong argument in favour of so construing the word "surviving," if by so doing it avoids an intestacy.

The other case is more distinct, it is the case of *Hawkins v. Hamerton* (16 Sim. 410), the concluding words of the judgment of the Vice-Chancellor explain the words of the will, and also his reason for determining that "survivor" meant "other."

It follows from hence, that I think, by parity of reasoning, that "surviving" means "other," and that the children take by substitution for the parent; nor am I clear that the word "surviving" may not be extended to the children of the daughter in this instance, having regard to the division which immediately follows when he gives the accrued share in the same manner as the original shares.

In my opinion, the children of Mrs. Hodge and of Mrs. Croad take Mrs. Hall's share *per stirpes*, that is, one moiety equally between the children of Mrs. [354] Hodge, and the other moiety to the child of Mrs. Croad.

NOTE.—See *Greenwood v. Percy*, 26 Beav. 572; *Holland v. Allsop*, 29 Beav. 498; *In re Keep's Will*, 32 Beav. 122; *Blundell v. Chapman*, 33 Beav. 648.

[354] GILBERTSON v. GILBERTSON. May 24, 1865.

[S. C. 12 L. T. 816; 13 W. R. 765. See *Powell v. Riley*, 1871, L. R. 12 Eq. 181; *Harloe v. Harloe*, 1875, L. R. 20 Eq. 473. Distinguished, *In re Banks* [1905], 1 Ch. 547.]

Personal estate held exonerated from the payment of "funeral and testamentary expenses and debts."

A testator bequeathed his leasehold and personal property (except plate) to his wife absolutely, and he devised his real estate in trust to sell, and out of the produce to pay "his funeral and testamentary expenses and debts," and to invest "the residue" and pay the income to his wife for life, with remainders over. Held that the "funeral and testamentary expenses and debts" were primarily payable out of the produce of the real estate.

The costs of a special case, to obtain the opinion of the Court on the true construction of a will, held not to be "testamentary expenses."

This was a special case for the opinion of the Court, under the following circumstances:—

The testator, by his will, expressed himself in substance as follows:—

"I give and bequeath all my leasehold house called Eryldran, and all other leasehold premises which are or shall be holden by me, and all other *my personal property* over which I have a disposing power (except silver plate), to my dear wife Anne Catherine Gilbertson absolutely. And I give and bequeath my said plate to my said dear wife for the term of her natural life, and after her decease," he gave the plate to other persons.

He then devised all his real estates to his brother in fee on trust, as soon as conveniently might be to sell, and he proceeded as follows:—

"And I declare that my brother, Lewis Gilbertson, and his heirs, executors and administrators, shall, by and out of the moneys to arise by the sale of my said real estate, *pay my funeral and testamentary ex-[355]-penses and debts*, and shall invest the residue of the said moneys, in his or their name or names, in any of the public stocks or funds of Great Britain," &c. "And I declare that the said trustee or trustees shall pay the annual income of the said trust funds to my said wife for and during the

term of her natural life, and from and after her decease, upon trust to pay such annual income unto and equally between my sisters, Anne and Mary Gilbertson, with benefit of survivorship, and from and after the decease of the survivor of them," on certain trusts for his nephews and nieces.

"And I further declare that, until all my said real estate shall be sold and converted into money, the said trustee or trustees shall apply the income of such part thereof as shall, for the time being, remain unsold, to the person or persons, for the purposes and in the manner, to whom and for and in which the annual income of the stocks, funds or securities aforesaid would be payable and applicable if such real estate had been invested as aforesaid."

The testator died in 1864, his debts considerably exceeded the value of his personal estate, but his real estate was considerably more than sufficient for their payment.

Questions had arisen upon the construction of the testator's will, whether the personal estate was or not exonerated from the payment of the testator's debts, funeral and testamentary expenses, as between the widow and the persons entitled to the testator's real estate.

The question submitted for the opinion of the Court [356] was, whether the widow was entitled to the leasehold and personal estate freed and discharged from the payment of the testator's funeral and testamentary expenses and debts, and whether the testator's real estate or the proceeds thereof were primarily applicable in exoneration of the personal estate.

Mr. Everett, for the widow, relied on *Greene v. Greene* (4 Mad. 148); *Michell v. Michell* (5 Madd. 69); *Burton v. Knowlton* (3 Vesey, 107); *Kynaston v. Kynaston* (1 Bro. C. C. 457); *Lance v. Aglionby* (27 Beav. 65).

Mr. William Pearson argued that the question was not whether the real estate was charged with the debts, &c., for of that there could be no doubt, but whether the personal estate was exonerated therefrom; *Boole v. Blundell* (1 Mer. 192). That the personal estate was the primary and natural fund for payment of the debts, and that there was no proof of its exoneration. He referred to Mr. Jarman's observations on *Burton v. Knowlton* and *Kynaston v. Kynaston*; *Aldridge v. Wallscourt* (1 Ball & B. 312); *Brummell v. Prothero* (3 Vesey, 111); *Tait v. Lord Northwick* (4 Vesey, 816); *Collis v. Robins* (1 De Gex & S. 131); Jarman on Wills (vol. ii. 549 (2d ed.)).

THE MASTER OF THE ROLLS [Sir John Romilly]. If I were to determine that there was no exoneration in this case, I should be laying down this proposition:—That no circumstances or evidence would [357] be sufficient for that purpose, unless the testator said in express words, "I mean that my real estate shall be primarily liable to pay my funeral and testamentary expenses and debts." I am not of that opinion, and I will proceed to state why, in this case, I am of opinion that the personal estate is exonerated. Sir William Grant, whose observations on this subject are so valuable, points in *Tower v. Lord Rous* (18 Vesey, 138), to this as the rule: viz., whether you can discover an intention to give the personal estate as a specific bequest, as distinguished from a gift to the executor or as a residue.

This, therefore, being the guide, I look at the will and I find, in the first place, that the testator gives his leasehold at Eryldran and all other leasehold premises to his wife "absolutely." Nothing can be more distinct than that this was a gift of all the leaseholds he possessed at his death, and the bequest is clearly specific. He also gives her his plate for life, and afterwards to other persons. It is very obvious that the leaseholds and plate are given free from the payment of debts; this is clear from all the cases. That being so, I am of opinion that it is not possible to separate them from the rest of the personal estate, and that the widow takes them altogether.

But that alone would not exonerate the personal estate. There must be something more in the words of the will.

The testator then devises all his real estate in trust to sell, and, out of the produce, to pay "his funeral [358] and testamentary expenses and debts." Here we have the direction to pay the "funeral and testamentary expenses" out of the produce of the real estate, which words, though not sufficient of themselves, are important and have always been relied on as shewing an intention to exonerate the

personal estate. (See *Ram on Assets*, 64.) Though not sufficient of themselves to exonerate the personal estate, they become important when coupled with the previous gift of the whole personal estate in the shape of a specific bequest.

The testator then directs the trustee "to invest the residue of such money," that is the residue of the produce of the sale of the real estate which remains after the payment of his "funeral and testamentary expenses and debts," and to pay the income thereof to his wife for life, and afterwards to his sisters and then to his nephews and nieces. And he goes on to direct that until the sale of the real estate, the income shall be applied in the same manner as the income would have been payable "if such real estates had then been sold and the *net surplus* moneys had been invested."

It is also to be observed that the wife was not the executrix, and that no legacies were given, so that there was nothing to fall on the personal estate.

Having regard to all these circumstances, it appears to me that the cases referred to of *Greene v. Greene*, *Michell v. Michell*, and *Lance v. Aglionby* apply, and that in strict accordance with what has been laid down by Lord Eldon in *Bootle v. Blundell* and by Sir [359] William Grant in *Tower v. Lord Rous*, I must declare that the real estate is primarily liable.

The costs of this special case, not being testamentary expenses, are payable out of the personal estate. (1)

[359] COCHRANE v. WILLIS. May 9, 10, 31, 1865.

[Affirmed, L. R. 1 Ch. 58; 35 L. J. Ch. 36; 13 L. T. 339; 14 W. R. 19.

See *Jones v. Clifford*, 1876, 3 Ch. D. 791.]

In October the Plaintiff, who was entitled to an English estate during the life of J. W., and that without impeachment of waste, entered into an agreement with the remainder-men as to the timber on the estate. Unknown to all parties, J. W. had died in India in September previous, whereby all the Plaintiff's interest in the timber had ceased:—Held, that the contract having been entered into by mistake was not binding in equity upon the remainder-men.

An agreement entered into between A. B. (the assignee of a tenant for life without impeachment of waste) and the Defendants (the remainder-men) by which it was agreed, 1st, that A. B. should be entitled to the timber as if cut in August previous; 2dly, that the Defendants should carry out the agreement; 3dly, that A. B. should have no greater right than he had in August; 4thly, that A. B. should not cut the timber until December. Held, that the remainder-men received no consideration for this agreement, and that it was *nudum factum*.

The question in this cause was as to the validity of an agreement entered into between the Plaintiff, by his Attorney, and the Defendants, on the 30th October 1863. The bill in substance, though not in terms, prayed the specific performance of this agreement. The facts were not in dispute, and were as follows:—

In the beginning of 1863 Joseph Willis, a merchant in Calcutta, was tenant for life without impeachment of waste of an estate called Halsnead Hall, near Prescott in Lancashire, not far from Liverpool, with remainder to his first and other sons in tail male, with remainder to the Defendant Daniel Willis, his brother, for life, without impeachment of waste, with remainder [360] to the Defendant Henry Rodolph Willis, his eldest son, as tenant in tail. Joseph Willis, who was about eighty years old, had no son, and his brother, Daniel Willis, managed the estate for him in Lancashire.

In June 1863 Joseph Willis became insolvent, and the whole of his property became vested in the official assignee of the Court for the Relief of Insolvent Debtors at Calcutta (the Plaintiff in this suit). He immediately sent a power of attorney to Messrs. Graham & Lyde in London to act for him, and at the same time informed

(1) See *Broune v. Groombridge*, 4 Mad. 495; *Webb v. De Beauvoisin*, 31 Beav. 573.

them that the insolvent was entitled to a life interest in an estate near Prescott in Lancashire, known as Halsnead Hall, and also a leasehold property near the estate known as the Can Colliery, and also to some money known as the Patrimonial Fund.

This was in fact a correct account of all the property which the insolvent was entitled to in this country.

Immediately on the receipt of this letter, in August 1863, Messrs. Graham & Lyde wrote to the Defendant Daniel Willis for an account of this property. By him they were referred to Messrs. Farrar, Jarman & Co., and through them to Messrs. Lawrance, Plews & Co. Little detailed information was afforded by the Defendants, till on 10th October 1863, Messrs. Graham & Lyde threatened to institute proceedings. On the 22d October 1863 a statement was furnished to them by Messrs. Lawrance, Plews & Co., and on the following day Messrs. Graham & Lyde complained that it had not been communicated to them before. A day or two after this, Mr. Lyde, accompanied with Mr. Barry, a gentleman in his office, went down [361] to Liverpool to make the necessary arrangements respecting the insolvent's property, and after various communications between the parties, a meeting took place at Halsnead Hall on the 30th of October 1863. The persons present were Mr. Lyde and Mr. Barry, on behalf of the Plaintiff, and on the other side, the Defendants, with Mr. Williams their land steward and Mr. Farrar their solicitor. At this meeting the agreement in question, which had previously been discussed, was finally settled and signed by the two Defendants, and by Mr. Lyde, in the name of his firm of Graham & Lyde. It was as follows:—

"Memorandum of agreement made and entered into between Daniel Willis of &c., and Henry Rodolph Willis of the one part, and John Cochrane, Esq., of Calcutta, barrister-at-law, official assignee of the Court for the Relief of Insolvent Debtors at Calcutta of the other part. Whereas Joseph Willis has been adjudged an insolvent by the said Court: And whereas Daniel Willis was agent in England of Joseph Willis, and heard of such insolvency on or about the 6th day of August last: And whereas Messrs. Graham & Lyde, the agents in England of John Cochrane, at once applied to Daniel Willis for a statement of the assets of Joseph Willis and to be put in possession of such information as would enable them to act, which the said Daniel Willis has, until the last few days, delayed to do. And whereas Messrs. Graham & Lyde have called upon Daniel Willis forthwith to put them, as representing John Cochrane, in the position, so far as represents the assets of Joseph Willis, they would or might have been in if Daniel Willis had, on their application in August last, at once put them in possession of such estate and effects: And whereas Daniel Willis and Henry Rodolph Willis are respec-[362]-tively interested, in reversion, in all or a portion of the real and leasehold hereditaments and premises situate in the parishes of Prescott and Huxton and Bolton-le-Moors or one or more of the townships thereof, respectively or elsewhere, lately in the possession of Daniel Willis, as such agent as aforesaid: And whereas, in particular, Messrs. Graham & Lyde have called upon Daniel and Rodolph Willis to put them in such position as aforesaid, as regards the timber and timberlike trees and other trees, plantations and underwood, in and upon the said hereditaments and premises, and as regards all fixtures and quasi-fixtures, articles and things in or about the same, which, as representing the official assignee and through him, Joseph Willis, they were entitled to fell, cut down, root up or move and carry away on the 15th day of August last, and threaten, if Daniel Willis and Henry Rodolph Willis decline to enter into such engagement, forthwith to fell, cut down, root up, and move and carry away the same, as far as they legally can or may. And whereas Daniel Willis and Henry Rodolph Willis, being very desirous to avert, if possible, such a course, which would irreparably injure the said hereditaments and premises, have offered and agreed to enter into the agreement and arrangement hereinafter contained: Now it is mutually agreed, by and between Daniel Willis and Henry Rodolph Willis, and each of them apart from the other on the one part, and John Cochrane on the other part, as follows:—

"1st. That John Cochrane, as such assignee as aforesaid, shall be and be deemed and taken as entitled to the said timberlike trees and other trees, plantations and underwood, in or upon the said hereditaments and premises, and the said fixtures and quasi-fixtures, articles and things in or about the same, as if the same had been respec-

tively felled, cut down, rooted up, [363] removed and carried away by him on the 15th day of August last.

"2d. That Daniel Willis and Henry Rodolph Willis, to the extent of and according to their respective interests in the said hereditaments and premises, present or future, will carry out this agreement.

"3d. That nothing herein contained shall be construed as giving John Cochrane any right, title and interest besides what he had or could have exercised on the said 15th day of August or since.

"4th. That John Cochrane shall not fell, cut down, root up or move or carry away any timber, fixtures or quasi-fixtures, in or about the said hereditaments, before the 1st of December next."

At the time when this agreement was entered into, Joseph Willis was dead, he had died on the 24th of September previously, but the fact was unknown to each and every one of the persons signing the agreement or present at the time.

This suit was instituted in November 1863 by Mr. Cochrane against Daniel Willis and Henry Rodolph Willis, stating the above circumstances, and alleging that "it was for the interest of the Defendants, as long as possible, to delay the Plaintiff and prevent him from entering into possession of the freehold and leasehold hereditaments, and from cutting or selling the timber and other trees and plantations and underwood thereon, and from taking down or removing the fixtures and quasi-fixtures and other articles and things in or upon or affixed to the said mansion-house and premises, and they were desirous of delaying the Plaintiff and preventing his obtaining the benefit of the said property accordingly. And to that end Daniel Willis [364] with the concurrence of Henry Rodolph Willis, from time to time by himself and his solicitors, made promises to the said Messrs. Graham & Lyde to supply the said information or such information as would enable them to act for the Plaintiff, on behalf of the said insolvent's creditors, and to realize the aforesaid property, but purposely omitted to fulfil the said promises, and much correspondence took place between Messrs. Graham & Lyde, on the part of the Plaintiff, and the Defendants and their solicitors, in reference to the matters aforesaid, and the Defendants, from time to time, put Messrs. Graham & Lyde off. That Messrs. Graham & Lyde relied on the promises of Defendant Daniel Willis, and, on the faith thereof, forbore to take proceedings to compel the performance of the said promises and the furnishing the aforesaid information, but ultimately, Messrs. Graham & Lyde threatened to take legal proceedings to enforce Plaintiff's said rights, and thereupon Daniel Willis signed, and on the 22d day of October last delivered, to the said Messrs. Graham & Lyde a paper entitled *Re Jos. Willis—Mr. Daniel Willis's report as to property*, which gave the said Messrs. Graham & Lyde some information as to the said property."

The bill prayed a declaration that the timber and fixtures were, in equity, to be considered as if the same had been felled, removed and carried away by the Plaintiff on the said 15th day of August last, and that the Defendants were trustees thereof for the Plaintiff, or otherwise that it might be declared that the Defendants were bound to make good to the Plaintiff the value of the timber and fixtures, and pay to the Plaintiff such value.

Mr. Baggallay and Mr. G. Lake Russell, for the [365] Plaintiff. First. This was a valid agreement *bonâ fide* entered into; both parties had an equal knowledge, and the very object of it was to compromise uncertain rights, and place the Plaintiff in the same position as he would have been, if he had exercised his powers over the timber in August previously. Secondly. The circumstance that, at the date of the contract, Joseph Willis was dead, but of which fact all the parties were ignorant, does not affect the validity of this contract. It is like insuring a ship on her voyage, in which case the insurance may be recovered, though the vessel happened to be lost at the date of the policy. Thirdly. An equity arises in favour of the Plaintiff, from the delay on the part of the Defendant (an agent) in giving the Plaintiff the necessary information. If the Defendant had, in August, made the Plaintiff acquainted with his rights, he would have at once realized the timber, &c.

Mr. Selwyn, Mr. Hobhouse and Mr. Lawrance, *contrâ*. Upon the death of the tenant for life in September, the Plaintiff ceased to have any interest in the estate, the Defendants received no consideration for this contract, it was a mere *nudum pactum*

and cannot be enforced. Secondly. The agreement was entered into by the Defendants in ignorance of their rights at the time. They believed that Joseph Willis was alive and that the Plaintiff was then entitled to the estate; the contrary was the fact, and this Court never assists in enforcing a contract entered into under such circumstances. Thirdly. In October, the Plaintiff, who was in India, well knew of the death of the tenant for life, and this knowledge affects the agreement entered into by his agent in England, who must be assumed to have the same information as his principal. Fourthly. The Plaintiff's remedy, if he has any, is at law. Lastly. [366] The case of a marine policy does not apply, for the event is specially provided for by the policy. They cited *Day v. Newman* (2 Cox, 77); *Wedgwood v. Adams* (6 Beav. 600); *Falcke v. Gray* (4 Drew. 651); *White v. Damon* (7 Vesey, 30); *McCarthy v. Decaix* (2 Russ. & Myl. 614); *Harnett v. Yelding* (Sel. & Lef. 549; 2 Sel. N. P. 951).

Mr. Baggallay, in reply.

May 31. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether this agreement has any validity, and whether it can be enforced by the Plaintiff. When this case came before me on demurrer, I was of opinion that the agreement could not be enforced, and that there was no consideration, proceeding from the Defendants or either of them, sufficient to support it. I was also of opinion that the agreement having been entered into in ignorance of the death of Joseph Willis, this constituted a mistake which was sufficient to induce this Court to abstain from enforcing the contract, even if there had been a good consideration apparent on the face of the agreement.

On further and more mature consideration, I retain the opinion I expressed on the demurrer. The only consideration apparent on the face of the contract, by which the Defendants obtain anything is, if at all, to be found in the fourth stipulation, viz., that the Plaintiff shall abstain from felling or removing timber [367] or fixtures for thirty-one days, viz., till the 1st December. There is no condition giving them a right of pre-emption. The timber, according to the usual custom in such matters, could not usefully be felled before the winter set in; and if there were any oak trees, they would most profitably be felled in the spring of the ensuing year. The benefit of shade and mast during the month of November is nominal, and not in my opinion sufficient to support such an agreement. I think that if, on the day after the agreement had been entered into, the Defendants had repudiated it, the Plaintiff could not, although Joseph Willis had then been alive, have obtained from this Court a decree for the specific performance of it.

But it is unnecessary to consider that question, for in my opinion, the fact that Joseph Willis was then dead removes all possible right on the part of the Plaintiff.

It is argued, on the part of the Plaintiff, that this agreement was intended to be, and must be treated as being, to this effect:—In consideration of your abstaining for thirty-one days from felling any timber, we consent that you shall have now and hereafter the same full right to the timber and fixtures which you had during the life of Joseph Willis, although he should be now dead at the time of executing this agreement. This is obviously untenable.

Suppose it to be so expressed, it amounts to this:—In consideration of your forbearing to do what you are not legally entitled to do, in consideration of your postponing to commit a trespass on our land, we consent that you shall have all the timber and fixtures which belonged to the prior tenant for life, but which [368] ceased to belong to him on his death. The answer, in my opinion, is twofold. In the first place, that is not the agreement; and in the second place, if it were, it would be bad on the face of it, and one which could not be enforced in a Court of Equity.

But both parties obviously believed that the insolvent was then alive, the Defendants clearly did. Mistake as to the rights of a party who enters into a contract has always been considered sufficient, in this Court, to prevent the Court from exercising the power it possesses of compelling the specific performance, and in such cases, it leaves the parties to their remedy at law. It is true that in cases of family arrangements, a doubt as to an existing fact has been considered sufficient to support the arrangement; this is on the ground of the peace of families; but this case does not come, nor is it alleged that it comes, within that rule.

In other cases so strongly has a Court of Equity acted, upon the ground that

mistake takes away the foundation of such a right as that of specific performance, that in one case, before Lord Hardwicke, *Bingham v. Bingham* (1 Ves. sen. 126), where a man had, by mistake, bought an estate of which he was the real owner, the purchaser was allowed to recover back the purchase-money, which he had so erroneously paid in ignorance of his real right.

That case would seem to apply to the present, even if the Defendants here had, on the 30th October 1863, paid to the Plaintiff's agents £1000 for the price of the [369] timber and fixtures, under the belief that they belonged to the insolvent, but which, in truth, were no longer his. But, as the case stands, it is much stronger in their favour.

The Defendants rely also on the fact that Messrs. Graham & Lyde, who entered into this agreement, did so solely as the agents for the Plaintiff, and insist that the agents can stand in no better position than the Plaintiff himself, and that, though this case is relieved from all taint of fraud, still that the fact is that, at the time when the Plaintiff, by his agents, entered into this contract, he knew that the insolvent was then dead and had been dead a month.

The Plaintiff endeavours to get rid of this objection by referring to the ordinary case of insuring a vessel at sea, where the insurance holds good though the vessel was lost at the time when the contract of insurance was effected. But, in reply to this answer, it is justly observed that this very objection is foreseen and obviated in policies of insurance against losses at sea, by the introduction into the policy of the words "lost or not lost."

Upon the whole, in every way that I look at this case, it appears to me that this is a contract without consideration, entered into under a mistake, which, as the circumstances now appear, this Court will not give either party any assistance to enforce.

The Plaintiff by his counsel contends that this is not an agreement, but an actual conveyance of the timber; if so, the Plaintiff must enforce his right at law and not come here for assistance. So also, my refusal to give relief will not preclude the Plaintiff from bringing [370] any action at law that he may be advised to commence, and if it be a good agreement for valuable consideration, he may obtain, at law, such damages as he has sustained by the refusal of the Defendants to perform it. In my opinion, it is equally nugatory both at law and in equity, and I must dismiss the bill with costs.

NOTE.—Affirmed by the Lords Justices, 7th November 1865.

[370] *Ex parte WILLIAMS. Feb. 23, 1865.*

The Master of the Rolls declined to direct a writ of prohibition to issue to the Court of Chancery of the County Palatine of Lancaster, in respect of an order for taxation, His Honor being of opinion that the proper course was to appeal to the Appellate Court constituted by the 17 & 18 Vict. c. 82.

On the 30th of January 1865 an order for taxation had been made by the Court of Chancery of the County Palatine of Lancaster.

Mr. Lloyd Morgan now moved for a writ of prohibition, on the ground that the Court had not jurisdiction under the 6 & 7 Vict. c. 7, s. 37, to make the order. He argued that the registrar could not refer to the proper officers of any other Court to assist him in taxing and settling any part of the bill (s. 42), and that "prohibition lies to the Duchy Courts and Courts of a County Palatine;" Comyn's Dig. "Prohibition" (A. 1); and see Bacon's Abridg. (vol. 7 (5th ed.), p. 137; vol. 7 (7th ed.), 588).

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think I have any jurisdiction. The proper course is this:—If the Vice-Chancellor of Lancaster has made an order which he has no authority to make, [371] you must appeal to the Lords Justices, who may reverse his order. I should only make an order to shew cause, and this would constitute me a Judge of Appeal over the decisions of the Vice-Chancellor of Lancaster. The Lords Justices have jurisdiction, and if you say the

Vice-Chancellor has made an improper order, you must apply to them under the Act of Parliament (17 & 18 Vict. c. 82), which furnishes a regular and formal mode of obtaining redress.

NOTE.—The Lords Justices, as I have been informed, entertained the application, but directed notice to be given. The decision of the Master of the Rolls was not, as I understand, ultimately affected.

[371] BARWELL v. BARWELL. May, 5, 9, 30, 1865.

A trustee, who buys up at an under price a charge on the trust property, may, if for a long lapse of years the *cestuis que trust* refuse to adopt the purchase, keep it for himself.

There is no rule of equity which prevents one of several residuary legatees buying the share of another or purchasing for less than the amount a charge on the share of another.

A suit to set aside a transaction entered into openly twenty years previously cannot be sustained.

In 1834 C. B., one of several *cestuis que trust*, mortgaged his share for £10,500. In 1842 the trustees bought up this mortgage for £1200 for the benefit of C. B.'s widow and family, but they were unable to find the purchase-money. Thereupon three other *cestuis que trust* became the purchasers, and six years afterwards they became trustees. By an unexpected sale of the trust property in 1863 the whole mortgage money was paid. Upon a bill filed in 1864 by C. B.'s widow: Held, that she was entitled to no interest in this beneficial purchase.

Under the will of his father, who died in 1804, Charles Barwell was entitled to one-ninth of his father's property. This consisted principally of a house in Calcutta, which was not sold until 1863.

In March 1834 Charles Barwell mortgaged his one-ninth share to Mr. Lowe to secure a sum of £10,500 and interest.

[372] In December 1836 Charles Barwell died, leaving the Plaintiff, his widow, and several children.

In August 1842 Mr. Lowe, being desirous of disposing of his mortgage, proposed to Mr. Brace (the then sole trustee of the father's will) to sell his mortgage, and ultimately, on the 6th of December 1842, Brace agreed to buy and Lowe to sell it for £1200. It was admitted that this purchase was not made by Lowe on his own account, but that it was intended for the benefit of the family of Charles Barwell. When, however, the purchase-money became payable, they became wholly unable to pay or procure it, though every exertion was made to obtain it from Mrs. Charles Barwell, her family or friends.

After every attempt to procure the money had failed, the mortgage was purchased and paid for by William Rose Barwell, Charles William Short and George Slead (three of the other *cestuis que trust*), and the mortgage was conveyed to them by Mr. Brace on the 1st of October 1843.

Upwards of six years afterwards, in 1850, these three purchasers were appointed trustees of the father's will in the place of Mr. Brace, who retired.

During the whole of these transactions, there was no legal personal representative of Charles Barwell in this country. In 1863 the Calcutta property was sold at the unexpected price of £77,500, and Mrs. Charles Barwell afterwards, in December 1863, obtained letters of administration in this country to the estate of her husband. She instituted this suit in May 1864, praying a declaration that the three purchasers of Lowe's mortgage were only entitled to charge her with the sum of money actually [373] paid by them to Mr. Lowe for his debt, with interest thereon. She alleged, first, that proper information had not been given, and that the value of the property had been misrepresented; and secondly, that the purchase was really one made by Mr. Brace, the trustee, and that, therefore, according to the acknowledged rules of this Court, it could only be held for the benefit of his *cestui que trust*.

Mr. Hobhouse and Mr. Terrell, for the Plaintiff, the widow of Charles Barwell, cited *Ex parte James* (8 Ves. 337); *Ex parte Bennett* (10 Ves. 380, 395); *Randall v. Errington* (10 Ves. 423).

Mr. Selwyn and Mr. Colt, for the purchasers, cited *Gregory v. Gregory* (Sir G. Cooper, 201); *Roberts v. Tunstall* (4 Hare, 257).

Mr. Hobhouse, in reply.

May 30. THE MASTER OF THE ROLLS [Sir John Romilly] recapitulated the facts, and, on the first point, came to the following conclusion:—"Upon the most careful examination I have been able to give to the evidence, I think that the case of the Plaintiff fails. I cannot find, throughout the evidence, any trace of any concealment by anyone, or that any facts were suppressed from Mrs. Barwell or her brother.

I can come to no other conclusion than that Mr. Brace entered into the transaction solely from a desire of benefiting Mrs. Charles Barwell and her family, and [374] that he was deeply grieved and mortified when he found that her friends would not advance the money required, or even give a bond for its repayment.

On the ground that Mr. Brace was a trustee and that a trustee cannot purchase for himself, the case of the Plaintiff is, in my opinion, still more hopeless. That rule applies only where the trustee purchases for his own benefit, but Mr. Brace did not purchase for his own benefit, he repudiated the purchase throughout. It was never made or thought of for himself, and although he advanced, at personal inconvenience to himself, £300 of his own moneys, he did so solely as the agent of and for the benefit of his *cestuis que trust*. He could not compel Mrs. Barwell to pay the purchase-money, and he might unquestionably, if all his *cestuis que trust* had refused for a long lapse of years to adopt the purchase, have kept it for himself; but instead of this, when the *cestuis que trust* whom it most concerned, viz., Mrs. Charles Barwell and her family, could not or would not adopt the purchase, he allowed three other of his *cestuis que trust* to take it for themselves.

But assuming that he had bought it as trustee for himself and that his *cestuis que trust* were entitled to the benefit of it, that would include all the persons for whom he was trustee in this matter, in other words, the class of persons entitled would be all the children of the original testator, which would reduce Mrs. Barwell's interest to one-ninth.

When I come to consider the particular case of the three gentlemen who bought the mortgage and took the conveyance of it by the deed of October 1843, I fail to discover any privity between them and the Plaintiff which should deprive them of the benefit of their purchase. It was not till upwards of six years afterwards that they became trustees in the place of Mr. Brace, and there is no law or rule of equity which prevents one of several residuary legatees from buying the share of another or from purchasing a charge on the share of another. Besides all the difficulties which I have above enumerated, the time which has elapsed since the transaction presents another and insuperable obstacle in the way of the Plaintiff. The transaction was known to everyone at the time, it was openly done, and since then upwards of twenty years have expired.

It is true that these three gentlemen have made a very good purchase; what they gave £1200 for in 1843 produced them £3589 before the end of 1850, and they will probably now, in 1865, receive the whole balance of the £10,500 and interest, or nearly so, out of the produce of the Calcutta property. But though it is impossible not to feel regret for the loss which this lady has suffered from the timidity and refusal of her friends to assist her in 1843, it is equally impossible for this Court to interfere, where everything was open and straightforward, and where upwards of twenty years have elapsed since the transaction occurred, and when its being disputed at present seems to have arisen rather from the unexpected produce of the estate sold, than from any well-founded belief in the irregularity of the original transaction.

I must, therefore, refuse to make the declaration required, but I must make a decree in favor of the Plaintiff as to her right to redeem the mortgage, on the footing of the mortgage being the same as when made to Mr. Lowe; and for that purpose the usual accounts must be taken as in an ordinary suit to redeem. But this will entitle the Defendants to add the costs of the suit to their mortgage security.

[376] MICHOLLS v. CORBETT. March 16, 17, 1865; Feb. 24, 1866.

[Affirmed, 3 De G. J. & S. 18; 46 E. R. 544.]

When a requisition is made by a purchaser, the vendor must be allowed a reasonable time to comply with it. Thus, a requisition was made at the end of June, which involved the necessity of instituting a suit and obtaining a decree. On the 1st of August the vendors consented to comply with the requisition, and they obtained a decree in Michaelmas term following; but on the 9th of August the purchaser gave notice to rescind the contract. Held, that it was ineffectual.

The Court, in sanctioning an arrangement on behalf of infants, considers not only their pecuniary interest but its effect as a family arrangement.

Trustees, who had a power of sale, but no power of leasing, first granted leases and afterwards sold subject to them. Infants being interested, the Court afterwards sanctioned the sale on their behalf: Held, that the purchaser was bound to complete.

Under the will of the testator, who died in 1844, certain freehold property in Eastcheap and Philpot Lane, in the City of London, was vested in trustees, upon trusts, under which it was admitted the trustees had power to sell but no power to lease.

In 1852 the trustees leased the Eastcheap property for twenty-one years at a rent of £310.

In 1860 they leased the Philpot Lane property for ten years at a rent of £350.

On the 1st of April 1864 the trustees sold both properties by auction to the Defendant. The particulars of sale stated the leases, that the will contained no power to lease, and it provided that no objection should be taken on account thereof, and that "the purchaser should take, subject to such interests as the tenants might be entitled to under the same."

The purchase was to be completed on the 8th of May.

Such of the parties beneficially interested as were competent to assent adopted the sale, but there were [377] some infants and married women interested in the produce of the sale, and who could not assent. The only substantial objection which arose to the title was this:—that the trustees had committed a breach of trust by granting the leases without authority, and that the sale, having been made subject to those leases, was so prejudicial that the parties not *sui juris* were not bound by it, and that they might, therefore, hereafter institute proceedings to set aside the sale. The opinion of the purchaser's counsel, which was sent by way of requisition on the 21st of June 1864, stated as follows:—

"The proper course is, for Mr. Corbett (the purchaser) to require the sale to be adopted and confirmed under the sanction of the Court, in an administration suit, so as to bind all parties interested or who may be interested, and, in default of this, he should insist that the contract be rescinded."

Some correspondence ensued, and the vendors, on the 1st of August 1864, expressed their willingness to comply with this requisition; but, on the 9th of August 1864, the purchaser gave notice that he rescinded the contract.

To remedy the objection, the vendors, on the 22d of October 1864, instituted a suit of *Micholls v. Micholls* against all persons interested, praying a declaration that the contract was fit and proper and ought to be carried into execution. A decree to that effect was made on the 12th of November 1864, but the purchaser still insisted that the contract had been rescinded, and he refused to complete. The trustees instituted this suit in November 1864 for the specific performance of the contract.

Mr. Selwyn and Mr. Jessel, for the Plaintiff, cited [378] *Cornick v. Pearce* (7 Hare, 477); *The Earl of Malmesbury v. The Countess of Malmesbury* (31 Beav. 407); *Salisbury v. Hatcher* (2 Y. & Coll. (Ch.) 54); *Chamberlain v. Lee* (10 Sim. 444); *Brooke v. Lord Mostyn* (33 Beav. 457).

Mr. Baggallay and Mr. Wolstenholme, for the Defendant, cited *Rede v. Oakes*

(32 Beav. 555; reversed, 34 L. J. (Ch.) 145); *Ord v. Noel* (5 Madd. 438); *Mortlock v. Buller* (10 Ves. 291).

THE MASTER OF THE ROLLS [Sir John Romilly]. I entertain no doubt as to the proper decree to be made on this occasion.

I am of opinion that all the previous matters having been perfectly well known to both parties when the requisition of the 21st June was sent by the purchaser to the vendors, the purchaser must be held to have accepted the title and waived all matters prior to that time, and that, subsequent to that requisition, it was not open to the purchaser to say, I contracted with one set of persons, and another set now propose to sell to me. In point of fact, all his had been disposed of previously to that period, and I must take up and regard the matter as from the time of making that requisition.

The purchaser, at the end of June, required the sale to be adopted and confirmed under the sanction of the Court, in an administration suit, so as to bind all parties interested, or who might be interested, and in default [379] of this, he insisted that the contract should be rescinded.

The vendors admitted their obligation to comply with that requisition, and I am of opinion that it was not in the power of the purchaser, on the 9th of August 1864, to put an end to the contract.

The Court unquestionably applies this principle to all these cases, viz., that when a requisition is made by a purchaser, the vendor must have a reasonable time to comply with it. Here the requisition was made in the latter end of June, and the time required for obtaining the opinion of counsel, and the necessary information as to the state of the family, appears, by the correspondence, to be brought down to the end of July or the beginning of August. The compliance with the requisition involved the filing of a bill in this Court, and obtaining a decree. This could not be done until the following Michaelmas term, and this was a reasonable time to be allowed for the purpose of complying with the requisition.

The question I have next to consider is, whether that requisition has been complied with.

I remember that, at the hearing of *Micholls v. Micholls*, the only argument was in favor of the confirmation of the leases; but on the present occasion, the counsel for the Defendant having the pleadings and the evidence in that case before them, have been enabled, in their argument before me, to rehear that case, and to submit to my consideration whether I arrived at a sound and proper conclusion, when I declared it was for the benefit of the children and the persons under disabilities that this contract should be [380] carried into execution. On reconsidering the case, I am still of opinion that it is for the benefit of the persons under disabilities, that this contract should be carried into execution. It is very true, assuming that the property, if sold discharged from these leases, would produce a larger sum than it has, and that the children would ultimately get a larger sum of money than they will under this contract, as far as the *corpus* is concerned, still, in dealing with matters of this sort, and in considering what will be most for the benefit of infants and persons under disability, the Court does not solely regard (though it is always a material element) the pecuniary interests of the children themselves. It regards also their relations, their families and their situation towards their parents. It is on this principle that the Court has considered family arrangements fairly entered into, though under a mistaken view of circumstances of the case, to be of so sacred a character, that it will not allow them to be set aside, though it appears that one of the parties was under an erroneous impression. The case of *Gordon v. Gordon* (3 Swanst. 400; and see the cases, 1 Story, Eq. 100, note 4), and many other similar cases, afford instances of the application of that principle, which the Court has very strongly enforced.

When I had to consider the case of *Micholls v. Micholls*, I found that the children and persons under disability were interested in two-thirds of the property, that the last lease was made in 1860, about four and a half years ago, and that since that time there appeared to have been an extraordinary increase in the value of property in the City of London. But, on the other hand, the Court has sometimes found that the value of property has considerably decreased, as in the case of property in the neighbourhood of the City of London. [381] The Court, therefore, has to consider

whether, if the sale of this property were postponed until after the leases have expired, that is until 1870 in one case, and 1872 in the other, or for five and a half and seven and a half years from the present time, it is reasonably to be expected that the present high prices of this property would remain. Another consideration to bear in mind is this: Is it probable, that after the deaths of the tenants for life, it would be for the benefit of the children to institute a suit, insisting that the sale of this property was a breach of trust. Undoubtedly, a very serious evil arises, as between parents, children and trustees, when the latter, acting *bona fide* and with no sinister object, and no personal interest in the matter, have committed a breach of trust. The Court has reluctantly set aside such a transaction, and dealt with the trustees as leniently as it can in such matters. Here, if the property became depreciated, it would be found for the interest of the children that this sale should have actually taken place. It is true that, by reason of this sale, the income of the tenants for life will be increased, still, it must be recollected that the tenants for life are the parents of the children, and that the increase of the parents' income is for the benefit of the children.

Taking these matters into consideration, I am still of opinion that it is for the interest of the children that this contract should be carried into execution, and that my decision in *Micholls v. Micholls* was correct.

I am of opinion, therefore, that the proper decree to be made, in this case, is, to say that the contract must be carried into execution; and I will give the Defendant as good a title as I possibly can, by making him pay [382] the costs, upon the ground that the decision in *Micholls v. Micholls* is clearly and manifestly right.

NOTE.—Affirmed by the Lords Justices, 7th June 1865. The Chief Clerk having certified that a good title was made, a decree for specific performance was made by the Master of the Rolls on the 24th of February 1866.

[382] SERCOMBE v. SANDERS. Feb. 20, 21, 1865.

[See *Readdy v. Pendergast*, 1886, 55 L. T. 768.]

Securities, given by the Plaintiff six months after he attained twenty-one to the Defendants for a debt due to them from his elder brothers, set aside with costs.

Under the will of his father, who died in 1858, the Plaintiff Walter Sercombe was entitled, in common with his two brothers, to a share in some leasehold premises. His two brothers were the executors.

The Plaintiff was an infant at his father's death, and he was brought up under the care of his brothers George and Thomas Sercombe.

The Plaintiff attained twenty-one on the 27th of July 1863.

George and Thomas Sercombe carried on an extensive trade as seed merchants, and they had opened an account with the Defendants as their bankers. The Defendants afforded them considerable pecuniary accommodation, and to secure their floating balance, the two brothers mortgaged their shares in the leaseholds to the Defendants, the bankers.

In January 1864 George and Thomas had become greatly indebted to the Defendants, who required further security, and the Defendants' solicitors, without any instruction from the Plaintiff, prepared two documents, the first of which was a mortgage to the Defendants of [383] the Plaintiff's share in the leaseholds as a security for his brothers' debt; and by the second document the Plaintiff concurred in the sale of the entirety of the leaseholds to a purchaser.

On the 19th of January 1864 Mr. Cole, the bankers' clerk, called on George Sercombe with the two documents ready prepared, and which he executed. The clerk then suggested that as he was but slightly acquainted with the Plaintiff, his brother, George Sercombe, should write a note to the Plaintiff, which he accordingly did in the following terms:—

"Jan. 19th, 1864.—My dear Walter,—Mr. Cole [the bankers' clerk] will call and

see you for your signature to the assignment of your interest in the house. You will not object to do it, I am sure, after all that has passed. You may rely upon it that what we both have at stake shall be protected and preserved; but we must act in concert now.—Yours ever affectionately,
 “GEORGE SERCOMBE.”

About ten o'clock of the same night (19th January), the clerk took the two documents to the Plaintiff, who was residing at the house of his other brother, and, as the clerk deposed, the Plaintiff executed them, after he had read them and they had been explained to him by the clerk; but nobody else was present.

These documents had been prepared by the bankers' solicitors without any previous negotiations on the subject with the Plaintiff. No draft had been submitted to the Plaintiff, and he had no professional advice, and the recitals as to the Plaintiff's applications and agreement were altogether contrary to the fact, the Plaintiff having [384] made no application to the Defendants or entered into any previous agreement.

On the 23d of January 1864 George and Thomas Sercombe were adjudged bankrupts on their own petition, and in February following the Plaintiff instituted this suit against the bankers to set aside the securities thus given by him for his brothers' debt. He alleged that the “deed and agreement had been executed by him under circumstances of pressure and undue influence, soon after he attained twenty-one, for the benefit of persons standing towards him *in loco parentis*; that they had been signed without proper professional assistance, and had been obtained improperly and by surprise, and under a false suggestion contained in the recitals.” The Plaintiff also insisted “that they had been obtained without consideration, and that the consideration, if any, for the same had failed.”

Mr. Selwyn and Mr. Beavan, for the Plaintiff, referred to the principles laid down in *Huguenin v. Baseley* (14 Ves. 273); *Archer v. Hudson* (7 Beav. 551, and 15 L. J. (Ch.) 211); *Maitland v. Irving* (15 Sim. 437); *Baker v. Bradley* (7 De G. M. & G. 397); *Hoghton v. Hoghton* (15 Beav. 278); *Berdoe v. Dawson* (11 Jur. 254); *Cooke v. Lamotte* (15 Beav. 234).

Mr. Baggallay and Mr. Dickinson, for the Defendants, argued that the deeds had been executed by the Plaintiff in order to secure his money embarked in his brothers' business, and in accordance with prior negotiations; that there had been no pressure on the part of the Defendants, and that, if any had been exercised, it was by the brothers, for which the Defendants were not re-[385]-sponsible; *Cobbett v. Brock* (20 Beav. 524). But that, in truth, the securities had been voluntarily and deliberately given by the Plaintiff.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this case has all the defects which this class of cases ever has, and it is obvious that the transaction cannot stand.

It is important that creditors should understand that they cannot improve their security, taken from persons to whom they have given credit, by inducing them, at the last moment, to compel near relations or persons under their influence, and not in a situation to resist their importunity, to pay their debts. Here a firm of bankers permit the Plaintiff's elder brothers to draw on them to a large amount, without having sufficient security for these advances, and six months after the Plaintiff, their younger brother, comes of age, they press him, through his brother, to convey his share of the property for his brothers' debt. This is like *Berdoe v. Dawson* (11 Jur. 254), where exactly similar transactions took place; there the security was obtained through the father, but here through the elder brother.

Mr. Cole's evidence alone is sufficient to set aside this transaction; he does not say a word to the Plaintiff, but goes to his brother and asks him whether his brother will execute the securities, and gets a letter to him in these terms, “Mr. Cole will call,” &c. [see *ante*, page 383].

There is a direct pressure, apparent upon the letter [386] itself, on a young man only six months after he had attained twenty-one. It is not sufficient to shew that a man knew what the actual transaction was, you must also shew that he is emancipated from control, and had the advantage of a separate solicitor, who would naturally have said to this Plaintiff, “You must understand that you are giving up your share of

these houses for ever. Are you quite sure that you will relieve your brothers from their difficulties, or are you only putting off the evil day? For if they become bankrupts you had better give them this property afterwards, unless your object is to benefit the bankers."

I must set aside these deeds and the Defendants must pay costs.

[386] *Re HORTON'S SETTLED ESTATE.* April 27, 1865.

Upon a petition under the Settled Estates Act (19 & 20 Vict. c. 120), an infant, remotely interested, had been born after the advertisement had been made. The Court permitted him to be made a party by amendment, and dispensed with further advertisements.

A petition had been presented to authorize the granting of leases of an estate under the Settled Estates Act (19 & 20 Vict. c. 120). This estate stood limited to one for life, with remainder successively to his children if they attained twenty-one, with an ultimate remainder over.

The petition had been presented making the three existing children and the remainder-men parties, but, after the advertisements had been made, a fourth child had been born to the tenant for life.

Mr. C. Hall applied for leave to amend the petition by making the fourth child a party Respondent, and that the matter might proceed without any further advertisements. He argued that this was a matter of dis-^[387]cretion with the Court. See *Re Bunbury's Settled Estates* (5 N. R. 229; 13 W. Rep. 270; 11 Jur. 27; 11 Law T. 585).

THE MASTER OF THE ROLLS [Sir John Romilly]. The petition may be amended by making the infant a party, and I will dispense with a repetition of the advertisements.

[387] *GATAYES v. FLATHER.* Jan. 25, 1865.

The Defendant agreed to assign a life policy to the Plaintiff. When the policy was effected, it was agreed that the payment of one-third of the annual premiums should be deferred until the death of the person insured, and be a charge on the policy. Held, that this was an incumbrance on the policy which the Defendant was bound to discharge.

In 1862 the Plaintiffs filed their bill against the Defendant Flather, in respect of some trust matters, but the suit was stayed by a compromise. One of the terms was that Flather should pay the Plaintiffs a sum of money, and another was, that he should assign to the Plaintiffs some policies, one of which was on the life of T. W. Parkes for the sum of £800. This policy was dated in 1851, and it appeared that at the time it was effected it had been agreed between the office and Flather that the payment of one-third of the annual premiums should be deferred until the death of Parkes, and that the amount, with compound interest, should be a charge on the sum assured by the policy. This stipulation was indorsed on the policy. The consequence was, that the charge on this policy now amounted to £151, while its value was only £146.

This suit was instituted for the specific performance of the agreement for compromise, and the Plaintiffs thereby insisted that the Defendant was bound to assign the policies free from incumbrances.

[388] Mr. Baggallay and Mr. Cracknall, for the Plaintiffs, argued that the Defendant was bound specifically to perform the contract, and to discharge every existing incumbrance on the policies beyond the annual premiums. That this was an ordinary matter of conveyance and not of title.

Mr. Selwyn and Mr. Langworthy, for Flather, insisted that he had intended merely to assign the policies as they existed, and subject to the terms on which they had been effected. That the rule of this Court was, that a party was not bound specifically

to perform a contract entered into by mistake, or to perform it with a compensation in a case like the present; *Edwards v. Marjoribanks* (3 De G. & J. 329).

Mr. Cracknall, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiffs are entitled to a decree. It is true that a mistake of fact will justify a person in saying that he ought not to be compelled to specifically perform a contract, as where he has mistaken the subject of the thing sold. But here there was no mistake of fact, it was one of law if one at all. If a man sells a real estate, he undertakes to convey it to the purchaser free from all incumbrances, and he must discharge them all. So if he sells a leasehold estate, it must be assigned free from all incumbrances except, of course, those which are necessarily incidental to a leasehold, such as the ground rent and the like. I do not know any distinction between the case of the sale of a policy of assurance and the sale of an estate.

[389] The case cited does not appear to me to bear upon the present case. There a person had bought an advowson; he afterwards found that it was incumbered with a charge for money borrowed of the Commissioners of Queen Anne's Bounty for rebuilding the parsonage. Upon this, the purchaser did not ask to be discharged from the contract altogether, which I apprehend he might have done, but he asked to have it specifically performed, with an abatement. The answer to that was, "If you do not like to take it you need not, but you cannot have it specifically performed with an abatement, and we cannot pay off the charge, because it is to be paid off by the incumbent for the time being by annual repayments." That is quite distinct from this case, where there is a charge upon the policy known by the vendor, and which he has the power of discharging.

I am of opinion that the Plaintiffs are entitled to a decree for specific performance, and to have the policies assigned to them free from incumbrances. It is quite clear that if that were not so, the parties would not be bound by the agreement, and would be remitted to their rights in the former suit.

[390] *TURNER v. MIRFIELD.* Feb. 20, March 2, 1865.

The Defendant allowed a noxious and offensive refuse water to flow from his manufactory into an old pit on his own land, but which percolated underground into the Plaintiffs' colliery. The Defendant was restrained by perpetual injunction.

On a bill to restrain a nuisance, a delay of six months in filing the bill, though important on an interlocutory application, held no bar to relief by injunction at the hearing of the cause.

The object of this suit was to restrain a nuisance affecting the Plaintiffs' property.

The Defendant was the owner of a worsted mill near the Plaintiffs' property. The nuisance complained of was of the following nature:—In the process of cleaning worsted before manufacturing it, it is washed with soap and caustic alkali, and the liquid used in such washing is afterwards curdled by mixing oil of vitriol with it. By these means, the greasy portion is caused to rise to the surface and is taken off, and the remainder of the liquid is refuse, and contains offensive substances, which emit a very strong and unwholesome stench, injurious to animals and men.

The Defendant, in February 1864, commenced draining this liquid into an old coal pit on his lands, about forty yards from the Plaintiffs' land, and it found its way underground into the Plaintiffs' colliery, and caused sickness to the men and boys there, and seriously injured their health. It was first observed about the 15th of February, and a correspondence took place between the parties, which commenced on the 2d of May, and ultimately this suit was instituted on the 25th of June 1864, praying an injunction to restrain the Defendant "from transmitting or allowing to flow from his mill into the Plaintiffs' land, or the mines in or under such land, the refuse fluid from his mill or any part of it, or any other water or fluid containing any filthy, noxious or offensive substance or materials."

[391] The existence of the nuisance was, in the opinion of the Court, established.

Mr. Hobhouse and Mr. Wickens, for the Plaintiffs.

Mr. Baggallay and Mr. Rigby, for the Defendant.

Mr. Hobhouse, in reply.

Eaden v. Forth (1 Hem. & M. 573) and *Swaine v. The Great Northern Railway Company* (33 L. J. (Ch.) 399) were cited.

March 2. THE MASTER OF THE ROLLS [Sir John Romilly]. In defence, it is said, on behalf of the Defendant, that the utmost that the Court can now do is, to direct an issue, and that the Court must either direct an issue to try whether there is a nuisance, or it must hear additional evidence, and determine the question of fact. I dissent from that argument, for I am of opinion that it is not necessary to adopt that course, except when there is some doubt on the mind of the Court as to the fact; but here I am satisfied that there is a nuisance, and that the Plaintiffs are entitled to have it stopped.

It is alleged that the Plaintiffs are not entitled to any injunction, because the bill was not filed until six months after the nuisance was perceived. This delay would be very material, in the case of an interlocutory application for an injunction, but it cannot have any bearing at the hearing of the cause. The Plaintiffs are not applying for an interlocutory injunction, and they are entitled, at the hearing, to have their property protected for the future.

[392] It is also objected that there is some evidence to shew that the suit is got up by Colonel Tempest (a neighbouring proprietor who had been affected by the nuisance), who, it is said, has indemnified one of the Plaintiffs, and there is some proof of actual co-operation of Colonel Tempest. I am of opinion that, although that were established, it cannot bar the Plaintiff from his right to have the nuisance discontinued.

The Plaintiffs are entitled to a perpetual injunction in the terms of the prayer of their bill.

[392] *Re BAILEY.* April 29, 1865.

A solicitor of a mortgagor ordered, upon petition, to deliver to a mortgagee a copy of his bill of costs, in pursuance to his undertaking.

In 1862 the Petitioner, Mr. Gandee, advanced some money to Mr. Williams on the security of his freehold property. The deeds and documents were in the hands of Mr. Williams' solicitor (Mr. Bailey), who claimed a lien on them for advances and costs.

Mr. Gandee, by his solicitors, applied to Mr. Bailey for the delivery of these deeds and documents, who informed them that the probable amount due to him for his costs and moneys lent would be from £110 to £120, and Mr. Bailey offered, on payment of £115, on account of his said claim against Mr. Williams, and an undertaking to pay any further balance, at once to deliver up such deeds and documents.

Mr. Gandee's solicitors acceded to this offer, and on the 23d of December 1862 they paid Mr. Bailey £115 on account of his claim, and they gave him an undertaking to pay any balance that might be due to him. [393] Mr. Bailey thereupon delivered over the deeds and documents.

On the following day (24th December 1862), Mr. Bailey delivered to Mr. Gandee's solicitor his bill of costs, amounting to £95, and an account of his advances, which together exceeded the £115 by £5, 13s. 2d.

Mr. Gandee handed over this bill of costs to Mr. Williams for his approval, but Mr. Williams having absconded, Mr. Gandee was unable to obtain possession of the bill, which, as he alleged, formed one of his vouchers.

In November 1864 Mr. Bailey applied to Mr. Gandee's solicitors for payment of the remaining £5 13s. 2d., in pursuance of their undertaking. The solicitors referred to the circumstances under which the bill could not be obtained, and asked for a copy of it. To this Mr. Bailey, on the 9th of November 1864, replied as follows:—

"I shall be quite willing to supply you with a copy of my bill of costs as soon as I shall have received your cheque for the balance due to me, £5, 13s. 2d. The bill was duly delivered, not a word has ever been said since as to any charge in it, and I

am quite ready, if Mr. Gandee has parted with it and a copy is of any use to him, to supply such copy. I am entitled first to, and must request a settlement of, the balance so long due."

Mr. Gandee's solicitors, on the 15th of November, paid the £5, 13s. 2d., but Mr. Bailey afterwards refused to deliver any copy of his bill, without the sanction of Mr. Williams, his client.

The present petition was presented by Mr. Gandee, [394] praying that Mr. Bailey might be ordered to deliver to him a true copy of the bill of costs, the Petitioner undertaking to pay the costs.

Mr. Selwyn and Mr. Beavan, in support of the petition, cited *In re Foljambe* (9 Beav. 402).

Mr. Locock Webb, *contra*, argued that the Court had no jurisdiction to make the order asked on petition, and that no such order could properly be made in the absence of Mr. Williams, the client.

THE MASTER OF THE ROLLS [Sir John Romilly]. Mr. Bailey is under a mistake as to this matter. He has entered into an express undertaking, by his letter of the 9th of November, to supply a copy of his bill of costs upon the balance being paid. It was paid, but he now refuses to do so without the consent of Mr. Williams, although he delivered the original bill to Mr. Gandee.

This is a simple application to have a copy of the bill in pursuance of the undertaking. I am of opinion Mr. Bailey is bound to perform that undertaking, delivering a copy of his bill on payment of the costs of the copy, and Mr. Bailey must pay the costs of this application.

[395] IBBOTT v. BELL. Jan. 23, Feb. 8, 1865.

A will was partially revoked by erasures and was afterwards republished. Held, that the revocation was final and not deliberative.

If a will be revoked by cancellation, for the purpose of giving effect to different dispositions, such revocation is ineffectual if the substituted dispositions be not effective.

The rule of English law, following that of the civil law, is this: "*Tunc prius testamentum rumpitur cum posterius perfectum est.*"

The testatrix, by her will, made in 1819, but not properly attested, purported to give real estate to seven persons as tenants in common. In August following, she executed a codicil, properly attested, which, by referring to the prior instrument, made it effective as regarded real estate. In November following she cancelled the names of two of the seven devisees and re-executed the will, but it was not properly attested. In February 1821 she republished her will by an instrument properly attested and died in 1823. Held, that the erasure of the names of the two devisees was final and not deliberative, and that they took no interest in the real estate.

The question in this case arose upon the testamentary instruments of Hester Mary Whitehead in regard to the right to her real estate.

One of them (called No. 3) appeared to have been originally executed by the testatrix on the 10th of May 1819, and to have been erased and altered on the 16th of November 1819. This instrument by itself was insufficient to pass real estate, not being attested by three witnesses. It was indorsed as her will and was, with the erasures, in the following form:—

"No. 3.

Nover 16

"Alpha Cottages Regent Park ~~May 10~~ 1819 As to the state of my mind, owing to the irretrievable Loss of my ever beloved Husband, and, Since his Death, the cruel treatment of my Brother, for no cause whatever, his conduct has added very much to my distracted mind, therefore I leave what property I may die possess of, after my Just debts are paid; I desire I may be buried by the side of my ever beloved Husband by Mr. Fisher 61 Green Street. I desire my property may be divided

Ibbott

James Dickinson, George, Mary Dickenson Joseph & Sarah [396] ~~William & Henry Ladd Ibbott the children of my two Sisters to be equally divided between them Share and share a like every thing to be sold and turned into money except the things here after mention^d. Know one of the above to receive their part till they have reached the age of 21—James Dickenson to continue his schooling till the age of 14—and the money to be paid Jointly by those that are to share my property.~~ [Then followed several dispositions of personal chattels and many erasures, and the paper concluded thus:]

“Witness my hand this day

“May, 10, 1819

“Hester Mary Whitehead

“Witness James Fisher

“Hester Mary Whitehead

“November 16, 1819.”

Between the above two dates (the 10th of May 1819, and the 16th of November 1819) the testatrix had made a codicil, dated the 27th of August 1819, by which she devised a freehold property at Tunbridge and bequeathed money in the bank, and she revoked “all former wills excepting two memorandums dated 10th May 1819, which are to remain in force with this my last will.” This codicil was attested by three witnesses, and by its reference to No. 3 gave effect to it in regard to real estate.

On the same day on which the testatrix had obliterated and re-executed No. 3 (16th November 1819), she made two codicils, which did not affect the question in the cause. They were not attested so as to pass real estate.

[397] The testatrix subsequently made two codicils dated the 19th of February 1821, and the 28th of September 1822, attested so as to pass real estate, but they did not dispose of the real estate. These the Court considered must be taken to represent the existing testamentary instruments which related to and disposed of her real estate.

She died in February 1823.

In the case of *Dickinson v. Stidolph* (11 C. B. Rep. (N. S.) 341), the Court of Common Pleas had held, upon these testamentary papers (but in the absence of the present Plaintiff), that the testamentary paper of the 10th of May 1819 was incorporated with the will of the 27th of August 1819, and made the two instruments one will, and that the first became effective to pass real and personal estate.

The Plaintiff was the legal personal representative of William Ibbott, whose name was erased in the testamentary paper No. 3. By this bill, filed in May 1864, she claimed, under the will of the 16th of November 1819, a share of the produce of the real estate of the testatrix.

The Defendants demurred to the bill, and the demurrer now came on for argument.

Mr. Baggallay and Mr. Hardy, for the Defendant, in support of the demurrer. Jarman on Wills (vol. 1, pp. 113, 114 (2d edit.)).

Mr. Shee, in the same interest. *Winsor v. Pratt* (2 Brod. & Bing. 650), *Ex parte The Earl of Ilchester* (7 Ves. 373).

[398] Mr. Selwyn, Mr. Heming and Mr. Clare, for the Plaintiff, in support of the bill.

Mr. Baggallay, in reply. Jarman on Wills (vol. 1, p. 117).

Feb. 8. THE MASTER OF THE ROLLS [Sir John Romilly]. The question raised on this demurrer arises on one of the testamentary papers of Hester Mary Whitehead, which are nine in number, and the question I have to determine is, whether William and Henry Ibbott, the children of the testatrix's two sisters, took any interest in her property under her devise contained in the testamentary paper No. 3, their names having been erased from it by the testatrix. The Plaintiffs claim through them, and the case is very properly brought before the Court on demurrer.

The question to be determined is this:—Whether this erasure was made by the testatrix in contemplation of a new disposition of the property being made, and, therefore, not final as a revocation, or whether it was really final and not deliberative.

The history of the case is singular. Hester Mary Whitehead, through the will of John Whitehead, who was the heir of George, became possessed of all the property of George Whitehead. A suit of *Whitehead v. Lynes* was instituted to administer their estates, and it proceeded for a considerable time on the assumption that Hester Mary Whitehead had died intestate, although the existence of the papers seems to have been [399] known. But sometime in the latter part of the year 1854 a claim was raised by four persons, as devisees of certain interests in the descended estates of George Whitehead under these testamentary instruments of Hester Mary Whitehead, and which testamentary instruments were admitted to probate by the proper tribunal, and are therefore binding on the personal estate.

Thereupon the suit of *Dickinson v. Stidolph* was instituted in this Court for the purpose of having that question determined, and the Court, on the hearing of that cause in June 1857, directed the claimants to bring such action of ejectment for such parts of the real estate claimed by them as they might be advised. This was accordingly done, a verdict was found for the Plaintiff, with liberty to the Defendants to move to set aside that verdict and enter a verdict for the Defendant. Ultimately the parties agreed, on both sides, on a case being stated for the opinion of the Court, which is set out at length in the report of *Dickenson v. Stidolph* (11 C. B. Rep. (N. S.) 341), which ended in a very learned judgment being delivered by Mr. Justice Williams, in November 1861, in favour of the Plaintiffs in that action.

It has been contended, in this case, on the part of the Plaintiffs, that the judgment of the Common Pleas has disposed of the question now before me, and that this Court is or must feel itself bound to follow the unanimous decision of the Court of Common Pleas on this subject. In reality, however, the judgment of the Common Pleas does not decide this question, except incidentally, in the manner I shall have presently to [400] notice, but the observations made in the judgment have a strong bearing on the point before me.

The testamentary paper No. 3, which is indorsed as the will of Hester Mary Whitehead and which the Court of Common Pleas has decided to be a valid instrument disposing of the real estate of the testatrix, is, so far as material, in these words. [His Honor stated this document, see *ante*, p. 395, and the parts struck through.] The question is, as to the effect of this erasure, whether it operates as a revocation of the devise to William and Henry Ladd Ibbott.

There is no question about the principle which pervades all the cases from *Onions v. Tyrer* (1 P. W. 343) down, and which are shortly expressed in the words of the civil law, "*tunc prius testamentum rumpitur cum posterius perfectum est.*" But the question before me is, whether there is any evidence to shew that the testatrix intended to make any fresh disposition of her property when she made this erasure. One argument, which is strongly urged on me, is that the revocation here is final, because, by a contemporaneous instrument, viz., one executed on the same 16th November 1819, the testatrix has proceeded to dispose of her property, and that this revocation, therefore, must be considered as if made for the purpose of making this new disposition by her will. And it also pointed out that she has, by two instruments, dated the 19th February 1821 and 28th September 1822, made two codicils to her will, both subsequent to the date of the erasure in the testamentary paper No. 3, which was made on the 16th of November 1819.

In considering the arguments with respect to the two instruments which bear date the 16th of November [401] 1819, and made contemporaneously with the erasures, I think that they can have but little bearing on this question, for they are not attested so as to pass real estate, as the testatrix might still have intended to dispose of her real estate. But the two codicils, dated 19th February 1821, which are in effect, though not in terms, identical, are attested so as to pass real estate, and though the will particularly mentioned in these documents as being in the hands of Mr. Fisher of Green Street has not been found, and must, therefore, be considered as having no existence, still these codicils must be taken to republish the existing testamentary instruments, which relate to and dispose of her real estate. Now, at this time, the testamentary instrument No. 3 had this erasure in it, and was endorsed as the will, and it is, therefore, in effect republished with the erasure.

I am somewhat at a loss to understand what sign or evidence there is that the

erasure in the testamentary paper No. 3 was made solely with a view to the making of a fresh disposition of that property, unless such intention is to be gathered from the contents of the document itself. The words, however, of Mr. Justice Williams are very strong; he says this (11 C. B. Rep. (N. S.) 341:—

“Assuming, however, that the two instruments, as they existed at the time of the making of the will of August 27th, 1819, might be regarded as forming one duly executed will, and might be so construed, it was further contended, on the part of the Defendant, that the paper of the 10th of May was revoked by the obliterations and alterations which were subsequently made on the face of it by the testatrix. It is unnecessary for us to consider what effect these acts, coupled with the testamentary documents dated the 16th of [402] November 1819 (and numbered 4 and 5 in the list of fac-simile copies) ought to have on the bequests of personal estate contained in the paper of May 10th, 1819 (No. 3). It is enough to say that, with respect to the devise of the realty, which, for the purposes of this part of the argument, it must be deemed to contain, the obliterations and alterations did not operate as a revocation. Even if they are to be regarded as final and absolute, and not as deliberative or dependent alterations, they would only operate to produce an intestacy *pro tanto* (which would not affect the result of this action) as to the shares of those devisees whose names are struck out, and not as a revocation of the whole instrument. But we incline to think, applying the doctrine of dependent relative revocations, that they are totally ineffectual as to the bequest of the real estate. The case of *Winsor v. Pratt* (2 B. & B. 650), which was cited by Mr. Couch on the argument, is an example of that doctrine; and it is supported by a long line of authorities, on the principle stated by Lord Alvanley in *Ex parte Ilchester* (7 Ves. 373), that “where it is evident that the testator, though using the means of revocation, could not intend it for any purpose than to give effect to another disposition, though if it had been a mere revocation it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation.”

It is true that the determination of this question, as he observes, was not necessary for the decision of the case before the Court, because, whichever way it was decided, the Plaintiffs in that action were entitled to a verdict, as soon as it was established that the testamen-[403]-tary paper No. 3 was a goodwill of real estate, either with or without the part erased forming a portion of it. But still the Court stated that the Plaintiffs in that action were entitled to four-sevenths, which could only proceed on the foundation either that the devise to William and Henry had not been revoked, or that the testatrix died intestate as to those shares. The view taken by the Court is shewn in the judgment; it did, though not with great confidence, express its opinion that the erasures were merely deliberative and of no avail, still this particular point before me between the claimants of the seven shares *per se* did not properly arise in the action, and was not argued as between the four Plaintiffs in that action and the two claimants William and Henry or any person claiming through them.

I have very carefully considered all the cases which are referred to on this subject, but I am unable to find any one where the obliteration of a devisee's name *simpliciter*, without any further evidence of an intention to make a new will, has been held to be inoperative.

The only evidence which is suggested to me in the present case is the internal evidence to be derived from the state and appearances of the document itself and the rest of the testamentary instruments. It is said, first, that the direction that the devisees are to take as tenants in common is struck through, but in the beginning of the devise she uses the word “devided,” which must mean “divided between,” but if it did not, there is no rule, that I am aware of, to prevent a testatrix, by erasure, from converting a tenancy in common into a joint-tenancy. It is clear that she could under the new law, if the erasure were properly attested, and, except as regards the attestation, the old and the new law are the same on this subject.

[404] It is also said that the direction that the property should be converted is struck through, but this, again, would only shew that the testatrix had changed her

mind on the subject of conversion, as she certainly had, in February 1821, during the life of Dr. Rees, as regarded the property included in the codicils of that date. The subsequent erasures, which are of bequests, are supplied by the disposition of her personal property by the testamentary interests of even date, and though the testamentary instrument No. 3, by means of the erasure is, to a considerable extent, rendered incoherent and uncertain, yet it was so to some extent as it originally stood, before any erasure took place, and this alone could not affect the law.

The testatrix was an illiterate woman who made her own will, and, as might be expected, much difficulty arises in construing it, in any form that it is placed.

One principal argument in favour of the erasure being deliberative is drawn from the whole tenor of her testamentary instruments, which shew a great dislike of her brother, who was her heir at law, and whom she wished to deprive of all interest in her property; and it is contended that if this erasure be held to be a revocation, then that the two-sevenths given to William and Henry will be undisposed of and go to her heir at law, which was plainly contrary to her intention. I do not mean to express any opinion as to the effect of this devise, on the footing of the erasure being final and complete; but I cannot think that the testatrix believed that by striking out their two names, their shares would go to her heir at law. It seems more probable that, having directed the property to be divided amongst seven, she thought that when she had struck out two names the [405] whole would be divided amongst the five remaining devisees.

I am, therefore, unable to see in these expressions in her will, any intention to make a different disposition of her property than that which appeared upon it after the erasures had been made. It existed in that shape when she made the codicils of the 19th of February 1821; the effect of the codicils must be to republish this will, which is left amongst her papers with an indorsement thereon that it is her will, and which, as it has been decided at law, is effectual to dispose of the real estate belonging to her. I then ask in what state did the codicil of the 19th of February 1821 republish the will? and I think it must be held to have republished it in the state in which it then was, that is, with the erasures existing in it, which erasures do not render it unintelligible, but merely exclude two devisees and certain legatees from taking any benefit under it. Then it does appear to me that the rule of the civil law expressly applies, "*tunc testamentum prius rumpitur cum posterius perfectum est.*" Here the "*testamentum posterius perfectum est,*" and thereupon, if not before, the devisees to William and Henry Ibbott *rumpuntur*.

I must however say that I express this opinion with great diffidence, as it seems to differ from that of the Court of Common Pleas; but I have taken what pains I could with the case, and it is my duty to decide it in the manner I believe to be in accordance with law and to the rights of the parties, and I have the satisfaction of considering that my opinion will be reviewed by a higher tribunal, which will dispose of the whole matter.

This is clearly not a case for costs, if I could, I should make the testatrix's estate pay them. I must allow the demurrer without costs.

[406] REILLY v. REILLY. April 22, 1865.

A fund set apart in 1857 to answer liabilities of an intestate's estate in respect of leasehold covenants was distributed in 1865 amongst the next of kin, it appearing that all the leases had either been sold or surrendered, and the statute 22 & 23 Vict. c. 35, s. 27, having passed in the meantime.

The testator died in 1854 possessed of certain leaseholds.

By the decree on further consideration, made in 1857, a sum had been carried over to an account intituled "The Indemnity Fund," as an indemnity against the covenants in the leases, and it had been invested in £907 consols.

All the leaseholds had since been either sold and assigned to purchasers, or surrendered to the lessors. A petition was now presented for the distribution of the

indemnity fund amongst the next of kin. The statute 22 & 23 Vict. c. 35, passed in August 1859, which, by the 27th section, relieved executors and administrators, to a certain extent, from future liability under the covenants in leases.

Mr. Bagge and Mr. Ramsay, in support of the petition. The fund set apart for the security of the ground landlord may now be safely distributed; *Bunting v. Marriott* (7 Jur. 565); for by the Law of Property Amendment Act (22 & 23 Vict. c. 35, s. 27) there is now a complete indemnity to the administrator, and the Act is retrospective; *Dodson v. Sammel* (1 Drew. & Sm. 575); and see *In re Green* (2 De G. F. & J. 121).

Mr. A. Smith, for the Respondents:

[407] THE MASTER OF THE ROLLS [Sir John Romilly]. The purchasers of the leasehold are liable for the future performance of the covenants contained in their leases, and as to past breaches there is no claim on the part of the lessor. I think I may safely distribute the fund.

NOTE.—*Dean v. Allen*, 20 Beav. 1; *Waller v. Barrett*, 24 Beav. 413; *Bennett v. Lytton*, 2 John. & Hem. 155; *Williams v. Headland*, 4 Giff. 495; *Brewer v. Pocock*, 23 Beav. 310; *Smith v. Smith*, 1 Drew. & Sm. 384; *Addams v. Ferick*, 26 Beav. 384; *Hughes v. Young*, 3 N. R. 690.

[407] HUGHES v. COOK. May 26, 1865.

A bill by a person entitled to a mortgaged estate, under the mortgagor's will, against the mortgagee and the mortgagor's representative, to have the mortgagor's estate applied in payment of the mortgage, cannot be sustained.

A bill by a person claiming under a mortgagor against the mortgagee is irregular, unless it offers to redeem.

The Plaintiff was entitled to an estate, subject to a mortgage created by his ancestor. He instituted a suit against the mortgagee and the representatives of his ancestor, praying to have the mortgage paid out of his assets or by a sale of the estate, and also for the delivery up of independent securities given by the Plaintiff to the Defendant. Held, that the suit was multifarious, and a demurrer to it was allowed.

This case came before the Court on demurrer.

The bill, in substance, stated that in 1821 John Young, the Plaintiff's grandfather, mortgaged some property for £500. He died in 1844, having devised the estate to trustees for the Plaintiff's mother for life, and then in trust to sell and pay off the mortgage, and hold the residue in trust for the Plaintiff.

The Plaintiff's mother died in 1863. The estate had not been sold, and the mortgage on it, which still remained unpaid, had become vested in the Defendant Cook. The Plaintiff, who was an infant, alleged that he "believed" the rents had, since his mother's death, been received by Cook, "but whether as mortgagee or as bailiff for the Plaintiff he was unable to ascertain."

[408] The bill stated another and distinct transaction. It stated that Cook had made payments to the Plaintiff, and proceeded in the following terms:—"The Defendant Cook, about December 1863, induced the Plaintiff to seal and deliver a deed, which the Plaintiff believes was dated the 16th November 1865, and which the Plaintiff believes to be a mortgage of the Plaintiff's property, to which he is entitled under the will of the said John Young, and, at the same time, the Defendant Cook induced the Plaintiff to sign a bill of exchange for £350, dated the 16th day of November 1865."

The bill was filed by Hughes, by his next friend, against Cook and the trustee and executor of the grandfather's will, praying as follows:—

1. "That the Defendant Robert Cook may be decreed to deliver up to be cancelled the said deed and bill of exchange dated respectively the 16th day of November 1865.

2. "That if the Defendant Robert Cook shall admit that he has entered into

possession of the rents and profits of the mortgaged hereditaments as the mortgagee thereof, that the usual account may be taken against him as a mortgagee in possession, with half-yearly rests, and that an account may be taken of what is due to him for principal and interest, if any, and that the same, if not paid as hereinafter mentioned, may be raised by a sale of the mortgaged premises.

3. "That if the Defendant Robert Cook should not admit that he has entered into such possession as mortgagee, that a receiver may be appointed" of the rents, to keep down the interest on the mortgage of 1821, and to pay the surplus for the benefit of the Plaintiff.

5. "That it may be declared that the residuary real [409] and personal estate of the testator John Young was liable to exonerate the mortgaged premises from the mortgage debt, and that, if necessary, that the accounts of such residuary real and personal estate may be taken and the same properly administered under the direction of this honorable Court."

The Defendant Cook demurred for want of equity, first, to the relief prayed by the first paragraph of the prayer separately, and then to the second and third paragraphs. He then demurred to the whole bill for multifariousness.

Mr. Jessel and Mr. Horsey, in support of the demurrer. This is a bill by a mortgagor against a mortgagee, which does not offer to redeem him or to pay what is due. The prayer for a sale does not amount to an offer to redeem. In *Harding v. Tingey* (12 W. R. 684), it was held that a prayer by a mortgagor that, on payment of what may be found due, the mortgagee may be directed to convey, does not amount to an offer to redeem. As to the delivery of the documents executed in 1865, the bill contains no allegation of fraud on which to found that part of the relief. Lastly, the suit is altogether multifarious; it mixes up matters totally distinct, in some of which the mortgagee has no concern. Besides this, "it is not competent, when A. is sole Plaintiff and B. is sole Defendant, for A. to unite in his bill against B. all sorts of matters wherein they may be mutually concerned;" *Attorney-General v. The Goldsmiths' Company* (5 Sim. 675). They also referred to *Saxton v. Davis* (18 Ves. 80).

Mr. Batten, for the Plaintiff. An infant cannot and is not bound to redeem his ancestor's mortgage; but [410] here he asks for a sale of the estate and payment to the Defendant out of the produce; this is sufficient. Vice-Chancellor Knight Bruce considered an offer to redeem unnecessary; *Inman v. Wearing* (3 De Gex & Sm. 733). The documents of 1865 were obtained from the Plaintiff while an infant, and they ought to be delivered up. The Defendant Cook is interested in all the matters of relief, and they are so mixed up as to make it impossible to have them determined in separate suits.

THE MASTER OF THE ROLLS [Sir John Romilly]. I must allow this demurrer, for it contains three suits in equity.

The first is, for taking an account of the estate of the Plaintiff's grandfather, for the purpose of having it applied in discharge of the mortgage. To such a suit the mortgagee is not a proper or necessary party. He is not bound to wait for payment of what is due to him until the accounts of his mortgagor's estate have been taken.

The second is, to take an account of the amount due on the mortgage, without any offer to redeem or even to pay the amount found due out of the produce of the sale, except "if not paid as hereinafter mentioned," that is, if not paid out of the testator's residuary estate. The consequence would be that the mortgagee would have to wait until all the accounts of the mortgagor's estate had been taken, before he would obtain a sale of the mortgaged property. There is no offer to redeem, and this is, on the authorities, a sufficient objection to this part of the relief.

[411] The third is a distinct transaction, which may be very improper, but has no reference to the rest of the suit. The Defendant is alleged to have obtained from the Plaintiff a deed and bill of exchange, which were post-dated by two years, but why or under what circumstances does not clearly appear, and he prays that these may be delivered up and cancelled.

I must allow this demurrer in the usual way, and cannot give leave to amend.

[411] INGLE v. PARTRIDGE (No. 2). Feb. 15, 17, 18, 1865.

Trustees lent trust money on mortgage, upon a valuation made on behalf of the mortgagor. The security proved greatly deficient. Held, that the trustees were personally liable for the loss.

This case, reported *ante* (32 Beav. 661), now came on for hearing, when the trustees were made liable for the several sums set forth in the former report.

Another point arose, under the following circumstances:—

In 1857 the old trustees, who had power to invest the trust moneys in real securities, lent £8000 to Mr. Ernest on a mortgage of some freehold property at Llanon, in the county of Carmarthen, which was principally in his own occupation. The trustees proceeded solely on a valuation which had been made the year previously by a Mr. Petherick, who had been employed on behalf of the mortgagor to value the estate. He had valued it at £12,684. Besides this, it appeared, from the abstract of title, that the property had last let for no more than £242, 11s. per annum.

The property turned out a very inadequate security for the £8000, and the interest was greatly in arrear.

[412] Mr. Selwyn and Mr. Beavan, for the Plaintiffs, the *cestuis que trust*, argued that the old trustees had been guilty of great negligence in not having had the property surveyed and valued by some independent person on their behalf, and that they ought not to have trusted to a valuation made by the mortgagor's agent. That the abstract itself shewed the inadequacy of the security, and that the trustees were therefore liable for the loss sustained by the deficient security.

Mr. Hobhouse and Mr. W. Pearson, in the same interest.

Mr. Southgate and Mr. Kay, for the old trustees, argued that they were not liable for an accidental loss, arising from the depreciation of the security. That they were justified in relying on a valuation *bond fide* made; *Jones v. Lewis* (3 De G. & Sm. 471), but reversed, see *Lewin on Trusts* (p. 242).

Mr. Baggallay, Mr. Cracknell, Mr. Karlake and Mr. Surridge, for the other Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. The question which I have to deal with is, whether the trustees exercised due caution and vigilance in advancing £8000 upon the security of the property mentioned in the schedule to Mr. Petherick's valuation. In the first place, it is a matter of constant observation that nothing is more uncertain than a valuation, and the Court has constantly had occasion to observe upon the great discrepancy between valuations made by those persons who want to enhance and by those persons who want to depreciate the value of property. They are so great that it is very difficult for the Court to [413] come to a satisfactory conclusion on the subject, and it sometimes leads to most singular results. In one case, to which I have often referred, a Plaintiff was compelled to compromise a suit in consequence of his valuer mistaking the side for which he was employed. Valuations are mere matters of opinion, on which a person cannot be indicted for perjury. A man *bond fide* forms his opinion, but he looks at the case in a totally different way when he knows on whose behalf he is acting. Here the trustees acted on the valuation made on behalf of the mortgagor.

In addition to this, they had in their possession, at the time, an abstract of title which shewed that when the property was last let it was let for £242, 11s., while the interest on the £8000 lent at £4 per cent. was considerably more than this rental. It shewed a great deficiency, the rule being, that trustees ought not to advance on mortgage more than two-thirds of the actual value of freehold property.⁽¹⁾ It turns out that the property will not let for more or even so much at the present time.

I will look at the evidence, but if the facts are as I have stated them, then, in my opinion, the old trustees must be made liable for the deficiency which arises from this property not realizing the £8000. I shall order them to pay the £8000 and interest

(1) See *Stickney v. Sewell*, 1 Myl. & Cr. 8; *Norris v. Wright*, 14 Beav. 307; *Macleod v. Annesley*, 16 Beav. 600.

into Court, on or before the last day of next Hilary term, giving them time to take proper steps to realize the security.

Feb. 18. THE MASTER OF THE ROLLS [Sir John Romilly]. I have read over the evidence, and I am of opinion [414] that Mr. Blencowe and Mr. Frederick R. Partridge, the old trustees, are liable for the deficiency in the value. A trustee cannot, with propriety, lend trust money upon mortgage upon a valuation made by or on behalf of the mortgagor. If he does, and the valuer has *bona fide* valued the property at double its value, the trustee must take the consequences; he ought to have employed a valuer on his own behalf to see to it.

That alone would be sufficient to dispose of the matter. But the case of the Plaintiffs is made stronger by the fact that, if the trustees had looked into the abstract, they would have found, by one of the deeds, that the amount at which the property was let the last time it was let, was insufficient to pay the interest on the money advanced. The decree against the old trustees will, therefore, stand as I stated.

[414] WILSON v. THE WEST HARTLEPOOL, &C., RAILWAY COMPANY (No. 2).
March 2, 1865.

Application by vendors, in a suit for specific performance, to suspend the execution of the conveyance pending an appeal to the House of Lords, refused, the purchaser consenting that notice of the appeal should be indorsed on the conveyance.

The Master of the Rolls had, in this case, made a decree for specific performance against the Defendants, the company, who were to convey the land in question to the Plaintiff. (Reported *ante*, p. 187.) The decree had been affirmed by the Lords Justices on the 19th of January 1865. The Defendants appealed to the House of Lords.

Mr. Hobhouse and Mr. Hawkins, for the Defendants, applied to suspend the execution of the conveyance pending the appeal to the House of Lords. They argued that the Defendants might be prejudiced by [415] conveying to the Plaintiff, as he would then be enabled to deal with the legal estate.

Mr. Selwyn and Mr. Fry, for the Plaintiff. The pendency of an appeal cannot be allowed to affect the rights of the Plaintiff established by the decree; *Gwynn v. Lethbridge* (14 Ves. 585); *Waldo v. Caley* (16 Ves. 206); *The Mayor of Gloucester v. Wood* (3 Hare, 150). They offered to endorse on the conveyance notice of the existing appeal.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Defendants may register a *lis pendens*, which will be a sufficient protection. The Plaintiff consenting that notice of the appeal shall be endorsed on the conveyance, I must refuse the motion.

The Defendants must pay the costs, for if they had succeeded they would equally have been bound to pay them.

Reg. Lib. 1865, B. fol. 493.

[416] COLBY v. GADSDEN. March 6, 7, 10, 1865.

[S. C. on appeal, 17 L. T. 97; 15 W. R. 1185.]

A delay from May to December in filing a bill for specific performance held not sufficient to deprive a vendor of his right to have the contract enforced.

A purchaser was let into the receipt of the rents before completion and without payment of his purchase-money. Great delay having occurred, and no payment having been made to the vendor, he gave notice to the tenants and prevented any further receipt of the rents by the purchaser. Held, that this did not deprive the vendor of his right to have the contract specifically performed. *Knatchbull v. Grueber* (3 Mer. 124) distinguished.

Property was sold which was represented as standing on a fine vein of anthracite coal: Held, that the doctrine of "*caveat emptor*" applied, and that it was the business of the purchaser to inquire as to the extent to which the coal had already been worked.

This was a suit, instituted by a vendor against the purchaser, for the specific performance of a contract for the purchase of a real estate. The defence was, first, that the Plaintiff was barred by his delay in instituting the suit; secondly, that the Plaintiff, having put the Defendant into possession, had, by afterwards resuming it, abandoned the contract; thirdly, that a schoolhouse had been built on a part of the property given by the Plaintiff for that purpose, and which fact ought to have been stated; and, fourthly, that a vein of coal, stated in the particulars of sale to exist on the property, had been considerably exhausted by working.

Mr. Southgate and Mr. Babington, for the Plaintiff, cited *Macbryde v. Weekes* (22 Beav. 533); *Watson v. Reid*, (1 Russ. & Myl. 236); *Southcomb v. The Bishop of Exeter* (6 Hare, 213); *Dyer v. Hargrave* (10 Ves. 505); *Rigway v. Sneyd* (1 Kay, 627); *Haywood v. Cope* (25 Beav. 140); Sugden's Vendors (p. 212 (14th edit.)).

Mr. Selwyn and Mr. Ward, for the Defendants, cited [417] *Knatchbull v. Grueber* (3 Mer. 124); *Higgins v. Samels* (2 John. & Hem. 460); *Mozey v. Bigwood* (10 Jur. 597).

Mr. Southgate, in reply.

March 10. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit, by a vendor against a purchaser, for the specific performance of a contract to buy an estate called Colby Lodge, near Tenby, in Pembrokeshire. The contract is admitted; the defence set up by the Defendant consists of four particulars. The first is that the time which has elapsed before the bill was filed constitutes a bar to the Plaintiff's recovering in this suit. Upon this subject the dates, which it is important to refer to, are as follows:—the contract for the sale of the estate for £3775 was entered into on the 13th of October 1860, and the purchase was to be completed on Christmas Day following. On that day possession was given, by putting the purchaser into the receipt of the rents and profits of the estate. No money was paid by the purchaser; he took several objections to the title, and there was a continued delay in the payment of the purchase-money, although he remained in the receipt of the rents. This went on for a very considerable time; the purchaser's solicitor prepared a draft conveyance, which was approved of on the part of the vendor, but still the contract was not completed. Ultimately, in March 1862 (which was a year and a half after the contract had been entered into), the Plaintiff's solicitors, with the authority of the Plaintiff, proposed that the agreement should be cancelled, that [418] the Defendant should pay £10, that there should be no account of the rents received by the Defendant, and that, thereupon, the whole matter should be settled. This arrangement was approved of by the Defendant's wife, who appears to have shewn very good sense in the course which she adopted on this occasion. But the Defendant did not know of this until May 1862, when it became necessary to obtain his signature, and he thereupon dissented, and insisted on the contract being carried into execution. Upon this taking place, the Plaintiff, finding that he neither got the purchase-money nor the rents of his property, gave notice to the tenants in July 1862 to pay their rents to him. The tenants, finding it difficult to know to whom they ought to pay the rents, paid them to no one, and, thereupon, this bill was filed in December 1862.

Now, it is obvious, from this statement of the dates, that this is not a case in which the Court can refuse specific performance of the contract on the ground of delay. In these cases, where one person says, "I will have nothing more to do with the contract, I put an end to it," if the other party to the contract, who insists on its being carried into execution, does not file his bill speedily (a time which is not very accurately fixed, though the cases have determined that it must not exceed a year), he shall not be allowed to insist that the contract shall be carried into execution. But here both parties were insisting on the contract; the Defendant, in May 1862, declared that it should be carried into execution, and he has, in fact, been all along insisting on the contract with an abatement of the purchase-money. This matter being in contest between them in May 1862, and the bill being filed in December 1862, the lapse of time cannot be treated as such a delay as will bar the Plaintiff from his right of calling upon this [419] Court to afford him relief, if, in other respects, he is entitled to it.

The second defence is this: It is said that the Plaintiff having, in the first instance, put the purchaser into possession, and having afterwards resumed posses-

sion, has, by thus resuming possession, abandoned the contract, and is not entitled to enforce it. The well-known authority of *Knatchbull v. Grueber* (3 Mer. 124) is referred to upon the subject; but, as I observed in the course of the argument, that case has no application to the present. In that case, actual possession was, by residence in the house, an essential part of the contract. The Defendant had contracted that he should, immediately on the execution of the contract, be put into possession of the house in question, and that he should remain in possession until the contract was completed, and that such possession should not be considered as an acceptance of title. In a short time it appeared that the Plaintiff could not make a title to the whole of the property, upon which the Plaintiff turned the Defendant out of possession of the house, and filed a bill for the specific performance of the contract, with an abatement of the purchase-money. Lord Eldon did not give any judgment on the question whether it was a case for abatement of the purchase-money or not; but he said that the object of the Defendant was to have actual possession of the house, and that this was expressed in the contract, and was totally independent of the question of title, or whether a good title could be made to the rest of the land. At the hearing Lord Eldon said, "You have turned the purchaser out of possession, which is the very thing he contracted for, and this is a matter totally distinct and apart from the question of title. You [420] have, therefore, abandoned the contract, and cannot now enforce it;" and he dismissed the bill on that ground. But that does not apply to a case where the purchaser is let into the receipt of the rents and profits of the estate, under a contract which is to be completed at a definite period, from which time the purchaser is to receive the rents and profits, and, on the other hand, to pay interest on the purchase-money. Here, the period fixed for this purpose is the 25th of December 1860, and the purchaser accordingly receives the rents from that time; but the Plaintiff, finding that he can get neither the purchase-money nor the interest, gives notice to the tenants to pay no more rent to the purchaser, and it becomes necessary for him to file this bill. This is no breach of contract on the part of the vendor; and the case decided by Lord Eldon has no application to the present case.

The third ground of defence, raised by the Defendant, is this:—That a schoolhouse has been built on a small piece of the land near the church, which had been given by the Plaintiff for that purpose a year or two before this contract was entered into, and that this ought to have been stated to the Defendant. The Defendant contends that in respect of this he is entitled either to put an end to the contract, or to have an abatement for it, out of the purchase-money. I am of opinion that he is not entitled to either. This small piece of land is close to the church, and on the roadside, and is forty-five feet by sixty-five feet, and therefore contains a little under 330 square yards. The house was built, and was known to everybody; it stood there at the time the Defendant entered into the contract, and the Defendant, when he went over the property, saw it and was aware of its existence. Then it appears also even on the very map on which he bought the property, although the map [421] was made some years before the schoolhouse was built, that this plot of land on which the schoolhouse was subsequently built was marked off as not included in the little plot No. 189, which is one of the pieces of land sold, and does not appear to have been included in the map. Why that was marked off before the schoolhouse was built, I am unable to say. There is no evidence given upon that subject, but it does appear that it was not within the contract itself. The Defendant was perfectly well aware of the circumstance, for it was a matter patent to everybody, and therefore he is neither entitled to reject the contract, nor to have any abatement in respect thereof.

The last question is the one most prominently put forward in the argument and in the evidence. It relates to the vein of anthracite coal. It is stated on the particulars and conditions of sale, "that this property stands on a vein of anthracite coal, the finest vein in South Wales," and where the crop of it lies is marked. Now I am satisfied, on the evidence, that the Defendant knew the coal had been worked; he admits that he saw the old pit. There is the evidence of Protheroe, who, if he is to be believed, declares positively that he told the Defendant about it before he entered into the contract. It is said that this evidence is contradictory

to that of Collins and Gunter, who speak of the meeting between Protheroe and the Defendant as having taken place in August 1861. It was said, in the reply, that it is clear that Protheroe speaks of two meetings, and that Collins and Gunter only speak of one, and upon reading the evidence I think that this is so, and that the two statements are perfectly compatible and accurate.

I am of opinion, also, that this is a case of *caveat emptor*. It was not alleged that the vein had not been [422] worked; the Defendant knew it had been worked to some extent, and it was his business to inquire into what extent it had been worked. That it had been worked out is admitted not to be the case, because there is coal now to be had on the property; besides which, I was strongly impressed with this:—that it formed no considerable ingredient in the estimate by the Plaintiff and by the Defendant as to the value of the property. This is shewn very strongly in a valuation made, on his behalf, in one of his attempts to resell the property. He gave £5775 for the property, and it appears that he values the surface, independently of the minerals and the timber, at £4000, and attempted to resell it for that amount. In fact, if the estimated value put upon it by him or on his behalf be correct, he has, without any abatement, got a most valuable purchase, for he has been offered 800 guineas for the coal, not to be paid down, but coupled with conditions as to the time and mode of payment, which detract from the value of it, but still it would make the coal worth £840. Mr. Collins has valued the timber at £1800, making together £2640. The present rental is £185, and the Defendant, in one of his letters, suggests that £150 might be obtained for the house to let. My opinion is that this coal formed no ingredient in the price which the Defendant offered for the property, and that it was not considered of much value on either side. Therefore, in my opinion, the case of the Defendant entirely fails, and there must be a decree for specific performance, with an inquiry as to title; but as the Defendant occasioned the suit by his refusal to complete the contract except with an abatement, I am of opinion that he must pay the costs up to and including the hearing.

[423] SIMPSON v. TERRY. *March 23, 1865.*

[See *Hutchings v. Humphrey*, 1885, 54 L. J. Ch. 651.]

A decree for specific performance was made against a purchaser. Not having paid the purchase-money, he was ordered, on motion, to pay it within a limited time, and in default, that the contract should be rescinded and all proceedings stayed. He was also ordered to pay the costs of the motion.

The Defendant, on the 7th of March 1863, had agreed to purchase some property, and the contract was to have been completed on the 24th of June. This not having been done, the vendor, in November 1863, instituted a suit for the specific performance of the contract; and a decree for specific performance was made on the 7th of July 1864.

The Defendant made default in payment of the purchase-money (£6587), and

Mr. G. Hastings, for the Plaintiff, now moved that in default of payment the contract might be rescinded. He cited *Foligno v. Martin* (16 Beav. 586); *Sweet v. Meredith* (4 Giff. 207).

Mr. Archibald Smith, for the Defendant, asked for six weeks to enable him to find the money.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot grant that time; but I will order the Defendant to pay the amount on or before the first day of Easter term (15th April), and in default, the contract must be rescinded, and all further proceedings stayed.

The Defendant must pay the costs of this application.

Reg. Lib. 1865, B. fol. 693.

[424] TIBBS v. ELLIOTT. April 26, 27, 1865.

A testator devised a real estate to his three daughters equally in remainder, and he provided that if "any of them should die and leave issue, then such issue should succeed to the mother's share in that his will." He afterwards gave the residue of his estate and effects to the same daughters and to his two sons in possession. Held, that the issue of the daughters took no interest in the daughter's share in the residue.

The testator devised a freehold house at Plaistow and some leaseholds to his widow during her widowhood, and he devised them to his daughters Louisa Margaret Elliott, Caroline Amelia Elliott and Maria Hannah Elliott, at the death or marriage of their mother, "to have the rents and incomes therefrom in equal shares between them, but not to be liable or subject to the debts, control or interference of any husband whom they might respectively marry; provided that during the lives of his said daughters, or the life of any of them, the said estates should not be sold; and in case either of them should die and leave no issue, the share of such deceased daughter, or daughters should more than one so die, should revert and become part of the residue of his estate and effects, and provided any of them should die and leave issue, *then such issue should succeed to the mother's share in that his will.*" After bequeathing divers pecuniary legacies, the testator gave all the residue of his estate and effects whatsoever and wheresoever to his children Stephen Frederic Elliott, Joseph Elliott, Louisa Margaret Elliott, Caroline Amelia Elliott and Maria Hannah Elliott, "in equal portions share and share alike, provided that if any of them should die without leaving issue, the share or shares of such deceased child or children should be distributed in equal shares among the survivors of them, and if only one such survivor, then the whole to such survivor."

The testator died in 1838, and his widow in 1856.

[425] The testator's daughter Louisa died in 1855, leaving two children. The testator's other children were still living.

The question was, whether the issue of the testator's children took any interest in his residuary estate.

Mr. Baggallay and Mr. Speed, for the Plaintiffs.

Mr. Selwyn, Mr. Morris, Mr. Lewin, Mr. Cracknall, Mr. Fry, Mr. Fitzhugh and Mr. Peck, for the Defendants. *Mansergh v. Campbell* (25 Beav. 544, and 3 De G. & Jones, 232) was cited.

April 27. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case I think that the children of the daughters do not succeed to their mother's share in the residue.

The Plaistow property was given to the three daughters on the death or marriage of the mother, and the issue was "to succeed to their mother's share in that his will." I think that means all the mother's share in the will at that time, namely, at the death or marriage of the widow.

But the residue had to be divided previously, for it was to be distributed at the death of the testator, and not at the death of the widow. The testator gives the residue to his five children, and adds, if any of them should die without leaving issue, his share is to be distributed amongst the survivors, and if only one such survivor, then the whole to such survivor. That refers [426] to the persons who survive the testator, and the survivorship is to be ascertained at the period of distribution of the residue, which is to be divided amongst the five children at the death of the testator.

[426] COLLIER v. M'BEAN. May 1, 2, 26, 1865.

[Affirmed, L. R. 1 Ch. 81 ; 13 L. T. 484 ; 12 Jur. (N. S.) 1 ; 14 W. R. 156. See *Bealey v. Carter*, 1869, L. R. 4 Ch. 236. Held overruled, *Colliers v. Walters*, 1873, L. R. 17 Eq. 260.]

A testator devised real estate to trustees and their heirs in trust, during the life of his brother and until payment of his debts and legacies, to apply the rents in payment of such debts and legacies, and then to pay them to his brother for life, and, after the decease of his brother and such payment, he devised the estate to the heirs of the body of his brother, and in default to his own right heirs. The Court held, first, that the trustees took the legal fee, determinable upon the death of the brother, and payment of the debts and legacies ; secondly, that the brother took an equitable estate for life, with a legal remainder to the heirs of his body, and the trustees having conveyed to the brother the legal estate for his life, and he having suffered a recovery, the Court held, thirdly, that the heirs of the body were not barred, because the legal estate to the brother for life and the legal remainder to the heirs of his body had become vested by different instruments, and also because it was the duty of the trustees to preserve the contingent estates, and that it was therefore a breach of trust in them to convey the legal estate to the brother. But held, on appeal, that the title under the recovery was too doubtful to force on a purchaser.

This was a suit by a vendor against a purchaser for the specific performance of a contract, and the question was, whether the Plaintiff had shewn such a title as he could compel the Defendant to accept.

The objection raised questioned the validity of a recovery suffered by William Collier, the vendor, under the devises contained in the will of James Collier, deceased. The will was dated the 23d of May 1827, and by it the testator devised the property in question and all his personal estate to his brother Joseph Collier and his sister Hannah Collier, their heirs and assigns, and to the survivor of them, his or her heirs and assigns, upon trust, as to the personal estate, to sell and apply the produce, as far as it would extend, in payment of his debts, and as to his real estate, upon the following trusts :—

“Upon trust that they, Joseph Collier and Hannah [427] Collier and their heirs, and the survivor of them and his or her heirs, shall stand seised of the same, for and during the term of the natural life of my brother William Collier, and also until the whole of my just debts and all interests due or to grow due thereon, together with the following legacies, be fully paid off and discharged, to, for and upon the several uses, trusts, ends, intents and purposes hereinafter mentioned, that is to say, upon trust to set and let the same, and to pay and apply the rents, issues and yearly profits thereof and the value of whatever timber may be considered at its best growth, from time to time, in further discharge of my said just debts and of all interest due or to grow due thereon, until the same shall be fully paid off and satisfied, and upon further trust to pay and apply the rents, issues and yearly profits thereof, from time to time, in discharge of and until the whole of the three following legacies, which I hereby give and bequeath, be fully paid and discharged, that is to say, to my sister Hannah Collier the sum of £50, to my niece Mary Ann, the daughter of my brother Joseph Collier, the sum of £50, and to my niece Sarah Stubbs the sum of £50, and from thenceforth upon further trust to pay over, from time to time, the rents, issues and yearly profits of the said premises unto my brother William Collier or his assigns, for his use and benefit, for and during the term of his natural life ; and from and immediately after the decease of my brother William Collier and the payment of all my said just debts as aforesaid and also the legacies above mentioned, together with all expenses which my trustees or any or either of them may be at or put unto in the execution of this my will, I do hereby give and devise my said real estate unto the heirs of the body of my brother William Collier, lawfully to be [428] begotten, and for default of such issue, then I give and devise the same unto the right heirs of me, the

said James Collier for ever." And he then appointed his brother Joseph Collier and his sister Hannah Collier executor and executrix of his will.

The testator died shortly after. William Collier was not his heir.

The recovery was effected as follows:—By indenture, bearing date the 4th and 5th of June 1830, the two trustees, Joseph Collier and Hannah Collier, conveyed the hereditaments in question to William Collier and his heirs, to hold the same to the use of him the said William Collier and his assigns, for and during the life of the said William Collier, and for no other use whatever. William Collier suffered a recovery of these hereditaments in Trinity term 1830, and by indenture of lease and release of 23d and 24th of June 1830, he directed the uses thereof to be in trust for himself, William Collier, his heirs and assigns for ever.

In October 1862 the Plaintiff, William Collier, agreed to sell the property to the Defendant for £2050, and, in deducing the title, a question arose whether the recovery had vested an indefeasible estate in fee-simple in the vendor, William Collier.

The Defendant insisted that the Plaintiff had failed to make out a good and marketable title to the property, and he declined to complete the purchase without having the concurrence of the Plaintiff's son in the conveyance of the premises.

Mr. Selwyn and Mr. J. J. Jervis, for the Plaintiff, [429] cited *Poad v. Watson* (6 Ell. & B. 606); *Lord Saye and Seal v. Lady Jones* (8 Vin. Ab. 262, affirmed, 3 Brown, P. C. 133); *Fearne's Conting. Rem.* (p. 54, note); *Doe d. White v. Simpson* (5 East, 162); *Doe d. Tomkyns v. Willan* (2 Barn. & Ald. 84); *Bagshaw v. Spencer* (Fearn's Com. Rem. 120, 8th edit.).

Mr. Cole and Mr. Ince, for the Defendant, cited *Doe d. Cadogan v. Ewart* (7 Adol. & E. 636); *Ward v. Burbury* (18 Beav. 190); *Doe d. Kimber v. Cafe* (7 Exch. Rep. 675); *Ackland v. Lutley* (9 Adol. & E. 879); *Silvester v. Wilson* (2 Term Rep. 444); *Lord Saye and Seal v. Lady Jones* (8 Vin. Ab. 262, affirmed, 3 Brown, P. C. 133); *Doe d. White v. Simpson* (5 East, 162); *Glover v. Monckton* (3 Bing. 13); *Adams v. Adams* (6 Q. B. Rep. 860); *Hardson v. Williamson* (1 Keen, 33); *Doe v. Barthrop* (5 Taunt. 382); *Coape v. Arnold* (4 De G. M. & G. 574); *Else v. Osborn* (1 Peere Wms. 387); *Mansell v. Mansell* (2 Peere Wms. 678); *Barnard v. Large* (1 Bro. C. C. 534); *Doe d. Davies v. Gatacre* (5 Bing. N. C. 609); *Warren v. Richardson* (Younge, 1).

Mr. Selwyn, in reply. *Brydges v. Brydges* (3 Ves. 120).

May 26. THE MASTER OF THE ROLLS [Sir John Romilly]. The first thing to be considered is, what estate the trustees, Joseph Collier and Hannah Collier, took under the will of James Collier. The devise is to them and their heirs during the life of William Collier and until the debts and legacies shall have been paid. On the part of the vendor, this, it is contended, gave them the [430] fee-simple. But I am of opinion that, though the estate taken by the trustees was a fee-simple estate, still that it was one determinable on payment of the debts and legacies and the decease of William Collier. These were the sole purposes for which the estate was vested in them; and when these objects are fulfilled, then I am of opinion that the legal estate in fee-simple devised to and vested in them determines. This appears to me to be decided by the cases of *Doe d. Cadogan v. Ewart* (7 Ad. & E. 636); *Doe d. Kimber v. Cafe* (7 Exch. 675). Several other cases also, which were cited to me during the argument, appear to me to establish or confirm that proposition.

The result of so holding will have a very material bearing on the solution of the question before me, because it follows from thence, that the estate in favor of the heirs of the body of William Collier is a legal limitation, and that, consequently, it would not coalesce with the estate of William Collier, which unquestionably was an equitable estate. This is established in *Tippin v. Cosin* (1 P. Wms. 40, n.), and *Lady Jones v. Lord Saye and Seal* (8 Vin. Ab. 262, and 1 Eq. Cas. Ab.), and the various other cases cited and commented upon on this subject by Mr. Fearne in his work on Contingent Remainders.

If this be correct, it would follow that, unless the conveyance of the trustees to William Collier has enabled him to suffer the recovery, the equitable estate for life in him would not have united with the legal estate in remainder to the heirs of his body, and would not have enabled him, by virtue of any recovery, to bar the entail.

[431] But I am of opinion that the conveyance of the legal estate to the Plaintiff, by the trustees, for the term of his natural life, could not enable the Plaintiff to bar the rights of his issue or of the right heirs of the testator. There are, I think, two objections which prevent this result. In the first place, if an equitable estate for life is vested in A. with a legal remainder to the heirs of his body by one instrument, and by another instrument the legal estate for the life of A. is vested in him, the legal estate so acquired will not coalesce with the legal remainder in favor of the heirs of his body. And, in the second place, if the view I take of the estate vested in the trustees is correct, it would have been a breach of trust in them, if they had so conveyed the legal estate vested in them as to defeat the remainder in favor of the heirs of the body of the Plaintiff.

I am of opinion that the legal estate in fee was devised by the will to the trustees, in order that it might remain in them until the debts and legacies of the testator had been paid, and also until the decease of William Collier, and that thereupon the estate became vested in the eldest son of William Collier, if he had any child then alive, or, if not, in the right heirs of the testator. The consequence is that this peculiar devise was intended to supersede the necessity of the interposition of trustees to preserve contingent remainders, and consequently, in my opinion, the trustees could not, in equity at least, defeat those estates, by a conveyance of the estate vested in them to William Collier the tenant for life, but the attempt so to do would, in my opinion, amount to a breach of trust which this Court would relieve against.

Such is the view I have taken of this question. At all events, I am of opinion that there is far too great [432] a difficulty in this case to permit me to force this title upon the Defendant, who, even if I am wrong, would probably have to litigate the question hereafter with persons who could not now be bound by any decree of mine.

NOTE.—Appeal dismissed by the Lords Justices on the 9th of November 1865, the title being by them considered too doubtful to enforce.

[432] SAUMAREZ v. SAUMAREZ. May 27, 29, 1865.

A testator declared that the bequests to one daughter (C.) should be enjoyed by her for life, and then be put in trust for the benefit of the children she might leave, and to be divided at twenty-five. And he "in like manner" directed the bequests to his second daughter (M.) should be paid to her for life, and after her death "may be continued in trust and may be divided equally between her children after they have attained the age of twenty-five." Held, that the bequest to the children of M. was not too remote, and that they took vested interests at their birth.

The question which arose upon petition related to a bequest to the children of Martha de Havilland.

The testator, by his will, made a provision for his two daughters Cartaret Gimingham and Martha de Havilland. Subsequently, by a codicil, dated in 1833, he expressed himself as follows:—

"I hereby declare and direct that whatever sum I leave to my daughter Cartaret, the wife of John Gimingham, may be put in trust and placed in the Bank of England, and the interest thereof be enjoyed by her and her husband during her life, and after her death, that it may be put in trust for the benefit of the child or children which she may leave, and to be divided in equal proportions between her children and after they have attained the age of twenty-five years;" and if she should die without issue, the whole sum to be put in trust for the benefit of her brother Richard and sister's children.

[433] "In like manner I direct that whatever sum may devolve to my daughter Martha, the wife of Major Charles de Havilland, may be placed in the hands of trustees, and that the interest thereof may be paid to her and to her alone, without the control of her husband, and, after her death, that the whole amount may be continued in trust, and may be divided equally between her children after they have attained the age of twenty-five years."

The testator died in 1835.

By the decree made, on the 12th of December 1837, on the hearing on further directions, Lord Langdale declared that the bequest to the children of John Gimingham and Carteret his wife, and the bequest to the children of the Defendants Charles de Havilland and Martha his wife were severally good bequests and not void for remoteness.

Martha de Havilland died in December 1864, she had had five children, one of whom had died an infant in 1843.

Some advances had been made, out of the fund, for the outfit of some of the children during their infancy.

This was a petition for the distribution of the fund amongst the children and their representatives.

Mr. Martineau, in support of the petition.

Mr. Southgate and Mr. Jones Bateman, for Respondents.

[434] *May 29.* THE MASTER OF THE ROLLS [Sir John Romilly]. I think that all the children took vested interests at their births, but payable as they attained twenty-five. This is the only construction consistent with the advancements made during their minority and the declaration made by Lord Langdale that the gift to the children was not too remote. The fund is therefore divisible in fifths.

[434] SCOTT v. IZON. *May 2, 31, 1865.*

When a testator has authorized the employment of his estate in trade, though the firm in which it is so employed becomes bankrupt, no proof can be made against the estate of the bankrupts, in respect of the money of the testator so employed.

A debt due by one partner in a firm to his co-partners cannot be proved against the joint estate until all the joint debts have been paid in full; but it can properly be proved against the separate estate of the debtor as soon as the joint debts of the partnership have been discharged by the solvent partner.

Trustees, being authorized by their testator, embarked the assets in a partnership trade. In 1831 the active trustee became bankrupt, indebted (as was alleged) to the partnership, and through it to the testator's estate. In 1865 parties still under disability sought to charge a co-trustee with the loss occasioned by his not proving the alleged debt under the bankruptcy, but they did not prove the debt at the hearing. The Court considered that the right of proof could only be ascertained by taking the partnership account, and, having regard to the lapse of time, the deaths of parties and the trouble, expense and difficulty, declined to direct any inquiry on the subject, and dismissed the bill without costs.

This was a suit instituted by various persons interested in the estate of William Ketland, deceased, praying a declaration that William Izon, the Defendant and surviving trustee under the will, might be made liable to make good the losses sustained by reason of his testator's estate being engaged in the testator's trade after his death, and also for the loss sustained by reason of William Izon not having proved against the estate in bankruptcy of Thomas Izon, the other trustee, now deceased, the amount due from him to the bankrupt's estate.

[435] William Ketland made his will on the 3d of September 1804; by it, after reciting that he had agreed with James Allport to carry on the business of a gunmaker for twenty-one years from the 1st of May 1804, he bequeathed to Thomas Izon and James Roberts, their executors and administrators, all his estate and interest in the said trade, upon trust that they or the survivor of them should continue to carry on the said trade in co-partnership with James Allport, and after the determination thereof, to carry on the said trade, and pay the profits to his (the testator's) wife during her widowhood, and after the second marriage of his widow, to pay her £300 per annum. And, subject to the interest of his widow, the trustees were to hold all his estate, as to one-fourth, in trust for his nephews Thomas and John Scott, and all other the children of his sister Mary Scott, equally to be divided between them, as to one-fourth for Thomas Izon absolutely, as to one-fourth for James Roberts absolutely,

as to one-eighth for his (the testator's) nieces and nephews, and all other the children of his brother-in-law John Izon, and as to the remaining one-eighth, for his brother-in-law William Izon absolutely. And the testator gave his leasehold messuage in remainder and all the residue of his estate to the said trustees, in trust to sell and hold the produce upon the trusts expressed concerning the profits of the business of a gunmaker. And he declared that it should be lawful for them to advance or employ all or any part of the moneys to be received, as aforesaid, in the said trade, for better carrying on the same. And he appointed Thomas Izon and James Roberts and his widow, during her widowhood, executors of his will.

The testator died shortly afterwards, and his will was duly proved by the executors in November 1804.

[436] James Roberts resigned his office of trustee in 1812, and in that year the Defendant William Izon and Isaac Hands were appointed trustees in his place to act concurrently with Thomas Izon.

James Allport died in 1817, after whose death the three trustees continued to carry on the business.

In 1831 Thomas Izon became bankrupt, and a dividend was paid on his estate, and he was, as the Plaintiffs alleged, largely indebted to the partnership at that time. He died intestate in 1834, and Isaac Hands also died intestate in 1835.

In 1841 the widow died intestate, and the interests of the Plaintiffs, many of whom were then infants, and one of whom was still an infant, then arose.

The complaint against the Defendant William Izon was that he permitted Thomas Izon his brother to have the uncontrolled management of the business, and that by reason thereof he became largely indebted to the business; and further, that when he became bankrupt, William Izon did not prove for that amount against his estate.

Mr. Selwyn and Mr. W. Pearson, for the Plaintiffs.

Mr. De Gex, Mr. C. Roupell and Mr. Surridge, for the Defendants. *Ex parte Garland* (10 Ves. 110); *Ex parte Butterfield* (1 De Gex, 319).

Mr. Selywn, in reply.

[437] May 31. THE MASTER OF THE ROLLS [Sir John Romilly], after stating the above facts, proceeded on the following terms:—

The facts I have mentioned, which are those on which the Plaintiffs rely, remove the foundation of the Plaintiffs' claim to make the Defendant William Izon personally liable to make good any loss, so far as the same may have arisen from the employment of the testator's assets in the trade of a gunmaker. The carrying on of this trade is expressly in accordance with the trusts and directions contained in the will of the testator, and no one can be made answerable for having obeyed his directions.

As regards the contention that William Izon ought to be made liable for Thomas Izon's debt, on account of his having permitted Thomas Izon to manage the business without any control, in the first place, this is not proved, or, indeed, attempted to be proved, by any facts; and, in the second place, if he did, unless it were done collusively and with the view of enabling Thomas to abstract assets of the partnership, it would amount to nothing, for one partner cannot be made personally liable to others, because the other partner has mismanaged the business.

The contention that it was the duty of William Izon to prove the debt due to the concern from Thomas against the estate of Thomas is of a very different character. It was not the partnership that was bankrupt, Thomas Izon was bankrupt alone, and accordingly there was no joint estate subject to the bankruptcy, but his separate estate was alone applicable, in the first place, towards payment of his separate creditors; if there were any creditors of the firm, they could not prove against the separate estate of Thomas Izon until they had exhausted the joint estate of the firm—they would, therefore, have been compelled, in the first instance, to go against the [438] remaining partners, and as they were solvent, it may be assumed that this was done, and that the creditors were paid. But the rights of the firm, or rather of the remaining members of the firm, against the separate estate of Thomas Izon, after the payment of the joint debts of the firm, is a very different matter. Many cases were cited to me to prove that when a testator has authorized the employment of his estate in trade, though the firm in which it was so employed becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of such money of

the testator so employed. This, no doubt, is correct, but it only proves that, as the testator's money was employed properly in this trade and without any breach of trust, the amount so employed could not be proved against the estate of the partners, if they had become bankrupts, as it was not a debt of the firm, but merely capital brought into it. But these cases do not apply to a debt due by one partner in a firm to his co-partners. It is true that a debt by one partner cannot be proved against the joint estate until all the joint debts are paid in full; but I apprehend that it can properly be proved against the separate estate of the partner as soon as the joint debts of the two partners have been discharged by the solvent partner. If it were not so, the debt due from the single partner to his co-partners could never be recovered, although his estate was sufficient to pay 20s. in the pound. In the present case, as I have already stated, I am of opinion that no proof could have been made against the estate of the bankrupt Thomas Izon, in respect of the estate of the testator employed in the trade; but assuming that, on taking the partnership accounts, it appeared that a balance was due from Thomas Izon to his co-partners, and that these co-partners, who were liable to pay, had actually paid all the debts due from the firm jointly, then I am of opinion that this debt due to them from the bankrupt could have been [439] proved by the co-partners against the estate of Thomas Izon; and that, assuming this state of things to have existed, a proof for this purpose ought to have been made, or attempted to have been made.

But the difficulty I feel in the present case arises principally from the lapse of time. The persons who carried on the business at the time of Thomas Izon's bankruptcy were the executors and trustees of the testator and those who had been put in the place of such as had retired. In 1831 the widow and executrix was still alive, and interested in and carrying on the business; those who were associated with her were the Defendant William Izon, Thomas Izon the bankrupt, and Isaac Hands, who died in 1835.

It was, in fact, only in this character of partner that they could prove against the estate of Thomas Izon, for in their character of executors and trustees, of which Thomas Izon was one, they had, as I have already observed, no such right. In order to ascertain what, if anything, could have been proved against his estate, it would be necessary for me to take the accounts of a partnership which has been discontinued for upwards of thirty years, when there is only one partner surviving, and when the trouble and expense attending it must be very great. In addition to which, the burthen of proof must lie on the Plaintiffs to establish the amounts that were due to the partnership from Thomas Izon at the time of his bankruptcy in 1831.

In addition to this, each of the other partners, viz., the widow and Isaac Hands, were as much bound to do this as the Defendant William Izon himself; and they were the persons who were best acquainted with the affairs of the partnership and the trade that was carried [440] on. The Plaintiffs have not proved the fact of the debt from Thomas Izon to the partnership, and though the Plaintiffs have been under disabilities during the whole time, viz., thirty years, which have elapsed since the event, I think it more than probable that the inquiry, if I directed one, would prove worse than fruitless to those who ask for it; for if I directed any inquiry, it could only be to ascertain what, if anything, after payment of the joint debts of the concern, was due from Thomas Izon, deceased, to the estate of the testator at the date of his bankruptcy in 1831, and whether any and what steps were taken for the purpose of obtaining payment thereof under the said bankruptcy.

Having regard, however, to all the circumstances of the case, I am convinced that the best course I can take for the Plaintiffs themselves, after the time which has elapsed, is, to decline to make any inquiry at all on this subject, and dismiss without costs so much of the bill as asks relief in this respect. In other respects the decree will be of course.

[441] EYRE v. BRETT. April 28, 30, 1865.

[S. C. 34 L. J. Ch. 400; 13 W. R. 732; 763; 6 N. R. 57, 191.]

In a suit relating to real estate the sole Plaintiff died before decree, having devised the estate: Held, that the devisee might be brought before the Court by the common order, under the 15 & 16 Vict. c. 86, s. 52, and that a supplemental bill was unnecessary.

Laurie v. Crush (32 Beav. 117) overruled.

This suit related to real and personal estate. The sole Plaintiff died before decree, having devised the estate to A. E. in fee, and appointed A. E. and F. M. his executors.

A question arose, whether an order to revive under the 15 & 16 Vict. c. 86, s. 52, could be made as against the devisee.

Mr. Roberts now mentioned the difficulty to the Court, and stated that it was considered that, under the above section, an order of revivor and supplement could not be made, for under the old practice a supplemental bill and a decree thereon would be necessary to bring the devisee before the Court; Mitford (p. 71 (4th edit.), and p. 85 (5th edit.)); who says, "If the death of a party whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of a real estate, the suit is not permitted to be continued by bill of revivor." He referred to *Jackson v. Ward* (1 Giff. 30); *Williams v. Williams* (30 Law J. (Ch.) 407).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the order may rightly be made.

NOTE.—See 20 & 21 Vict. c. 77, s. 64, which might possibly affect the modern practice.

[442] April 30. Mr. Roberts again applied to the Court, stating that the order had been stopped in the registrar's office, on the ground that it was contrary to the previous decision in *Laurie v. Crush* (32 Beav. 117). He stated that the decision of the Vice-Chancellor Wood and Vice-Chancellor Kindersley were opposed to those of Vice-Chancellor Stuart, and that in *Laurie v. Crush* this Court had followed the former.

THE MASTER OF THE ROLLS. I think that I granted the order improvidently. In *Laurie v. Crush* I followed the majority of the decisions, which were conflicting. The practice ought to be uniform, and you had better apply to the Appellate Court.

NOTE.—On the same day, Mr. Roberts brought the matter to the attention of the Lords Justices, who were of opinion that the extended construction of the statute ought to prevail. See the next case.

[442] EARL DURHAM v. LEGARD. May 2, 1865.

An order to revive, under the 15 & 16 Vict. c. 86, s. 52, made in order to bring before the Court the devisee of a Defendant who had died before decree.

This was a suit by a purchaser against the vendor, for the specific performance of a contract for the sale of real estate.

The Defendant died before decree, having devised the estate.

Mr. Wickens asked for an order of revivor and supplement under the 15 & 16 Vict. c. 86, s. 52. He [443] referred to *Laurie v. Crush* (32 Beav. 117), but which was the case of the devise of a sole Plaintiff, while this was that of a sole Defendant.

THE MASTER OF THE ROLLS [Sir John Romilly], after referring to *Eyre v. Brett*, (1) made the order.

(1) *Ante*, p. 441; and see *Bedford v. Bedford*, M. R. 24th March 1866, where a similar order was made in the case of a Defendant who had died after decree.

[443] LAKIN v. LAKIN. March 6, April 20, 1865.

[S. C. 12 L. T. 517; 11 Jur. (N. S.) 522; 13 W. R. 704. On point as to appointment, see *In re Bringle's Trusts*, 1872, 26 L. T. 60; *Swete v. Tindall*, 1874, 31 L. T. 224. On point as to assumption of death, see *In re Phend's Trusts*, 1872, L. R. 5 Ch. 147.]

A tenant for life had a power to appoint £5900 consols. She appointed £1400 to each of her three sons, but not to vest until her death, and reserved to herself a power of revocation. She also appointed, irrevocably, to her daughter the residue of the £5900, after setting apart a sufficient portion to satisfy the appointment to the three sons, to vest in the daughter *instantly*. Held, that the appointment to the daughter comprised only a residue, after deducting the £4200; and the appointment in favour of two of the sons having failed by their deaths in the life of the appointor: Held, that the shares intended for them went as in default of appointment.

A sailor left his ship at the end of the year 1849 or very early in 1850, and had not since been heard of: Held, that, if he was shewn to have intended to desert, it could not be presumed that he was dead in May 1850; but that if he intended to return to his ship, then the Court would assume that he had met with an accident, by which he perished a very short time after leaving the vessel and before May 1850.

The question in this suit arose upon the construction of a deed of May 1850, exercising a power of appointment contained in the settlement made on the marriage of Mr. and Mrs. Lakin, the parents of the Plaintiff Caroline Lakin and the Defendant William Lakin. This settlement bore date the 31st of October 1816, and was made between William Lakin of the first part, Susan Lakin of the second part, and John Skoulding and Harry Lakin the elder of the third part. By it £1200 £5 per cents. were assigned to the trustees, in trust to pay annually £50 to the mother of Susan Lakin, and, subject thereto, for Susan and William and the survivor for life, and after the decease [444] of the survivor, upon trust for one or more of the issue of the marriage, to be born before the appointment was made, as Susan Lakin should appoint by deed or will; and in default of appointment, upon trust for the child or children of the marriage equally, as tenants in common, the son's share to be vested at twenty-one and daughters at twenty-one or marriage. But the child so appointed to bring his share into hotchpot before taking anything in default of appointment.

There were five children of the marriage, viz., William, Charles, George, Caroline and Henry, who died an infant before May 1850.

It was doubtful whether George, another of the sons of the marriage, was or was not alive in May 1850. He left his ship at Buenos Ayres at the close of 1849, or very early in 1850, and, as the captain intimated, with the intention of never returning, and he had never since been heard of.

On the 20th of May 1850 Mrs. Lakin executed the deed of appointment in question. About this time it appeared that the trust funds had been varied and augmented, and that they consisted of £5903, 6s. 8d. £3 per cent. consols. The deed in question was a deed-poll, it recited the state of the family, and the desire of Susan Lakin to appoint the fund, and thereupon she directed Anne Isabella Lakin (who was the legal personal representative of Henry Lakin the elder, the last surviving trustee) to hold the fund after the decease of the survivor of herself Susan Lakin and her husband, in trust to pay £1400 £3 per cent. annuities to each and every of William, Charles and George and assign, and pay the residue to Caroline, the Plaintiff.

[445] The words were these:—Upon trust to pay “unto each and every of the said William Lakin the younger, Charles Lakin and George Lakin a sum of £1400 £3 per cent. consolidated Bank annuities, part of the said sum of £5903, 6s. 8d. like annuities, and the dividends due thereon; or, if the said sum of £5903, 6s. 8d. £3 per cent. consolidated Bank annuities, or any part thereof, shall have been sold out and reinvested upon other securities, so that there shall not be a sufficient amount

of such securities to answer and satisfy the trusts aforesaid, then upon trust to assign, transfer, pay and apply unto each and every of the said William Lakin the younger, Charles Lakin and George Lakin such part or share of the trust moneys, stocks, funds and securities for the time being, subject to the trusts of the said indenture of settlement, as may be at the time of the death of the said Susan Lakin of equal value, with a sum of £1400 £3 per cent. consolidated Bank annuities, and the dividends and interest on such part or share, and upon trust to assign, transfer and pay and apply unto the said *Caroline Lakin the residue which will remain* of the said sum of £5903, 6s. 8d. consolidated Bank annuities, or other trust moneys, stocks, funds and securities for the time being subject to the trusts of the said indenture of settlement, and the dividends and interest thereof, *after setting apart a sufficient portion thereof to answer and satisfy the appointment hereby made unto or for the benefit of the said William Lakin the younger, Charles Lakin and George Lakin.*"

The deed provided that the appointment to the three sons should be subject to revocation and new appointment, and that their shares should not vest in them until the death of Susan Lakin. But as to Caroline, it was provided that the amount of the Bank annuities, [446] trust moneys, &c., appointed to her should not be subject to revocation, and that they should invest in her immediately upon the execution of the deed of appointment.

Charles Lakin died in 1859.

Mr. Lakin died in 1856, and Mrs. Lakin in 1862, and the fund became divisible.

Mr. Hobhouse and Mr. Wright, for the Plaintiff Caroline Lakin. The appointment to Caroline includes the residue of the fund after providing for the shares appointed to her brothers; *Carter v. Taggart* (16 Sim. 423); *In re Harries' Trust* (John. 199); and see *Vivian v. Mortlock* (21 Beav. 252). George must be presumed to have died at the date of the appointment (20th May 1850), and at all events both Charles and George were dead at the decease of their mother, and therefore failed to take vested interests. The consequence is that the Plaintiff is entitled to the whole fund, subject to the share of £1400 consols, payable to William.

Mr. Selwyn and Mr. Eddis, for the Defendant William Larkin, argued that Caroline only took the residue after deducting the three sums of £1400 consols, viz., £1703, 6s. 8d. That the shares to Charles and George went as unappointed, and that the Plaintiff must bring the appointed portion into hotchpot.

THE MASTER OF THE ROLLS referred to *Taylor v. Frobisher* (5 De Gex & Sm. 191) as to the vesting indefeasibly, and to *Page v. [447] Leapingwell* (18 Ves. 463) as to the whole fund being appointed in definite proportions between all the appointees.

Mr. Hobhouse, in reply.

April 20. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is whether the appointor Mrs. Lakin intended to give the whole fund to the Plaintiff, charged with the payment of the three appointed sums of £1400 each to her three sons; or whether she intended to give £1400 to each of them, and the £1703 which remained to her daughter, the Plaintiff.

On one side *Carter v. Taggart* (16 Sim. 423) and *Falkner v. Butler* (Ambl. 514) are relied upon to shew that the Plaintiff takes the whole of the £5903, except such as is validly appointed. On the other hand, *Page v. Leapingwell* (18 Ves. 463), *In re Harries' Trust* (John. 199), and that class of cases, are relied upon for the purpose of shewing that the Plaintiff was only to take an ascertained residue of a fixed sum, after providing for three defined payments out of it.

I am of opinion, on the construction of the deed of appointment, that only the surplus of £1703 was appointed to the Plaintiff. It is "the residue" which will remain "after setting apart a sufficient portion" to satisfy "the appointment made to the sons;" it is not "after payment," but after setting apart a sum to satisfy the appointment when it should become payable. Next, it is provided that although the appointment of the three [448] sums of £1400 each shall be revocable, the appointment made for Caroline Lakin shall not be revocable. The words are very material: "Provided always that the true intent and meaning of these presents is that the appointment hereby made unto or for the benefit of William Lakin the younger, Charles Lakin and George Lakin as aforesaid, shall be subject to revocation and further disposition and appointment by Susan Lakin; and that the said several sums

of Bank annuities, trust moneys, stocks, funds and securities, dividends and interest, so as aforesaid appointed to William Lakin the younger, Charles Lakin and George Lakin respectively, *shall not thereby vest* in them, or any of them, until the death of Susan Lakin. But it is further declared that no such revocation and new appointment shall affect the appointment hereby made unto or for the benefit of Caroline Lakin as aforesaid, or the amount of the Bank annuities, trust moneys, stocks, funds and securities, dividends and interest to which she will become entitled thereunder; and also that the said appointment unto or for the benefit of *Caroline Lakin shall not be subject to revocation*, and that the Bank annuities, trust moneys, stocks, funds and securities, and the dividends and interest hereby appointed to her as aforesaid, *shall vest in her, Caroline Lakin, immediately on the execution of these presents.*"

Although the other three sums are not to vest in the appointees until the death of Susan Lakin, the appointment made to Caroline is to vest at once. What is it that is to vest in her? not an unascertained sum, but it is the residue of £5903, 6s. 8d. consols, after deducting three sums of £1400 consols each; in other words, £1703, 6s. 8d. consols is appointed to her irrevocably, and is to vest in her at once.

[449] If this should be construed to be an appointment of the whole of the sum of £5903, 6s. 8d., including any of the three prior appointed sums which might fail of taking effect, then this inconsistency would arise:—this appointment is irrevocable, and then if one of the prior appointments failed, by reason of the death of one in the lifetime of Susan Lakin, she would not be able to make any reappointment of the sum of £1400, so appointed to him, and yet, by the deed itself making the appointment, she had reserved to herself the right of revocation. The whole scope of the deed speaks of the moneys and funds appointed to Caroline as something which is clearly ascertained.

It is not necessary to discuss and consider the various cases referred to, and which I have referred to generally; in truth, not one of them is properly any authority to govern this case, beyond this: that it appears, in every instance, that the Court has decided the construction upon the words contained in the instrument itself. It is on the plain meaning to be gathered from the words expressed in this deed, that I am of opinion that the donee of the power, Mrs. Lakin, intended to appoint and to reserve to herself the future power of revoking and reappointing £4200 consols, part of the £5903, 6s. 8d., and to appoint the residue, amounting to £1703, 6s. 8d., irrevocably in favour of the daughter, the Plaintiff.

The consequence of this is that the sum of £2800 consols has not been so appointed as to take effect in favour of the appointees George and Charles, both of whom died before their mother, the donee of the power.

The next question is, to whom does this money go, [450] and in what shares? The Plaintiff is the legal personal representative of both George and Charles. There was a fifth son Henry, who died an infant and without issue in 1844, before the deed of appointment; and the Plaintiffs and the Defendant William are the sole next of kin of all the deceased brothers.

I think it unnecessary to consider whether George was alive at the date of the deed of May 1850. If I were compelled to come to any conclusion on the subject, it would be with great reluctance and hesitation. If, as Captain Drewery seems to intimate, George and the three sailors in his company left the ship with the intention of never returning to her, and that, in fact, their departure amounted to desertion, I should think that it could not well be presumed that he was dead in May 1850. The exact time of his leaving the vessel is not given, but it appears to have been either at the close of the year 1849, or very early in the year 1850. In either case, I could not presume that he was dead in May following; but if George left the ship with no intention of desertion, but intending to return, I should assume that he and the three sailors who accompanied him had met with an accident, by which they all perished within a very short time after leaving the vessel, and before May 1850. But I do not consider it material to determine this question, because I am of opinion that the appointment being made revocable, and with the express condition that it was not to vest any interest in George and Charles until after the death of the appointor, no interest vested in either of them who predeceased their mother. I am therefore of

opinion that the appointment to them of the sums of £1400 each failed to take effect, and were in the event unappointed and went as in default of appointment.

[451] The result of this will be that the £2800 will be divisible into four-fourths, one-fourth to Plaintiff, one-fourth to William, one-fourth to George, and one-fourth to Charles; and these two last fourth parts go to their legal personal representatives, and, subject to the payment of their debts respectively, belong to the Plaintiff and William, as sole next of kin, in equal shares. There is also a provision in the original settlement which will compel the Plaintiff to bring her one-fourth of the unappointed fund into hotchpot with William's; but this provision will not extend to the shares she takes as one of the next of kin of George and Charles.

[451] WEBSTER v. DONALDSON. *March 6, 9, 1865.*

In May the Plaintiff agreed to purchase an estate, including hay and growing crops, for £9000. The purchase was to be completed in June, when the Plaintiff was to be let into possession, and if not then completed, the Plaintiff was to pay interest on the purchase-money. By subsequent agreement, November was substituted for June. The contract was not completed until the following February, and in the meantime the vendors had sold the hay and used the garden produce. Held, that under the altered contract, the Plaintiff was not entitled to this hay or produce.

On the 14th of May 1863 the Plaintiff purchased a property from the Defendant for the sum of £9000, which was to include the whole of the fixtures, hurdles, *hay, growing crops* and timber.

By the conditions of sale, the purchase was to be completed on the 24th of June, and the purchaser (having paid his purchase-money) was then to be let into possession or receipt of the rents and profits of the estate. And in case of delay in completion, the purchaser was to pay interest at the rate of £3 per cent. from that day.

[452] In May, and at the request of the Plaintiff, the time for completing was extended to the 29th of September, and that date was accordingly substituted in the agreement.

The purchase was not completed until February 1864, when the Plaintiff paid the purchase-money, together with interest from the 29th of September 1863. The conveyance was then executed and delivered over, and the Plaintiff was let into possession.

In the meanwhile, the Defendant had, in July, cut and sold the hay which was growing on the property, and he had also taken the garden produce. The Plaintiff claimed this hay and garden produce, and, after the completion of the purchase, he instituted this suit, praying that the Defendants might deliver over such part of the hay and garden produce, growing on the estate at the time of the purchase, as remained in specie, or might account for the money produced by their sale.

Mr. Selwyn and Mr. Dixon, for the Plaintiff.

Mr. Baggallay and Mr. Bardswell, for the Defendants, resisted the claim, first, upon the terms of the contract; secondly, on the ground that if the Plaintiff took the crops, as from June, he must pay interest from that date; thirdly, that this claim was made too late, and lastly, that it was properly the subject of an action at law.

March 9. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted to obtain the delivery of some hay and other produce grown on lands purchased by the Plaintiff, or, in the alternative, for payment of the [453] produce of it, if sold by the Defendant. The prayer is to that effect.

The facts of the case are these: The contract for the sale was entered into on the 14th of May 1863. The time for completion was originally on the 24th of June, and if it had been completed on that day, the matter would have been very simple; interest would have been payable from that period, the Plaintiff would have taken possession, and all the hay and growing crops would have been taken by the Plaintiff, because they would not have been severed at that time.

By agreement the term was extended to the 29th of September 1863, but in the

meantime all the crops were gathered, the hay was made and sold, and most of the fruit and garden produce was gathered and sold, so that, on the 29th of February, when the purchase was completed, very little of it remained. At the date of the contract, there was no hay severed which would have passed in the same way as the iron hurdles.

I think that having regard to conditions of sale, the hay and growing crops were limited to those existing at the time of the conclusion of the sale. No doubt, if they had already been severed and in a stack or rick, they would have passed like the hurdles, and so would the timber. But as the purchaser was not to have possession until the purchase was completed, he could not properly gather in any crops before that time, and it is clear that they were not to be allowed to rot in the ground; and the conditions, as varied, expressly state that the purchaser is not to receive any of the rents or profits of the land until the 29th of September 1864, that is the day for the completion. There would be a manifest advantage given to the purchaser, by post-[454]-poning the day for completion, if he were to have the crops exactly as if he had completed three months sooner, and yet escaped payment of the three months' interest on the purchase-money.

But there is a still more serious objection to this bill, which is that it is not a bill for specific performance. The contract is complete and has been carried into execution, the purchase-money has been paid or secured and possession given, and if this matter could have been made the subject of a suit in equity, it ought to have been mentioned before the completion of the contract.

I am of opinion that if the Plaintiff be entitled to any relief it is only by an action at law. I express no opinion as to the result of such an action, but I shall not prevent him from taking that course; still he must pay the costs of this suit, in which he is in the wrong.

I shall dismiss the bill with costs, but without prejudice to the Plaintiff's bringing any action at law which he may be advised.

[455] WENTWORTH v. LLOYD (No. 2). *March 2, 1865.*

[For other proceedings, see L. R. 2 Eq. 607.]

A bill was dismissed with costs. Considerable costs had been incurred by the examination and cross-examination of witnesses in Australia under a commission. Held, that the Taxing Master must have regard to the rules of taxation there; but the Court refused to refer the taxation of that part of the bill to the proper officer in Australia.

The bill, in this case, had been dismissed with costs by the Master of the Rolls at the hearing (32 Beav. 467), and his decision had been affirmed by the House of Lords (10 H. of L. Cas. 589).

An enormous amount of costs had been incurred in Australia, by the examination and cross-examination of witnesses there, under a commission.

In taxing the costs here, under the decree, a question arose as to the mode in which the Taxing Master should proceed in taxing the costs incurred in Australia, the scale of allowances being higher there than in this country.

It was argued that those costs should be referred to the Taxing Officer in Australia, who, in regard to the Defendants and their solicitor there, had already taxed them as between solicitor and client. On the other hand, it was said that the Taxing Master was bound to tax them here, having regard, however, to the practice and scale established in Australia.

A motion was made to give directions to the Taxing Master as to the principle on which he should proceed.

Mr. Baggallay and Mr. Pemberton, for the Defendants, in support of the motion, argued that the reference ought [456] to be sent to Australia, or that the Taxing Master should be directed to have regard to the practice there.

Mr. Southgate and Mr. Surrage, for the Plaintiff, objected to the reference to the

Taxing Master in Australia, over whom this Court had no control, and which would prevent an appeal. The cases of *Earl Nelson v. Lord Bridport* (8 Beav. 527, 547, and 10 Beav. 305), where the costs had been incurred in Sicily, and *Lord v. Colvin* (4 Drew. 366), where the costs had been incurred in France, were referred to.

THE MASTER OF THE ROLLS [Sir John Romilly]. I certainly shall not send this bill out to Australia for taxation, and I never heard of such a course having been pursued by this Court. I will make no order on this motion; but the Taxing Master must tax this portion of the bill according to the rules and in the way in which it would have been taxed there. If any matter of difficulty should arise, he must refer for information to Australia.

[457] CHAMBERS v. CRABBE. Feb. 21, 22, 1865.

[S. C. 12 L. T. 46; 11 Jur. (N. S.) 277.]

Voluntary conveyance to a mother by a daughter six months after she had attained twenty-one, and seven days before the daughter's marriage, but unknown to her husband, set aside, both on the ground of the maternal influence, and of the fraud on the husband's marital rights.

Mr. and Mrs. Turner married in 1840; on this occasion a settlement was executed of Mrs. Turner's property, which was conveyed in trust for Mrs. Turner for life, with remainder to her husband for life, with remainder to their issue (within proper limits) as Mr. and Mrs. Turner or the survivor should by deed or will appoint, but so as not to vest until twenty-one or marriage, and in default in trust for the children equally.

There were three children of the marriage, viz., Mary, Thomas and George.

Mr. Turner died in 1862, and in 1856 Mrs. Turner married again and became Mrs. Crabbe.

The daughter Mary attained twenty-one in October 1863.

In 1864 Mary, being then under an engagement of marriage to Mr. Chambers, executed a deed unknown to him, which was to the effect following:—By an indenture dated the 14th of April 1864, and made between Mary Turner of the first part, Mr. Lee, a solicitor, of the second part, and Mrs. Crabbe of the third part, it was witnessed, that Miss Mary Turner, in consideration of natural love and affection which she entertained towards her mother Mrs. Crabbe, conveyed all her share and interest, whether original or accruing, vested, contingent or otherwise, in the property comprised in her parents' marriage settlement, unto Mr. Lee in trust for the separate use of her mother Mrs. Crabbe.

Seven days after (21st April 1864), Mary Turner married Mr. Chambers, the settlement having been concealed from him until after the marriage.

This suit was instituted in June 1864, by Mr. and Mrs. Chambers and the two other children (who were infants), against Mr. and Mrs. Crabbe and the trustees, praying that the trusts of the settlement of 1840 might be carried into execution, and that the deed of the 14th of April 1864 might be declared fraudulent and void, and delivered up to be cancelled.

In July 1864, and after the institution of the suit, Mrs. Crabbe appointed the whole trust property to her two sons equally.

It appeared from the evidence that the deed had been suggested by the mother, that it had been prepared by the family solicitors, but that no separate solicitor had been employed on the part of Mrs. Chambers. She, however, executed it voluntarily, and after it had been read and explained to her. It appeared also that Mrs. Chambers, at the request of her mother, had promised her to conceal the settlement from her husband.

Mr. Selwyn and Mr. Graham Hastings, for the Plaintiffs.

Mr. Hobhouse and Mr. Looock Webb, for the Defendant.

Mr. Southgate, for the trustees.

[459] The following cases were cited as to the effect of parental influence: *Berdes v. Dawson* (12 Law Times, 103, and 11 Jurist, 254); *Baker v. Bradley* (2 Smale & G.

531, and 7 De Gex, M. & G. 597); *Sercombe v. Sanders* (*ante*, p. 382). And as to the fraud on the marital right the following cases were cited; *De Manneville v. Crompton* (1 Ves. & B. 354); *St. George v. Wake* (1 Myl. & Kay, 610); *Thomas v. Williams* (Moseley, 177); *Goddard v. Snow* (1 Russ. 485); *Taylor v. Pugh* (1 Hare, 608); *Downes v. Jennings* (32 Beav. 290).

THE MASTER OF THE ROLLS [Sir John Romilly]. The Plaintiffs are entitled to a decree. The evidence convinces me that this lady could do no otherwise than give the whole of her property to her mother. The case is this: a young inexperienced lady just of age, in substance, says to her mother, "I wish to do all I can for you as you have done a great deal for me, can I do anything to lighten your burthen?" On this her mother says, "Give me all your property." Is that a transaction which can be allowed to stand in a Court of Equity? I have had these cases so repeatedly before me that I do not like to go at any length into the principles of law on which they are decided. I examined them at full length in a case of *Hoghton v. Hoghton* (15 Beav. 278), where a father on his son coming of age induced him to execute a settlement from which the father derived great benefits, but the Court would not allow it to stand. The influence of a father over a son or a mother over a daughter is, as must be naturally expected, very considerable, and where the parent derives a benefit from the child it must be clearly proved that this influence has not been exercised, in order to allow any such transaction to stand. [460] Here the evidence of both parties shews that the influence was very considerable, that the daughter was desirous to do everything she could to assist her mother, and that her mother thereupon asked her to do this, which in effect is to give her the whole of her property.

The rule in such cases is very well laid down by Lord Justice Turner in one of the cases to which I have lately had occasion to refer: it is to this effect; viz., that when a child upon coming of age makes a settlement of his property for the benefit of his family, but from which his parents obtain no benefit at all, the Court will not inquire into the degree of influence used by them, but considers it as a family arrangement for the benefit of the family; but if the transaction be tainted by the slightest personal advantage being obtained by the parent, who induced the child to enter into it, then, in equity, the transaction is invalid, unless it can be proved, not merely that the child knew the nature and effect of the transaction, but also that the child was not, in any respect, influenced by the peculiar relations in which the parties stood towards each other. Here the whole evidence shews that the daughter acted under the influence of her mother.

Neither can I regard the deed itself as other than a very improper one, because, if the deed be allowed to stand, nothing would be more easy than for the mother to put the whole of the trust fund into her own pocket, to the exclusion of all the children, by exercising her power and appointing the whole to her daughter, and then, under this deed, she would take to herself the whole of the property. It is true, that since this suit has been instituted (and possibly in consequence of the feelings which the suit has engendered) she has [461] appointed the property to the two other children, who are both infants, and who, unless they attain twenty-one, will not be able to take the property.

I am also of opinion that in another respect this deed is invalid, as being a fraud upon the marital right. I think the principle laid down by Sir John Leach in *Goddard v. Snow* (1 Russ. 485) is perfectly correct, and also that in *Taylor v. Pugh* (1 Hare, 608), by Sir James Wigram, who took great pains with his judgments, and investigated the principles of equity in a more searching manner than had been done since the time of Sir William Grant. He says, "I take the rule of the Court to be correctly stated in Mr. Roper's Treatise. Deception will be inferred, if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence." The Vice-Chancellor states his concurrence in that which I apprehend to be the real principle which affects these cases. The case of *Goddard v. Snow* (1 Russ. 485), governs this case. There was concealment, as here there was most clearly concealment from the husband. The mother, Mrs. Crabbe, herself, in her evidence, says, "I told my daughter that Mr. Chambers had nothing to do with it (that is, with the deed in question), as he had made no settlement. I told her that there was no

necessity to mention it to her husband." In other words, she concurs with Mrs. Chambers, who, in her evidence, says that she was told by her mother "to keep it secret from Mr. Chambers."

In every way, I am of opinion that the deed is bad, and, therefore, that it must be delivered up to be cancelled.

[462] In the Matter of PARRY'S WILL. May 11, 1865.

Order made under the Settled Estates Act (19 & 20 Vict. c. 120), saving the rights of pecuniary legatees interested in the estate, who were numerous.

An application was made under the Settled Estates Act (19 & 20 Vict. c. 120), for power to grant leases of property devised by the will of the testatrix. There was no tenant in tail of full age in existence, and a great number of pecuniary legatees were interested.

Mr. Osborne Morgan asked that the order might be made without service on the legatees. He cited *In re Legge's Settled Estates* (4 W. R. 20), and argued that it was not absolutely necessary that "all the persons in existence should concur or consent," but that the order might be made, subject to their rights, under the 18th section.

THE MASTER OF THE ROLLS [Sir John Romilly] made the order, but he directed "that the leases were to be subject to and were not to affect the rights, estates and interests of the pecuniary legatees under the testatrix's will."

Reg. Lib. 1865, B, fol. 1118.

[463] *Re MASSEY*. May 8, 9, 29, 1865.

[See *In re Longbotham* [1904], 2 Ch. 159.]

Under the third party clause in the Solicitors Act (6 & 7 Vict. c. 73, s. 38), the third party stands in the position of the client, and if the client is not entitled to a taxation against the solicitor, neither is the third party entitled to a taxation, under the Act, either as against the solicitor or as against the client. But he may be entitled to have a taxation as against the client in a suit.

This was a summons by a gentleman of the name of Waters to tax the bill of Mr. Massey, one of the solicitors of this Court. Mr. Waters and Mr. Müller were the owners of some mining property in Chili, and they endeavoured, with the assistance of Mr. Banting, a solicitor in Manchester, to form a limited joint stock company, for the purpose of purchasing their property and working the mines. They entered into an agreement for this purpose with the persons who formed a board of directors, of which Mr. Waters and Mr. Müller were both members. After various ineffectual attempts to form the company, Messrs. Waters and Müller, on the 16th September 1864, signed a document, by which they guaranteed the preliminary expenses of the company in case it should not be established. Their exertions continued, but it was at last found to be impossible to establish the company, and, on the 23d November 1864, the directors resolved to abandon the attempt and to return the deposits to the subscribers. This rendered Waters and Müller jointly liable to the directors to pay the expenses incurred.

Mr. Waters acquiesced in this proceeding, and, on the 26th November 1864, he wrote to the directors, and after expressing his sense of their exertions ended his letter in these words:—"I shall be obliged by your sending me an account of the expenses to which I and Mr. Müller are liable, and with agreement of September last, for examination and discharge."

[464] Mr. Massey had been the solicitor employed by the directors during the whole period of their attempts to form this company. A meeting of the directors was held on the 5th December 1864, at which the letter of Mr. Waters above referred to was read, and Mr. Massey was instructed to ascertain all the liabilities of the company. Subsequent meetings took place on the 12th and 19th of December. At

these Mr. Massey, who had explained that some time was required to make out his bill of costs, produced a document marked H, shewing the amount of his claim to be £1300. This account consisted of copies of entries in his day-book and diary, with the charges in blank.

Adjourned meetings of the directors were held on the 21st December 1864, and the 4th January 1865, at which Mr. Massey gave various explanations as to the nature of his work and the proper and fair mode of remunerating him, and at the last of these meetings it was resolved unanimously by the directors present, that Mr. Massey's charge for £1300 for professional services, including disbursements, having been again considered, the board directed it to be paid. It was paid accordingly, without taxation and without any proper bill of costs having been delivered. During the whole of this time Mr. Waters was a director and had notice of the meetings and of the purposes for which they were held, and he might have attended them, but it did not appear that any notice had been given to him, that the directors intended to pay Mr. Massey a sum of money in full discharge of his claim, without having the bill taxed, or indeed without having any proper bill delivered.

In this state of things, Mr. Waters insisted that the directors were trustees for him, and that he was entitled, as against them, to require that he should only be com-[465]-pelled to pay the directors what they were legally liable to pay to Mr. Massey, and accordingly he, on the 16th of February 1865, took out this summons for the purpose of having the bill taxed.

Mr. Selwyn and Mr. Eddis, for Mr. Waters, in support of the summons. Payment, under the circumstances of this case, where no proper bill had been delivered, is no bar to the taxation. But even if the directors have, by their conduct and assent, precluded themselves from obtaining a taxation after payment as against their solicitor, still the applicant is entitled to have this bill taxed under the third party clause (6 & 7 Vict. c. 73, s. 38), in order to have the amount properly payable by him under the guarantee ascertained; *Re Jessop* (32 Beav. 406); *Re Baker* (32 Beav. 526).

Mr. Baggallay and Mr. Osborne Morgan, *contra*, for the directors. When a third party applies, under the 38th section, for an order for taxation, he places himself, as regards the solicitor, in the exact position of the client. If the client is not entitled to tax his solicitor's bill, neither is the third party entitled to do so. The statute only authorizes a taxation as against a solicitor, and no taxation can take place, under this jurisdiction, as between the party chargeable and the client.

Taxation after payment will only be ordered when there has been pressure and ordinary overcharges, or when there are overcharges alone, so gross as to amount to fraud; *Ex parte Dickson* (8 De G. M. & G. 655). Here none exists. The directors are not entitled to an order to tax, and Mr. Waters has no greater right.

[466] Mr. Jessel, for Mr. Massey, was stopped by

THE MASTER OF THE ROLLS, who said, I am clear that the bill cannot be taxed as against Mr. Massey.

Mr. E. Russell Roberts, for Müller.

THE MASTER OF THE ROLLS. My difficulty is this: I am of opinion that there is no case for taxation as against the solicitor, the directors having voluntarily paid him with full knowledge. Then, if the Court cannot order the taxation under the statute as against the solicitor, can it order a taxation as against the directors? I do not find any case in which the taxation has not been directed as against the solicitor, and in which the solicitor has been ordered to refund any excess. I am in favour of the applicant on every other point.

Mr. Selwyn, in reply.

May 29. THE MASTER OF THE ROLLS [Sir John Romilly]. The first question is, whether the bill can be taxed as against Mr. Massey, and I am of opinion that it cannot. I so expressed myself at the time of the argument, and stopped Mr. Jessel on this point. Mr. Massey was retained by the directors and not by Mr. Waters. They were his clients, and it was therefore perfectly competent for the directors to settle with Mr. Massey the amount of his bill. They took from him an account of the entries in his day-book and diary, with the charges in blank. They received and listened to his explanations, [467] and, after doing so, they agreed to give him £1300 in full satisfaction of his claim.

I am of opinion that they are bound by this proceeding, and that they cannot require the delivery or taxation of any bill as regards Mr. Massey.

The next question which arises is this: can Mr. Waters, in this state of circumstances, require the bill of Mr. Massey to be taxed as against the directors who have paid it? There is, in my opinion, no question but that he can do so on a proper proceeding being instituted for that purpose. I see nothing which amounts to acquiescence on his part to the course adopted by the directors, nor do I think that he was bound by their acts, although he was a director and had full notice of their meetings; and if a bill were filed by him, and the facts not varied from what they now appear, I am of opinion that he would be entitled to an account of the moneys properly paid by them on his account; and that, in such a proceeding, the directors would have to prove that the sum of £1300 paid by them was properly so paid. In other words, in my opinion, a bill for Mr. Massey would have to be submitted to be moderated by the Taxing Master, and the amount at which the Taxing Master fixed it would be all that Mr. Waters could be required to pay.

But that does not determine the question argued before me, which is, whether, under the 38th section of the Solicitor's Act, when the bill cannot be taxed against the solicitor, it can be taxed as against the trustees of the applicants who have paid it. The words of the clause are these:—"And be it enacted that where any person, not the party chargeable with any such bill within the meaning of the provisions [468] hereinbefore contained shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make; and the same reference and order shall be made thereupon, and the same course pursued in all respects as if such application was made by the party so chargeable with such bill as aforesaid: Provided always that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or Judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid, if he was the party making the application."

This, undoubtedly, seems to point only to the taxation of the bill as against the solicitor, and does not give any jurisdiction to proceed under this Act against the trustees, and to dispense with a bill in equity. Certainly several orders to that effect have been made by me; but they seem all to have been consented to, so far as jurisdiction was concerned.

In re Fyson (9 Beav. 117), Lord Langdale observed: "First, it is to be observed that the Petitioner has fallen into a mistake, which has been of very frequent occurrence; mortgagors think that where they call for a taxation of a mortgagee's solicitor's bill, they have a right to [469] alter the relation of solicitor and client, and are not bound to pay more than the mortgagees could establish as against them the mortgagors. There is nothing in the Act of Parliament which warrants this notion, and it is not so. The bill may be taxed at the instance of the mortgagor, who is liable to pay it; but it is the bill between the mortgagee and his solicitor; and the mortgagor desiring to tax it must do it on the condition of paying what is due to the solicitor from his client the mortgagee, which possibly may be more than the mortgagee, if he had paid it, could have recovered over from the mortgagor. The mortgagor asking taxation against the solicitor has merely the right to tax the bill as between the solicitor and his client the mortgagee."

If, therefore, Mr. Waters can only stand in the place of the directors under this statute, I am of opinion that he cannot tax this bill, because the directors themselves could not do it, as it is impossible for them to point out any special circumstance which would entitle them to do so. The observations of the Master of the Rolls seem to shew that, except as against the solicitor, this clause 38 does not apply.

Again, *In re Harrison* (10 Beav. 60), Lord Langdale observes, "This petition is also misconceived in this respect:—It proceeds on the notion that a mortgagor,

having settled an account with the mortgagee and paid the bill of the mortgagee's solicitor, is entitled, in this jurisdiction, by petition, to quarrel with the account so settled, and tax the costs of the solicitor, not as between him and his client, the mortgagee, but as between the mortgagor and the mortgagee; and further, that if charges be found in the bill of costs which the mortgagee could not maintain [470] in an account between him and the mortgagor they are to be disallowed. Such a notion is entirely erroneous, and so much of this petition as depends on this point falls to the ground."

It is true that this case has been very strongly disapproved by all the Judges of the Court of Exchequer in *Ex parte Deardon* (9 Exch. Rep. 210), but not on this point, which did not arise at law.

The same principle seems to have been enunciated by Lord Justice Turner in the case cited of *Ex parte Dickson* (8 De G. M. & G. 655), and I can find no case that lays down the opposite rule, unless such can be gathered from my own decision of *In re Jessop* (32 Beav. 406), and *In re Baker* (*Ib.* 526), but so far as the observations which fell from me in those cases may be construed to establish that the bill may be taxed, under the 38th section, against the trustees, without the solicitor having any interest or concern in such taxation, I am of opinion that they give a wider extension to the scope of the 38th section of the Act than the words of the section seem to warrant, when examined in conjunction with the cases to which I have referred.

At the same time, it cannot but be evident that the effect of these decisions will be to reduce the 38th section to a very narrow operation, for all the cases concur in this:—that the *cestui que trust* can only tax the solicitor's bill as his clients, the trustees, could have done, and if they, knowingly and after having had due time to consider the bill, have thought proper to pay it, unless some of the items contained in it are fraudulent, in the strict and criminal sense of that term, the trustees are precluded from taxing the bill, however improper it may be, short of containing fraudulent items, in which case [471] the *cestui que trust* is driven to his bill in equity to obtain relief.

I consider, however, that I am bound by the decisions to which I have referred, and that I must dismiss the summons. As, however, this is a case in which the amount of their bill is the only matter in dispute, which, in my opinion, ought to be settled without the tedious and expensive course of a bill in equity, I shall dismiss this summons without costs.

[471] MASON v. MORLEY (No. 1). March 11, April 22, 1865.

[S. C. 34 L. J. Ch. 422; 12 L. T. 414; 11 Jur. (N. S.) 459; 13 W. R. 669.]

A. and B. (a solicitor) were executors. B. deposited some of his deeds in the trust box, to secure some money due to the testator's estate. The box remained in B.'s possession, and on his death the deeds were found to have been abstracted from it, and they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt. Held, assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still that he had waived it by taking the particular security from the legal personal representative. Held, also, that, the creditors of B. were bound by the arrangement between his legal personal representative and A.

This was a suit for the administration of the real and personal estate of a Mr. Morley, a solicitor, who died on the 30th of April 1864.

Under the decree, a claim was carried in by Mr. Underwood, which was adjourned into Court. It arose under the following circumstances:—Mr. Underwood and the testator Morley were the executors of the will of Joseph Godber. Morley, who was a solicitor, had in his possession £2000, part of the estate of Joseph Godber, which, according to his statement, had been lent by him on the security of a deposit of title-deeds. On being informed of this, Underwood required that these deeds should be put into the box which contained all the deeds and papers relating to the estate

of Joseph Godber, and which box belonged jointly to Underwood and Morley. [472] Morley objected to this, but proposed, instead thereof, to put into the box deeds of his own, as a security for the £2000 so said to have been advanced. This was accordingly done. Underwood did not examine the parcel containing the deeds, nor could he say of what they consisted. This occurred after many visits had been paid by Underwood to Morley on the subject, and took place early in February 1864.

Morley died on the 30th April 1864, and on the 6th of May the box was opened, when it appeared that the deeds had been removed. The box was in the actual possession of Morley at his office, and he had access to it at all times, without the concurrence of Underwood; but the box was the property of the executors, and contained the documents relative to the estate of Joseph Godber.

On the 4th of June following the death of Morley, the Defendant Mrs. Morley, his widow, told Mr. Underwood to select such of her husband's deeds and securities as he desired to have placed in his hands as a security for the £2000. He did so, and the deeds selected were put into the trust box, and Mrs. Morley gave Mr. Underwood a memorandum of deposit for securing the £2000. This was done with the full concurrence of Mr. Morley's executor, but he afterwards refused to prove the will, and administration was, in July following, granted to the widow.

Mr. Baggallay and Mr. Law, for the claimant, Underwood. The claimant has a general lien on all the deeds of the testator Morley; for, by the improper act of Morley, it has become impossible to identify the deeds which were deposited. He has mixed them with his other deeds and securities, and therefore the whole [473] of them are subject to the claimant's lien on them for the £2000; *Frith v. Carliland* (2 Hem. & Mill. 417); *Armory v. Delamirie* (1 Strange, 504); and see *Gray v. Haig* (20 Beav. 219); *The Duke of Leeds v. Amherst* (Ib. 239); *Harford v. Lloyd* (Ib. 310).

Secondly. But, at all events, the deeds deposited by the widow as a security are now charged with the £2000.

Mr. Southgate and Mr. Marten, for the Plaintiff, a creditor, argued that the act of the widow before she had obtained letters of administration was ineffectual, and that the grant of administration could not have relation back; *Doe d. Hornby v. Glenn* (1 Adol. & E. 49). That the doctrine laid down by Lord Thurlow in *Russel v. Russel* (1 Bro. C. C. 269; and Tudor's Lead. Cas. Eq. 440) had been repeatedly disapproved of; *Ex parte Coming* (9 Ves. 115); *Ex parte Haigh* (11 Ves. 403); and only applied in a clear case, and that in the present there was no sufficient proof of the deposit.

April 22. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, what, if any, lien Mr. Underwood has, in this state of things, over the deeds of Morley as a security for this sum of £2000. I am of opinion that the claim made by Mr. Underwood for a general lien on all the deeds of the testator Morley cannot be sustained. Assuming that he had such a right on the death of Morley, by reason of Morley having withdrawn the deeds from the box which were in the joint custody of [474] himself and his co-executor, by means of which withdrawal the particular deeds which were deposited as a security cannot be ascertained, and assuming that this took place in consequence of the act of Morley himself, still I am of opinion that, when Mr. Underwood accepted from Mrs. Morley the selection of such deeds as he thought fit as a substitute for the deeds deposited by Mr. Morley, he entered into a contract with her, by which, in consideration of her allowing him to take these particular deeds delivered to him, he abandoned his claim upon the remainder, and that, provided this transaction, by which one set of deeds was substituted for a general lien on the whole, was valid, then that Mr. Underwood thereby waived his general lien and accepted this particular lien in lieu thereof.

The question is, however, whether this binds the general creditors of Morley, and I am of opinion that it does. Not to put it any higher than this:—there was a reasonable doubt whether Mr. Underwood was not entitled to a general lien on all the deeds of the testator Morley to secure the £2000; the satisfaction of this claim and the determination of this doubt by the executrix, by giving Mr. Underwood a lien on specific deeds, was, in my opinion, a sufficient consideration to support the transaction, and all the persons interested in the estate of Mr. Morley are concluded by this arrangement.

I am of opinion that Mr. Underwood has a lien for the £2000 on the deeds so

selected by him, but not on any other deeds or papers belonging to the estate of the testator Mr. Morley.

[475] MASON v. MORLEY (No. 2). *March 11, April 22, 1865.*

A solicitor deposited some of his own deeds as a security for a sum of money due to two clients in a box belonging to them. He retained the box, but after his death it was found that he had abstracted the deeds from it, and they could not be distinguished from the solicitor's other deeds. Held, that the clients had a lien on all the solicitor's deeds for their debt.

Under the decree for the administration of the estate of Mr. Morley, a second claim was made jointly by Mr. Underwood and Mr. James Wm. Godber, as the trustees and executors of the will of Robert Godber. The facts relating to this claim were as follows:—

Robert Godber died in January 1857, and, in March 1863, the executors lent £600 to Mr. Hickling on the security of an estate belonging to him situate at Sherwood. Mr. Morley, the testator, acted as solicitor for both parties in this transaction. Hickling afterwards sold the estate to Mr. Webster for £1250. Morley informed the executors of this circumstance in December 1863, and pressed them to convey the estate to Webster free from incumbrances, and to take his, Webster's, guarantee for the payment of the £600, and Morley also suggested that they should take, as a security for the repayment thereof, the deposit of a Lloyd's bond of the Cardigan Railway for £1000 in the possession of Webster. The executors declined to accept this guarantee and security, but they executed the deed of conveyance to Webster, on receiving from Mr. Morley a memorandum in writing, signed by him, acknowledging that he had in hand the £600 and interest.

Soon after this, on the 5th February 1864, they pressed Morley to give them some security for this £600, and thereupon he consented to this and placed a parcel of deeds of his own property in the box belonging to [476] the trustees and executors of Robert Godber; this box was in his custody as their solicitor.

After Morley's death, on examining the box, it appeared that the deeds so deposited had been withdrawn, and they could not be identified by the executors.

Amongst the papers of Mr. Morley were a promissory note from Hickling, the purchaser, to Mr. Morley for the sum of £600, being the sum of £600 advanced on the mortgage, together with interest thereon, and also the Lloyd's bond for £1000 given by the Cardigan Railway. These two documents had, in fact, been taken by Mr. Underwood (see *ante*, p. 472), in his character of executor of Joseph Godber, from amongst the documents submitted to him by the widow of Morley for his selection, but one only, viz., the promissory note, was mentioned in the schedule to the memorandum of deposit, the Lloyd's bond was not. In this state of circumstances, Mr. Underwood and Mr. James W. Godber, as the executors of Robert Godber, claimed, in the first place, a general lien on all the deeds in the possession of Morley at the time when this deposit of deeds was made, and also a particular lien on the promissory note for £600, and also on the Lloyd's bond, as having been given by Hickling in order to secure the amount originally due from him on the said mortgage for £600.

Mr. Selwyn and Mr. Freeman, for the claimants, the executors of Robert Godber. Mr. Southgate and Mr. Marten, for the creditors of Morley.

[477] Mr. Selwyn, in reply. See the cases cited *ante*, page 473.

April 22. THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the claimants have not any lien on the promissory note or on the Lloyd's bond. It is obvious that they refused this security at the time when it was offered; and that Morley, in the conversation in February 1864, referred to this fact, and stated that he had managed it or would manage it in another way.

But I think that they are entitled to a general lien on the deeds of Morley, the testator, of which he was possessed at that time.

It is argued against this that such a lien could only be constituted by an actual

deposit of the deeds, and no such deposit was made or existed in this case; but I think that there was an actual deposit in this case, by the circumstance that the deeds were deposited in the box which was the property of the executors of Robert, and from which, without their sanction, Morley was not entitled, as their solicitor, to remove anything. If the deeds had remained in the box and had been discovered there after the death of Morley, it would, in my opinion, be impossible reasonably to contend that the deposit had not been made. The fact that the box was afterwards opened by Morley does not, in my opinion, alter the case. Whether it had or had not been left in his custody as their solicitor; whether it had or not been locked, and the key retained by the executors; whether it had or not been forcibly opened by Morley, or simply unlocked by Morley, and the deeds abstracted by him or by any other person with or without his con-[478]currence, in all these cases, it seems to me that the consequence is the same, and that the accidental or improper removal of the deeds by Morley or by a stranger would not take away or derogate from the validity of the deposit made by him, on the faith of which the executors of Robert, it must be assumed, as is probably the fact, abstained from taking compulsory measures against Morley to obtain payment of or satisfactory security for the money due.

[478] RIDLEY v. RIDLEY. March 7, 9, April 21, 1865.

[S. C. 34 L. J. Ch. 462; 12 L. T. 481; 11 Jur. (N. S.) 475; 13 W. R. 763.]

That part of the fourth section of the Statute of Frauds (29 Car. 2, c. 3), which requires agreements not to be performed within a year to be in writing and signed, does not apply to cases in which the performance may, by possibility or accident, be extended beyond that period; it is to be confined to cases where the agreement is not to be performed and cannot be carried into execution within that space of time. Therefore, where A. B. agreed by parol, for valuable consideration, to leave C. D. a certain amount by his will, and A. B. died fourteen years after the agreement: Held, that the Statute of Frauds did not apply.

A. B., a trustee, verbally promised his *cestuis que trust* that if they would concur in a sale of the trust estate, for its full value, to C. D., he would bequeath to them, by his will, "at least as much as they would get under their father's will." A. B. had an interest in the purchase: Held, that the contract was binding, though by parol; secondly, that there was a sufficient consideration; thirdly, that it was sufficiently certain, and fourthly, that this Court would enforce it.

This was a suit, instituted by the widow and children of George Ridley, deceased, to obtain from the estate of Samuel Ridley, also deceased, compensation for and satisfaction of a promise, alleged to have been made by Samuel Ridley, to leave, by his will, to the children of George as much as they would get under the will of their father, provided they would concur in conveying a copyhold estate, part of the property of their late father, to Edward Ridley, who was the brother and partner of Samuel.

George Ridley, the father of the Plaintiffs, made his [479] will on the 18th of September 1844. By it he appointed his brother Samuel, his widow (the Plaintiff Mary Muskett Ridley), and her brother Thomas Eaton Lander, his executors. He left all his property to his executors, in trust for the sole use of his widow during widowhood, and, upon her death or marriage, to apply the whole income for the joint benefit of his children until the youngest attained twenty-one, and then the whole property was to be equally divided between them.

He died in August 1846, and all the executors proved the will.

George Ridley left six children, five of whom were infants at the date of his death, two had since died in infancy, and the remaining four, together with Wm. T. Mavins, the husband of one of the daughters, were Co-plaintiffs with their mother.

George Ridley's personal estate was small, his debts were considerable, and the principal property he had consisted of a copyhold estate of Hopstone in the manor

of Claverley in Shropshire, which was the property in question in this suit, and was mortgaged to the extent of £4000. This estate was conveyed to Edward Ridley for the sum of £7301 by an indenture bearing date the 25th March 1847. This indenture purported to be made between the three executors of George of the first part, the widow of George of the second part, the six children of George, four of whom were stated to be infants, of the third part, Edward Ridley, the purchaser, of the fourth part, and a trustee for him of the fifth part. It recited the title of George, his will, his death, the state of his family and the mortgages affecting the property. It recited that the widow and the two Plaintiffs Elizabeth Ridley and Edward William Ridley, [480] who had then attained twenty-one, were convinced that it would be very beneficial to the children of George if his real estates were immediately sold. It recited the contract for sale to Edward Ridley at the price to be fixed by two valuers. It recited that the valuers had fixed the price at £7301, free from incumbrances, or £3301 for the equity of redemption subject to the payment of the two mortgages of £1500 and £2500 affecting the same. It recited that the widow and the daughter and son who had attained twenty-one, had undertaken that the remaining children should execute the deed within one month after their severally attaining their respective ages of twenty-one years. It recited that the widow and two adult children had prevailed on the two executors of the will to concur in this sale. The indenture then, after some other recitals as to the apportionment of the purchase-money between the freehold and copyhold parts of the estate, not material to be stated for the purpose of this suit, proceeded to convey the Hopstone estate to Edward Ridley in fee, on payment of the money due for the equity of redemption, and on his entering into a covenant to pay the two mortgages affecting the property.

In June 1847 when, in fact, this deed was executed by the adult parties to it, Edward Ridley was admitted to the copyhold.

Edward Ridley was, at the time of this purchase, the partner of Samuel Ridley; they lived together, carried on business together, they kept no accounts. Samuel was unmarried, but Edward had a wife and family.

Edward made his will in October 1852, by which he left his Hopstone property to Samuel for life, then to his own widow for life, and after her decease to his [481] children successively in tail, and he died in the same month.

The Plaintiff, George Ridley, attained twenty-one and executed the deed in 1848. Mary Helen attained twenty-one and executed the deed in February 1853, and died shortly afterwards intestate and without issue. The Plaintiff, Harriette Anne Mavins, attained twenty-one in 1855, and executed the deed in June 1856. John Ridley attained twenty-one in November 1857, executed the deed, and had since died, on 23d of November 1861.

The Plaintiffs asserted that each of their executions of the deed in question was obtained by repeated asseveration, on the part of Samuel Ridley, that he would fulfil his promise to leave to each child of George the amount he could get from his father's estate. Three wills of Samuel were proved to have been made in 1852, 1857 and 1858, by which he gave legacies to the children of George, but, in the last, only to the extent of £500 in the whole.

He died on the 26th of February 1861, shortly after which his will was proved by his executors, who were the two Defendants on the record.

The evidence proved very clearly that Samuel Ridley was interested in the purchase made by his brother Edward, that, being a trustee, he could not have appeared as a purchaser, and also that the price given was the full and ample value of the property sold. On the rest of the evidence, as to whether the promise was made by Samuel, or what were the terms of the promise, the testimony was somewhat contradictory and somewhat vague. Mary Muskett Ridley and Elizabeth [482] Ridley swore, distinctly, that, at the time of the sale, Samuel urged it on, and promised that if they would accept his proposal, he would bequeath to them, by his will, *at least as much* as they would get under their father's will. Samuel Ridley repeatedly afterwards, at the close of his life, denied that he had made any such promise or any promise at all. But the Court, upon the evidence, came to the conclusion that Samuel Ridley used words as stated by these two witnesses, or words to that or to the like effect.

Mr. Selwyn and Mr. G. N. Colt, for the Plaintiffs. The verbal promise is proved and was made for valuable consideration; it was therefore binding on Samuel Ridley and on his estate; *Bold v. Hutchinson* (20 Beav. 250); *Hammersley v. De Biel* (12 Cl. & Fin. 45). The 4th section of the Statute of Frauds (29 Car. 2, c. 3, s. 4) has no application to this case, for the contract *might* have been performed within a year; *Fenton v. Emblers* (3 Burr. 1278); *Peter v. Compton* (Skinner, 353); *Wells v. Horton* (4 Bing. 40); *Jouch v. Strawbridge* (2 Comm. B. Rep. 808).

Mr. Southgate and Mr. Eddis, for the Defendants, argued that as this agreement was not in writing and was not "to be performed within the space of one year from the making thereof," it could not be enforced by this Court; 29 Car. 2, c. 3, s. 4; and see Chitty's Statutes (p. 158 (3d edit.)). That the parol engagement alleged had not been sufficiently proved, and that it amounted to mere intention and not to a contract; *Maunsell v. White* (4 H. of L. Cas. 1039); *Jameson v. Stein* (21 Beav. 5); Sugden's Law of Pro-[483]-perty (p. 53). That there was no sufficient consideration to support the agreement, and that it was too vague and uncertain for the Court to carry into execution.

Mr. Selwyn, in reply.

April 21. THE MASTER OF THE ROLLS [Sir John Romilly]. There are two questions to be determined in this case, one of fact and another of law. The first question is, whether the evidence establishes that any such promise has ever been made; and the second question is (assuming that the promise has been made) whether this Court could, in the circumstances of this case, legally enforce the specific performance of it.

I think, upon the consideration of the evidence and the whole of the accompanying facts of the case, that the only reasonable inference to be drawn is, that Samuel Ridley did, at the time of the original sale of the Hopstone estate to Edward, use words to the effect stated by Mrs. Ridley and her daughter; and accordingly, in my opinion, the question of fact must be determined in favour of the Plaintiffs.

The next question is, what are the legal consequences which flow from the fact that he has used such expressions; do they amount to an obligation which can be enforced against his estate?

The first objection urged is that the promise in this case is not in writing. This, however, is not a case that comes within the 4th section of the Statute of [484] Frauds (29 Car. 2, c. 3), which enacts that "no action shall be brought whereby to charge any Defendant upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith."

These words have long since been held not to extend to cases which may, by possibility or accident, be extended beyond the space of one year, but that the clause is confined to cases where the agreement is not to be performed and cannot be carried into execution within that space of time.

The next objection is that there was no consideration for the promise, or none sufficient to support such an agreement as is alleged. But here, also, I think the case of the Defendants fails. The evidence, I think, shews that Samuel was interested in the purchase, that the fact of his being a trustee and, therefore, vendor made it impossible for him to be openly the purchaser, and that though the property was sold *bonâ fide* and for its full value, still that he was anxious that his brother and partner should be the purchaser. The evidence, documentary as well as oral, shews Samuel's anxiety on this account, which, amongst other things, is shewn by the condition he imposed on the bequests to the infant children of George and introduced into the codicil to his will, which codicil was executed in 1853, and whereby he revoked the legacies left by him to the children of George Ridley, in the event of any one of them refusing, after having attained the age of twenty-one years, to complete the conveyance.

I think that these circumstances constitute a sufficient [485] consideration to support the promise made by Samuel, amounting to an agreement to be performed by him, by which he obtained the execution of a deed in which he took a great interest, morally at least, if he did not take a pecuniary interest in it also. In truth,

in my opinion, the fact of the partnership between his brother and himself, and the circumstances connected with that partnership, which were referred to, have brought me to the conclusion that he had also a pecuniary interest in the transaction.

It is next insisted that the words of the promise, as attempted to be proved, are too vague and uncertain to be carried into execution by this Court. However, on this point also, I am against the contention of the Defendants. Samuel Ridley was one of the executors of his brother George; he knew what George's estate would produce, or he was able to form a fair estimate of what the clear surplus would amount to, and knowing this, he promises to leave, by will, to George's children as much as they would get under their father's will. The words sworn to are "at least as much;" this is undoubtedly vague, and, if they sought to obtain more than the amount they got under their father's will, could not be defined; but I think that the fair meaning of the words is, that the gift or bequest is to be confined to that amount. This, I think, Samuel promised to do, and this, I think, he, or rather his estate, must make good. A good deal of stress was laid, in argument, on the fact that Samuel had given legacies to other legatees by the former wills, which he reduced by the last, as well as the legacies to the Plaintiffs; but I am unable to apprehend how this circumstance can affect the question before me. This case stands by itself, and cannot, if the promise be established, be altered by the fact that he treated those [486] legatees exactly as he did other legatees to whom he had made no promise. It is true, unquestionably, that he repeatedly denied that he had made any such promise, and that he did this to various persons; but I do not find that this was done, in any instance, prior to the execution of the deed by the youngest child of George on his attaining twenty-one, nor indeed did he make the will of May 1858 until after that event had occurred.

I cannot say that I have been free from doubt in this case, but I have been, to a considerable degree, influenced by the fact that this claim was not got up unexpectedly after the death of Samuel, but that the promise was stated and insisted upon during his life; and although he denied its existence, I think that the evidence the other way is preponderating, and that he either forgot his words, or considered that they had no legal validity.

I am of opinion, therefore, that the Plaintiffs are entitled to have made good to them severally, out of Samuel's estate, as much as they have severally received from the estate of their father; and that the proper inquiries and accounts must be directed to ascertain this amount, unless the parties can settle it between themselves. The Defendant must admit assets, or the usual account of Samuel's estate must be taken.

The costs must come also out of Samuel's estate.

[487] NEVINSON v. LADY LENNARD. *April 27, 28, May 26, 1865.*

The word "money," coupled with the word "cash," held confined to money strictly and properly so called.

The word "money," standing by itself, is confined to the proper meaning of that word; yet, if money be given after a direction to pay debts, legacies, and funeral and testamentary expenses, or with any other words which denote an intention, on the part of the testator, to dispose of the whole of his estate, it will be construed as synonymous with "property."

Two questions arose on this summons to vary the Chief Clerk's certificate. The first was a question of construction on the will and codicils of the late Lady Dacre. The second (assuming the construction of the will to be adverse to the interest of the late Sir Thomas Barrett Lennard) was how the interests of his younger children were to be enforced against his estate and to what extent.

The first testamentary instrument referred to a prior will, which was not in existence, and was probably destroyed by the testatrix, and the first testamentary instrument contained a devise of two cottages to the person interested in the real estates of Lord Dacre.

The second testamentary instrument, on which the question principally arose, was in these words:—

"No. 2. When all my just debts and legacies are paid, without the smallest deduction arising from any sort of taxes, *I give the residue of all my money*, either in my banker's hands or elsewhere, if any such cash be remaining, in trust for my dear Mr. Lennard's (NOTE.—Meaning Sir Thos. B. Lennard's) younger children, to be laid out in some sort of security, the produce of which to be divided equally among them according to their father's approbation as to the time."

The question was this:—whether the word "money" did not include all the residue of the testatrix's estate.

By the third testamentary instrument Lady Dacre [488] gave £2016 consols to Sir Thomas Barrett Lennard, upon trust for her sister, and, after her decease, for two nieces, and, after the decease of the survivor of all, then in trust for the younger children of Sir Thomas Barrett Lennard.

The fourth testamentary instrument was to this effect:—

"No. 4. I, the Right Honorable Ann Dowager Lady Dacre, do hereby give and bequeath unto Sir Thomas Barrett Lennard, Bart. (who I have called in my will Mr. Lennard), who is to succeed me in the estates, all arrears of rent, both of my estates in Ireland as well as in England, that may be due or in arrear at the time of my decease, and also all my live and dead stock, horses, carts and carriages."

The fifth professed to be a will. By it the testatrix gave some legacies to servants by name, and said "any dividends due me in the public funds I look upon as my own property to the day of my death," &c., and after some specific legacies she proceeded thus:—

"I give to Sir Thomas Barrett Lennard, Baronet, who is to succeed me in the estates entrusted to me by my dear lord for my life, all arrears, my stock of every denomination after having paid all my just debts and legacies, and when all is closed, I desire, should there be any surplus, that such sum may be laid out in the funds for the benefit of his younger children. And I appoint my dear friend Sir Thomas Barrett Lennard my whole and sole executor to see my wishes complied with."

Number eight was in these words:—

"No. 8. When all my debts and legacies are paid, should there be sufficient remaining of my own property, I desire my executors will pay to my two old [489] valuable servants Swan and Lackery, in addition to what I have given them in my will, £50 to each of them in compensation for the trouble they have had in my removal to Beckenham, in which case I give the surplus of all belonging to me at that place, which will restore to Sir Thomas the furniture he supplied me with, and he will, of course, be entitled to everything belonging to me at Beckenham."

The testatrix died in 1806, and the eleven testamentary instruments were duly proved by Sir Thomas Barrett Lennard.

Sir Thomas Barrett Lennard died in 1857, and Lady Lennard was his executrix.

The questions were, first, whether the general residue of Lady Dacre's estate passed to Sir Thomas Barrett Lennard; and, secondly, whether the claims of his children had been satisfied or were barred by lapse of time, *laches* or acquiescence.

THE ATTORNEY-GENERAL and Mr. Speed, for the Plaintiff Mrs. Nevinson, a daughter of Sir Thomas Barrett Lennard. *Legge v. Asgill* (Turn. & R. 265); *Rogers v. Thomas* (2 Keen, 8); *Stocks v. Barrè* (Johns. 54); *Grosvenor v. Durston* (25 Beav. 97); and see *Langdale v. Whitfeld* (4 Kay & J. 426); *Chapman v. Reynolds* (28 Beav. 221); *Gover v. Davis* (29 Beav. 222).

Mr. Baggallay, Mr. Hobhouse, Mr. Selwyn, Mr. Busk, Mr. Druce and Mr. Haddan, for the Defendants. *Attorney-General v. Johnstone* (Ambl. 577).

[490] May 26. THE MASTER OF THE ROLLS [Sir John Romilly]. On the question of the construction of the the word "money," in the second testamentary paper, there is no doubt that though the word "money," standing by itself, is confined to the proper meaning of that word, yet, if it be given after a direction to pay debts, legacies and funeral and testamentary expenses, or with any other words which denote an intention, on the part of the testatrix, to dispose of the whole of her estate, it will be construed to be synonymous with "property," and in the popular and inaccurate sense of the word "money."

Here, if this testamentary instrument stood alone, I should be disposed to think that the word *money*, standing alone, meant a general residuary bequest, and that this codicil disposed of all the personal estate of the testatrix. But the interposition of the word "cash," which was wholly unnecessary if the testatrix intended to dispose of all her personal estate, and which, even in loose popular language, is never employed to mean property generally, throws great doubt on the propriety of extending the word "*money*" to include all her personal estate. It is, therefore, necessary to look at all the rest of the will and examine the scope and effect of the instruments taken collectively.

By the fourth instrument the testatrix gives all the arrears of rent due to her at the time of her decease to Sir Thomas Barrett Lennard; and by the fifth she seems to make a distinction between property at her disposal which she can properly call her own, and that which she cannot so designate. She then proceeds in these words:—"I give to Sir Thomas Barrett Lennard," &c. [see *ante*, p. 488].

[491] I think that the proper grammatical construction of these words is to give to Sir Thomas Barrett Lennard all arrears of rent, dividends or interest, and also her stock of every denomination, and that a stop is to be inferred after the word *legacies*. I am of opinion that she did not intend, by this instrument, to revoke No. 4, but that she meant to confirm and extend it, and also to give to Sir Thomas all her stock, and which words, I am of opinion, included all the stock she had, of any denomination, in any of the public funds. The surplus spoken of is, in my opinion, the surplus of the property after payment of debts and legacies, after deducting the arrears of income then due to her, and after deducting every denomination of stocks and funds to which she was entitled.

This view of the case is also, in my opinion, confirmed by an inspection of the original document itself, which introduced a stop, resembling a semi-colon, after the word *legacies* in this fifth testamentary instrument. I think that this view also is confirmed by the eighth codicil, which keeps up the distinction between two sorts of property of which she had power to dispose, and in which she seems to treat all the property which came to her from her deceased husband as belonging to Sir Thomas Barrett Lennard, but all that she had saved, the dividends due to her at her death and the moneys at her bankers as being her own exclusive property. It seems to me that it is in this sense that she refers to the fact that Sir Thomas Barrett Lennard will "of course be entitled to everything belonging to her at Beckenham."

The result that I have arrived at, from taking all these instruments together, and making them, as far as possible, consistent with each other, is that the word [492] "*money*" coupled with the word "*cash*" in the second testamentary instrument must be confined to *money*, strictly and properly so called, and not be extended so as to include all the personal property of the testatrix.

I think also that words of the fifth testamentary instrument give to Sir Thomas Barrett Lennard all arrears both of dividends and interest as well as of rents due at her decease, and also all the stock in the public funds that she possessed, and that only the surplus of her property after this is given to the younger children of Sir Thomas Barrett Lennard.

This will materially affect the case, as the finding of the Chief Clerk will have to be materially modified, and I cannot tell what effect this construction will have on the ulterior questions until I have ascertained what will be the amount to which the younger children would, on the decease of the testatrix, have been entitled to receive upon the footing of the construction which I have thought it proper to put on this series of testamentary instruments. The rest of the case, therefore, must stand over until the certificate is altered in accordance with the opinion which I have here expressed, and it must be referred back to Chambers for this purpose.

NOTE.—I have been informed that, upon appeal, the Lords Justices differed.

[493] UNITED KINGDOM LIFE ASSURANCE COMPANY. May 1, 1865.

[S. C. 12 L. T. 441; 11 Jur. (N. S.) 424; 13 W. R. 645; 6 N. R. 59. See *In re Webb's Policy*, 1866, L. R. 2 Eq. 458; *In re Haycock's Policy*, 1876, 1 Ch. D. 616; *Matthew v. Northern Assurance Company*, 1878, 9 Ch. D. 80.]

A mere stakeholder may pay a fund into Court under the Trustee Relief Act (10 & 11 Vict. c. 96).

An insurance company paid the amount of a policy, the right to which was disputed, into Court, under the Trustee Relief Act. Held, that they were entitled to their costs from the persons wrongfully claiming the fund.

In 1837 George Freeman effected an assurance on his life for £1000. He assigned it as a security, and afterwards became bankrupt, and the policy was sold. It afterwards underwent several changes of ownership.

George Freeman died in 1864, and his death having been proved to the satisfaction of the insurance company, they were ready to pay the amount to the three Petitioners, but they were prevented by three other persons named Alderson, who set up a claim to the amount. The company thereupon paid the amount into Court under the Trustee Relief Act (10 & 11 Vict. c. 96).

The Petitioners now presented a petition for payment out to them of the fund; they made the insurance company and the Aldersons Respondents.

Mr. Baggallay and Mr. Everitt, for the Petitioners.

Mr. Caldecott, for the Aldersons, argued that even if they failed in their claim, still that they were not liable to pay costs, for the Trustee Act did not apply to such a case as the present, where there was no trust fund, but a mere debt, and where the company had, therefore, no right to pay the money into Court. That the only remedy for a debtor, where the right to the debt was disputed between parties claiming under the creditor, was to file a bill of interpleader; *Jones v. Farrell* (1 De G. & J. 218).

[494] Mr. Wickens, for the insurance company, as to the right to pay in under the Trustee Act, cited *Re Hall* (5 Law T. 395).

THE MASTER OF THE ROLLS [Sir John Romilly] decided that the Petitioners were entitled to the fund, and he ordered payment of it to them. He said that he concurred with Vice-Chancellor Wood that mere stakeholders might pay money into Court under the Trustee Relief Act, though they might not, strictly speaking, be termed trustees. He ordered the costs of the company of and relating to the payment into Court and of this application, as between solicitor and client, and the costs of the Petitioners, to be paid by the Respondents, the Aldersons.

Reg. Lib. 1865, B. fol. 880.

[494] Re MASON'S WILL. May 27, 1865.

[13 W. R. 799; 6 N. R. 193.]

An unpaid legacy bequeathed to a testatrix, held not to pass under her will by the words "moneys and securities for money."

A. B. (a married woman) died in 1858, having bequeathed "her moneys and securities for money" to one, and all "her separate personal estate and effects not therein-before disposed of" to another. In 1863 A. B.'s mother died, having bequeathed to her a legacy and half her residue, and which bequest was saved from lapse by the Wills Act (1 Vict. c. 26, s. 33). Held, that this legacy passed under the residuary, and not under the specific, bequest in A. B.'s will.

Whether as to bequests to a child, who predeceases the testator, which are protected from lapse by the Wills Act (s. 33), the will of the child is to be construed as at the death of the parent or of the child, *quære*.

Mrs. Mason, the mother of Mrs. Parker (the wife of William Parker), made her will in 1856, by which she bequeathed £1000 to Mrs. Parker for her separate use, to be paid at the end of six months next after the decease of the testatrix; and she also gave her half of her residue.

Mrs. Mason survived her daughter and died in 1863.

[495] Mrs. Parker died previously, in 1858, having made her will in 1857, whereby, under a power in her settlement, she appointed the "sums of £400 and £735, 2s. 8d., and all other her moneys and securities for money, whatsoever, over which she had any power of disposition," to her executors, upon trust to pay her just debts and funeral and testamentary expenses, and, subject thereto, on certain trusts for her two sons and their issue. She also, by virtue of every other power, gave "all her books, plate and all other goods and chattels and separate personal estate and effects whatsoever, not thereinbefore disposed of," unto her two sons Samuel and William absolutely.

Mrs. Parker, on her death in 1858, left sons and other issue, and her husband survived her. Her husband died in 1860.

The executor of Mrs. Mason paid the £1000 legacy and half the residue into Court (£1295) under the Trustee Relief Act, and the question was, to whom this fund belonged.

The bequest had not lapsed, notwithstanding the death of Mrs. Parker in the lifetime of her mother; for by the Wills Act (1 Vict. c. 26, s. 33), it is enacted, in substance, that where any issue of a testator, to whom a devise or bequest is made, shall die in the testator's lifetime, leaving issue who shall be living at the testator's death, "such devise or bequest shall not lapse, but shall take effect, as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Mr. Hobhouse and Mr. Nalder, for Mrs. Parker's son Samuel. First, although Mrs. Parker predeceased [496] her mother, the bequest of the £1000 and of half of the residue did not fail, but it passed by Mrs. Parker's will; 1 Vict. c. 26, s. 33. Secondly, it passed under the residuary gift and not under the prior bequest of "moneys and securities for money," for the legacy, which did not become payable until three months after Mrs. Mason's death, was, in no sense, "moneys or securities for money" of Mrs. Parker. Under the 24th section, the will is to speak and to take effect as at the death of Mrs. Parker, and, at that time, nothing was due to her from the estate of her mother. The words "moneys and securities for money," must be something *ejusdem generis*, and similar to the £400 and £735, 2s. 8d.

Mr. Horton Smith, for the executors of the son William, who died in 1862, in the same interest.

Mr. Baggallay and Mr. Johnson, for the executors of Mrs. Parker. First, this fund passed by the will of Mrs. Parker, and, secondly, it passed under the gift of "moneys and securities for money." These words are amply sufficient to pass the money secured in Court, which represents the £1000 and half the residue. In *Johnson v. Johnson* (3 Hare, 157) Vice-Chancellor Wigram held that, under this clause of the statute, the issue do not take by substitution, but that the legacy forms part of the estate of the legatee, and does not pass as undisposed-of property. This, being separate estate, passed by her will; *Pearce v. Graham* (1 New Rep. 507).

Secondly, the direction to pay the debts, &c., tends to shew that it passed under the prior gift; Jarman on Wills (vol. 1, p. 730 (3d edit.)).

Mr. Southgate and Mr. Field, for the representatives [497] of Mr. Parker, the husband, argued that this fund did not pass by Mrs. Parker's will, for, at her death, it had no existence, and could not be said to form part of her "separate personal estate." That it was undisposed of and belonged to her surviving husband and not to her next of kin.

They cited *Winter v. Winter* (5 Hare, 306); *Wisden v. Wisden* (2 Sm. & Giff. 396).

Mr. Everitt, for the children of the son William.

Mr. Streeten, for the executors of Mrs. Mason.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this fund passed under the residuary clause contained in the will of Mrs. Parker.

I think that a very nice point might arise on the statute, as to whether the will of

a legatee who predeceases his father, the testator, is to be construed according to the event, or whether it is to be construed as if the legatee had survived the testator, or, in other words, as if the testator had predeceased the legatee.

There being two different periods which may be referred to, very nice questions might arise in regard to the rights of legatees, the next of kin, and the like, which I have not to decide on the present occasion.

I am, however, of opinion that, in which ever way it is treated, this property passed by the will of Mrs. Parker. If she is to be deemed to have survived her [498] mother, then she was at that time a *feme sole*, and this fund formed part of her property, which she could dispose of as she pleased. But if it is to be taken that her mother predeceased her, then her mother left her this property for her separate use, and she had equally the power of disposing of it by will.

Considering that, in either alternative, it passed by her will, the only question which I have to consider is, whether it passed under the first appointment of all "moneys and securities for money," or under the disposition of her "separate personal estate and effects."

I look at it in this way :—At whatever time Mrs. Parker's will is to be construed, it must be construed as if Mrs. Mason's will were then in existence. Then I have to consider what will pass under the words "moneys and securities for money" where a testator directs his "debts and funeral and testamentary expenses" to be paid out of his "moneys and securities for money," and afterwards makes a general residuary bequest of the whole of his property "not thereinbefore disposed of." It is clear that the words "moneys and securities for money" do not include the general residue, because there is an independent residuary gift and a definition of what is not to fall into the general residue; and that must be the case whether it be the will of a man or of a *feme coverte* having a mere power of appointment. Mrs. Parker defines what she means to appoint, in the first place, as being "all her moneys and securities for money," and that which is not "moneys and securities for money" is to pass by the general residuary bequest. I must assume that, at the time at which her will operated, a person had left her £1000, but which had not been paid. If so, it was neither "money nor a security for money," but a mere debt due [499] to her estate. I know of no case in which the words "moneys and securities for money" have been so extended as to include a debt due to the testator, and I do not think that any such case can be found. No doubt there are very nice distinctions on the subject, thus bills of exchange are securities for money, but I think that an I O U has been held not to be a security for money, which is a singularity. Stock in the funds is considered a security for money, but shares in companies are not.

It is unnecessary to go into an examination of the minute distinctions between these cases, but I do not find a single case in which an unsecured debt due to a testator had been held to be either "money or a security for money." A legacy is a mere debt from the estate of the testator, unsecured, except in this sense :—that this Court will enforce the will and secure the legacy; but that is not what is meant by a "security for money."

The half of the residue is still less a security for money, for it depends on the result of taking the accounts of the estate.

I am of opinion that this fund did not pass under the words "moneys and securities for money," but under the residuary gift of all "her personal estate and effects whatsoever." Being of that opinion, I will make a declaration to that effect.

[500] MORSE v. MARTIN. Feb. 28, 1865.

A father, under a power to appoint to his children, appointed a share to a daughter for life, for her separate use, with remainder as she should by will appoint: Held, that this was a good execution of the power.

The Court aided the defective execution of a power in favour of a daughter, as against her brothers, who, in default of appointment, would participate in the property.

The testator died in 1812, having, by his will, bequeathed £10,000 in trust for Alexander Thomas Morse and Henrietta his wife, successively, for life, and afterwards

as follows:—"Upon trust to pay the said principal sum of £10,000 unto, between or amongst all and every the child or children of them the said Alexander Thomas Morse and Henrietta Morse, or such one or more of the said children, in such parts, shares and proportions, and with, under and subject to such powers, provisoes and limitations as he, the said Alexander Thomas Morse, shall, by any deed or deeds in writing, or by his last will and testament duly executed and *attested by two or more credible witnesses*, direct, limit or appoint. And in default of any such direction, limitation or appointment, upon trust to pay the said sum of £10,000 unto the children of the said Alexander Thomas Morse and Henrietta Morse equally, to be divided between them, share and share alike, and their respective executors and administrators."

In 1814 Alexander Thomas Morse, by his will, attested by two witnesses, appointed the fund amongst his children, and as to £3000 he bequeathed it to his daughter Harriet for life, with remainder (which failed) to her husband and children, and in case she should not happen to marry, then to his three sons George, James and Anthony.

On the next day Alexander Morse made a codicil, *attested by one witness only*, whereby he revoked the [501] gift of the £3000 to his three sons, and appointed £1000 part of it, "for such uses, intents or purposes" as his daughter Harriet should, by her last will, appoint, and he appointed the remaining £2000 "upon trust for George Morse, James Morse and Anthony Morse [his three sons], their executors, administrators and assigns."

Harriet survived her parents and died a spinster in 1862. She made a will in 1859, disposing of "the whole of the property she might be entitled to," and she appointed a residuary legatee.

Several questions arose. First, whether the Court would aid the execution of the power attempted to be exercised by the codicil, which was attested by one witness only. Secondly, whether Alexander Thomas Morse had authority to appoint the £1000 to Harriet for life, and then as she should appoint by will. Thirdly, whether the codicil might not be good as a revocation, though invalid as a new appointment.

Mr. Cole and Mr. Renshaw, for the Plaintiff, the executor of Harriet. First, the Court will supply a defective execution of the power in favour of a child. This was done in *Lucena v. Lucena* (5 Beav. 249); *Hume v. Rundell* (6 Madd. 331); *Chapman v. Gibson* (3 Bro. C. C. 229). The appointment in remainder, as Harriet should by will appoint, is a good execution of the power. This was decided in *Bray v. Bree* (2 Cl. & Fin. 453); *Phipson v. Turner* (9 Sim. 227). Here the power is to appoint to the children, "subject to such powers, provisoes and limitations," &c., which would authorize the creation of a power for her protection.

[502] Mr. J. Napier Higgins, for the executor of James, and Mr. Williamson, for the representatives of George. The defective execution of a power will be supplied in favour of a child, but not as between children and persons having equal equities; *MacAdam v. Logan* (3 Bro. C. C. 310), Sugden on Powers (p. 316 (7th edit.)). To aid one is merely to defeat the other. It does not appear that the point was argued in *Hume v. Rundell* (6 Madd. 331), and in the case of *Lucena v. Lucena* (5 Beav. 249) there is no argument and no reasons given for the judgment; and besides this, there was no adverse interests as between the children. Secondly, the creation of a power was unauthorized; it was an attempt to delegate the old power. Thirdly, the revocation in the codicil was only to give effect to the new execution of the power, and therefore failed with it; Jarman on Wills (vol. 1, p. 156 (3d edit.)); Hawkins on Wills (ch. 10, p. 3).

Mr. Selwyn and Mr. Waller, for the legal personal representatives of Anthony. The cases of *Bray v. Bree* and *Phipson v. Turner* have no application, for the power to appoint by will was for the benefit of the married women, by protecting the property from their husbands; but here the power is only given to Harriet in case she shall not be married. The Court will not supply the defect in the execution of the power.

Mr. Baggallay and Mr. T. Stevens, for the legal personal representatives of Maria, as to the revocation, cited Jarman on Wills (vol. 1, p. 156 (3d edit.)); *Tupper v. Tupper* (1 K. & J. 665); *Onions v. Tyrer* (1 P. Wms. 343); and see *Ibbott v. Bell* (*ante*, p. 395).

[503] THE MASTER OF THE ROLLS [Sir John Romilly]. If I were to decide against the Plaintiff I should be overruling a settled principle relating to powers which has been established by a series of authorities.

I think it quite settled that, in dealing with powers, when you give the appointee the absolute power of disposing of the property, you make an appointment in favour of that person; *Bray v. Bree* (2 Cl. & Fin. 453) is always cited as an authority for that proposition. In *Thornton v. Bright* (2 Myl. & Craig, 230), under a power to appoint to children, an appointment was made to trustees for the separate use of a daughter for life, with power, if she predeceased her husband, to appoint by will to her children, and it was held that this was a perfectly good execution of the power. Again, *Phipson v. Turner* (9 Sim. 227) is expressly in point. If I were to hold otherwise, I should overrule many authorities, and disregard what has been stated by Lord St. Leonards to be a leading principle.

I am therefore of opinion that the appointment to Harriet for life, and in case she shall not happen to marry, for such uses, intents and purposes as she shall by will appoint, is a good execution of the power given to her father.

That being so, it is not disputed that this Court will supply a defective execution of a power in favour of a daughter. But the point raised is this:—That the Court will not supply the defect in favour of a daughter to the prejudice of a person standing in the same relationship, as, for instance, as between brother and sister, it will not aid a defective execution in favour of a sister so as to take the property away from her brother. The answer to this was properly given in argument, which is this: that if the others are provided for, it will. The point is decided by *Lucena v. Lucena* (5 Beav. 249) and *Hume v. Rundell* (6 Madd. 331).

I am of opinion that this was a good execution of the power, and that the defect in its execution will be supplied by this Court.

[504] DYER v. DYER. May 5, 1865.

[S. C. 34 L. J. Ch. 513; 12 L. T. 442; 13 W. R. 732.]

A. B. was tenant in fee-simple of an estate, subject to an executory devise over in the event of his death under twenty-one without issue. During the minority of A. B., timber, which was deteriorating, was cut with the sanction of the Court. A. B. died under twenty-one, without issue. Held, that the produce of the timber passed, as personalty, to his legal personal representative.

The testator devised all his real estates to trustees and their heirs, upon trust as to Falfield for his eldest son Samuel Webb Dyer, his heirs and assigns for ever; and as to Cromhall, in trust for his son John Adey Dyer, his heirs and assigns for ever; and in case either died under twenty-one without issue, then the trustees were to stand seised of the hereditaments devised to him in trust for the survivor, his heirs and assigns for ever.

The testator died in 1861.

By the decree, in addition to the usual accounts, an inquiry was directed "whether there were any and what timber trees or other trees standing on the testator's estate, which were in a state of decay or would deteriorate [505] by standing, or the standing of which would be prejudicial to the other trees, and which it would be for the benefit of all parties interested in the said estates to have felled and sold." And it was ordered that the trustees, "with the approbation of the Judge in Chambers," should proceed to fell and sell or sell such trees as, on the result of the inquiry, it appeared ought to be felled."

Timber had been cut under this direction, and the produce (£1215) had been paid into Court.

After the timber had been cut, John Adey Dyer died under twenty-one and without issue, and the question was, to whom the produce of the timber cut on the Cromhall estate now belonged.

Mr. Baggallay and Mr. North, for the legal personal representatives of John Adey Dyer.

Mr. Casson, for the trustees.

Mr. Selwyn and Mr. C. Hall, for Samuel Webb Dyer.

Cooke v. Dealey (22 Beav. 196); *Ozenden v. Lord Compton* (2 Ves. jun. 69); *Field v. Brown* (27 Beav. 90); *Lygon v. Lord Coventry* (14 Sim. 41), were cited; and see *Turner v. Wright* (2 De G. F. & J. 234) and *Craig on Rights to Trees and Woods*.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the produce of this timber forms part of the personal estate of John Adey Dyer. The case is this:—

[506] An infant is entitled to an estate in fee-simple. There is timber upon the estate which it is desirable to cut, and which the Court directs to be cut, and the produce is invested and secured in Court; the question is, to whom does that fund belong? I am of opinion that it belongs to the then owner of the estate, for it was cut for his benefit, and not for the benefit of any person who might thereafter become the owner of the estate. Then does it make the slightest difference that there is an executory devise over, in case he should die under twenty-one? When the timber was cut its character was changed, and it was converted into personalty. Suppose this young man had survived the age of twenty-one and had died intestate, it would have been personal estate, and not real estate. If so, can the fact of his dying two or three days sooner or later alter the character of the fund? The real thing which the Court has to consider in all these cases is, what was the character of the fund when it was produced. If the Court, in administering the real estate of an infant, finds that it would be for his benefit to cut the timber, the produce belongs to him as personal estate, and the Court does not consider whether, if he dies in his infancy, his heir at law or his next of kin would take it; but it simply directs the timber to be felled for the benefit of the person who is then the owner of the fee-simple. Thereby so much of the realty is converted into personalty: not when the order is made, but at the time when the timber is severed.

In my opinion, the fact of this young man having died before he attained twenty-one no more alters the character of the timber or the money derived from it than if he had died two or three days after attaining twenty-one; nor does the fact that there is an executory devise [507] over, in the event of his dying under twenty-one without issue, make any difference.

Now let us see if the cases are not consistent with this. In *Ozenden v. Lord Compton* (2 Ves. jun. 69), the Court, in dealing with the estate of a lunatic, cut timber during his life. When that was severed it became personalty, and on the death of the lunatic as personalty went to his next of kin, and not to the heir at law.

In *Field v. Brown* (27 Beav. 90) an estate was settled to one for life, impeachable for waste, with remainder to her children in tail, and in default of such issue to her brother for life, with remainder to his children in tail, and in default of such issue to him in fee. During the infancy of both it became beneficial to cut some timber, which was done: I held that the timber money was in the same situation as the estate, that it had never lost its character of realty, that it was the same as the produce of real property taken by a railway company invested in the funds in order to be reinvested in land. The tenant for life had no right to cut the timber, but the Court cut it for the benefit of all persons interested in the estate; the produce, therefore, remained settled to the same uses as the real estate itself, and impressed with the character of real estate, until, by some act of the owner of the estate in fee-simple, he elected to take it as, or converted it into, personalty.

The same principle is found in *Cooke v. Dealey* (22 Beav. 196). There the Court had to administer an estate, and, for the purpose of raising a fund to pay debts and legacies, it became necessary to sell a part of the real estate. It [508] ought to have sold the exact amount necessary, but that was impossible, and the produce of so much as had been unnecessarily sold was held to retain the character of real estate. In my opinion those three cases were rightly decided; they are consistent with each other, and they clearly establish that this fund belonged to John as part of his personal property, and that, at his death, it devolved, as such, upon his legal personal representative.

[508] BLISS v. SMITH. April 25, 1865.

In building contracts, this Court interferes in two cases, first, where there is collusion between the employer and the architect to injure the contractor, and, secondly, where the accounts are too complicated to be taken at law. If neither of these exist, the remedy of the contractor is at law.

In January 1862 Mr. Davis, a builder, entered into a written contract with Mr. Edward T. Smith for the construction of a new ballroom, theatre, &c., at Cremorne Gardens for £5055.

By the terms of the contract, Mr. Smith's architects (Allom & Laforest) were to be the sole judges, upon all matters relating to the contract, and their certificate was to be "binding and conclusive on both parties;" and, on any disputes connected with the works, their decision was to be "final without appeal."

Davis proceeded with the works and received certain payments on account, but in July 1862 he became bankrupt.

This bill was filed in August 1863 by his assignees against Smith and the two architects. It alleged that a large sum remained due to the Plaintiffs in respect of the works, but that the architects had not "made or delivered [509] any certificate or award of, nor (as they ought to have done under the contract) ascertained the amount due to the Plaintiffs on account of the works comprised in the contracts, and that the Plaintiffs were wholly unable to compel or induce" them to do so. That the Plaintiffs were consequently unable to recover at law the amount due to them, inasmuch as such amount had not, through the default of the said Defendants, been ascertained. It also alleged that, although the architects had "not expressed, and could not reasonably or fairly have expressed, any dissatisfaction with the execution of the works, but were, in fact, satisfied therewith, they declined to ascertain or certify the amount due to the Plaintiffs, and withheld their certificates, contrary to and in violation of the duties undertaken by them." That in so refusing and declining, the architects had "been and were acting under the authority and at the instigation of and in collusion with Smith, who had, in fact, forbidden them to accede to the said requirements; and that the Plaintiffs were, by reason of the aforesaid conduct of the said Defendants, prevented from recovering in a Court of law the amount to which the Plaintiffs were entitled." It also alleged that the accounts could not be conveniently or properly dealt with or disposed of in an action at law, and that such action would not afford adequate relief to the Plaintiffs.

The bill prayed a declaration that the refusal of the architects to ascertain the amount payable in respect of the said works or to give certificates was a fraud on the Plaintiffs, and that the Plaintiffs were entitled to receive all sums properly payable in respect of the aforesaid works, so far as the same had not already been paid. That proper accounts might be taken of the works done by Davis under the contract and of all extra works, and for payment of the amount.

[510] Mr. Selwyn and Mr. C. Browne, for the Plaintiffs, cited *Waring v. The Manchester, &c., Railway Company* (7 Hare, 482); *M'Intosh v. Great Western Railway Company* (2 De G. & Sm. 758; 3 Sm. & G. 146, and 2 Mac. & G. 74); and see *Kemp v. Rose* (1 Giff. 258).

Mr. Baggallay and Mr. Swanston, for Mr. Smith, cited *Hotham v. East India Company* (1 Term Rep. 638); *Ambrose v. The Dunmow Union* (9 Beav. 508); *Kirk v. The Bromley Union* (2 Phill. 640); *Scott v. The Corporation of Liverpool* (3 De G. & J. 334, 364).

Mr. Southgate and Mr. Druce, for Allan, and Mr. Cottrell, for Laforest, were stopped by the Court.

Mr. C. Browne, in reply.

April 25. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is, whether the Plaintiffs are entitled to come into this Court to have the accounts taken. The cases in which Courts of Equity will entertain jurisdiction in matters which might be tried in an action at law are well defined.

Courts of Equity interfere in two cases; one, where there is collusive dealing and

concert between the employer and the person whom he has appointed architect, overseer or agent, for the purpose of injuring the contractor or defeating his claim; then equity will interfere to prevent it.

The other instance in which this Court will interfere, [511] is a matter of discretion, when there are very long and complicated mutual accounts, which cannot be conveniently taken at law. Where neither of these circumstances occur, the case is simply one for the determination of a Court of law. The cases of this class are *Waring v. The Manchester, &c., Railway Company* (7 Hare, 482), and *Scott v. The Corporation of Liverpool* (3 De G. & Jones, 334). The first was a case on demurrer, and the bill contained strong allegations of collusion and concert, which being admitted by the form of the pleading, the Court overruled the demurrers, and said that it was a case for the interference of a Court of Equity.

M'Intosh v. The Great Western Railway Company was another case of the same sort. A demurrer was overruled (3 De G. & Sm. 758; 2 Mac. & G. 74; 3 Sm. & Giff. 146), but, at the hearing, the Court made a decree, not on the ground of collusion, but on the ground of complication of accounts, which made it difficult, if not impossible, to determine the questions at law. The case, if tried at law, must have been referred, for no Court of law could have taken the accounts.

Except in cases of these descriptions, the Court will not interfere.

It is also quite settled by the case of *Hotham v. The East India Company* (1 Term Rep. 638), that the mere refusal of the Defendant's agent to give certificates does not prevent an action at law, in which the right will be determined.

These being the principles, and the burthen of proof resting on the Plaintiffs to establish that there was [512] improper collusion between Mr. Smith and the architects, I find, on referring to the allegation in this bill, that the foundation of the Plaintiffs' equity proceeds on the existence of such collusion. I then look at the evidence, and I find, not only that the Plaintiffs fail to establish it, but that it is shewn the architects acted fairly, and that the difficulty arose from Davis undertaking this contract without sufficient capital to complete it, which obliged him to resort to various expedients to raise money.

I am of opinion that the collusion has been completely disproved.

As to the question of difficulty of taking the accounts at law, nothing is shewn to satisfy me that there is any account between these parties which could not be easily taken in a Court of law.

I am therefore of opinion that the bill ought to be dismissed against all the Defendants with costs.

[513] HOOD v. OGLANDER. April 25, 28, May 1, 1865.

[S. C. 34 L. J. Ch. 528; 12 L. T. 626; 11 Jur. (N. S.) 498; 13 W. R. 705.]

Questions as to the validity of the contract and as to whether it is inequitable to enforce its specific performance must be determined at the hearing; questions of title are referred to Chambers.

Devise in fee, with an earnest hope and request that the devisee would not sell, alien or dispose of the estate, except by way of exchange or for reinvesting in other estates: Held, that the restriction was repugnant and void.

A testator devised an estate to his son in fee, and in case of his death without issue male, it was his anxious desire that he would so settle the estate and all other his estates, that the same might continue in the name of Oglander. There was no penalty or gift over. Held, that the son was owner in fee of the estate, and might deal with it as he pleased.

In 1863 the Defendant, Sir Henry Oglander, contracted to sell the Kingston estate, in the county of Somerset, to the Plaintiffs, for £12,000.

Upon the delivery of the abstract, it appeared that the Defendant was tenant in tail of 279 acres of the estate, under a settlement of 1810, and that the residue of the estate (115 acres) had been devised to him by the will of his father, who died in 1852.

By this will the testator, after referring to and confirming the settlement, proceeded as follows :—

And after reciting that it was his earnest desire that his estates in the counties of Dorset and Somerset and in the Isle of Wight should continue in the name of Oglander, the testator gave and devised all his real estate unto and to the use of his son (the Defendant), his heirs and assigns for ever. And it was his (the testator's) earnest hope and he particularly requested his son to keep all and singular the said real estate thereinbefore devised to him, and the hereditaments to which he was entitled under the said settlement "*or otherwise howsoever*, and not to sell, alien or dispose of same or any part thereof, except by way of exchange or for reinvesting the value in the purchase of other estates. And in case his said son should die without leaving [514] issue male of his body him surviving, it was his (testator's) *earnest desire* that he would so settle and devise the same manors, messuages, lands and hereditaments so devised to him as aforesaid, and also the manors, messuages, lands and hereditaments to which he was or might become entitled as aforesaid, in such manner and to such persons that the same manors, messuages, lands and hereditaments, and every part thereof, might continue in the name of Oglander."

In reference to this devise, the purchasers made the following requisition :—

"The clause contained in the will, urging the present vendor not to alienate the estate settled or devised, is important and requires consideration, and it will be satisfactory to obtain, from the vendor, an assurance that it is his intention to 'reinvest' the purchase-money 'in the purchase of other estates.' If this assurance be given, the purchasers (considering the position of the vendor) may, we think, be satisfied, otherwise it will be necessary to ascertain whether, by electing to take the benefits conferred on him by the will, the vendor may not in fact have fixed a trust even on the settled estates, in which case the clause might operate on them."

In answer to this requisition the Defendant sent "his distinct and express refusal to give any promise or enter into any undertaking with respect to this investment or the application of the purchase-money." He also declined to proceed to answer any of the other requisitions. The Plaintiff thereupon filed this bill for specific performance of the contract.

The Defendant, by his answer, said that he entered into the contract for the sale for £12,000 on a cal-[515]-culation that he would be absolutely entitled to that sum, and be able to invest it in the funds, so as to bring him in a larger income. He positively said that he would not have sold the property except on the understanding and in the full belief that he should be absolute owner of the purchase-money and entitled to deal with it as he pleased without any obligation to reinvest it in the purchase of land or otherwise, and that his views, in assenting to the sale thereof, would be wholly defeated, if he were to be under any such obligation. He submitted and insisted that, in case the Court should be of opinion that he was not absolutely entitled to sell the estate and to receive and deal, at pleasure, with the purchase-money, free from any trust or obligation whatever, then that the contract was entered into solely under a mistake and misapprehension on his part, and that he ought not to be decreed specifically to perform the contract.

Mr. Selwyn and Mr. Jasper K. Peck, for the Plaintiffs, asked for the ordinary reference as to title. They said that the Plaintiffs were willing, at a future stage of the cause, to act with respect to the purchase-money as the Court might direct. They asked that the title might be reported upon, and they said that if it should appear, upon the argument on further consideration, that the Defendant was the owner in fee of the property, without any restriction upon his ownership, the Plaintiffs were willing and desirous to complete and pay the purchase-money to him. But if, on the other hand, it should be then determined that he was only the donee of a power of sale, then the Plaintiffs were willing to complete, leaving it to the Court to give proper directions as to the investment of the purchase-money. They argued that the Defendant was not entitled to intercept the requisitions and decline to answer them [516] further, and contend at the Bar that the contract was at an end.

Sir Hugh Cairns, Mr. Baggallay, and Mr. Bagshawe, for the Defendant. The contract in question was entered into by the Defendant under the impression that he was owner in fee of the property, possessing the ordinary power of unrestricted

alienation. Then came the requisition of the purchaser's conveyancer, which not only threw doubt upon such power but also treated the property as inalienable except for the purposes of selling and reinvesting the proceeds of sale in the funds or in the purchase of other lands. It in fact turned the Defendant into a sort of tenant for life with a power of sale, but without the ordinary power to give receipts. The requisition also went further and required the Defendant to give his personal assurance that the purchase-money will be reinvested. To this requisition the Defendant's answer was that he contracted to sell as the owner in fee, and that he absolutely declined to give any such personal assurance, as it was not his intention to reinvest the money in the purchase of other lands. We contend that the construction put upon the will by the Plaintiff's conveyancer was not the correct one; but that if it were, then the Defendant, having entered into the contract by mistake, is not bound to perform his part of it. *Howell v. George* (1 Madd. 1) is exactly in point. In that case the Defendant, supposing himself to be absolute owner of an estate, contracted to sell it to the Plaintiff; but he discovered that he was only tenant for life, with power to make himself owner in fee by settling other lands of equal value to the [517] like uses. Sir Thomas Plumer held that it was not a case where specific performance ought to be decreed. For these reasons, and for no others, the Defendant declined to answer the purchasers' requisitions, and this suit has not therefore been rendered necessary by the Defendant. The Court will not allow a specific performance suit to be turned into a suit to execute the trusts of a will.

Mr. Selwyn, in reply. The rule in cases of this kind is to bring only the parties to the contract before the Court, and then to send the case to Chambers on a reference as to title. [THE MASTER OF THE ROLLS. You recollect the Lord Justice Turner's decision in *Pyrke v. Waddingham* (10 Hare, 1), as to not enforcing a doubtful title?] Yes; but the Court must hear the cause in order to determine whether the point be doubtful or not. *Howell v. George* is distinguishable, first, because there the concurrence of other parties was necessary, and the Court saw that it could not order the Defendant to procure their concurrence; and secondly, there was a condition precedent affixed to the sale, by the terms of the contract, which the Court thought it impracticable to perform. The Court will not say, at this stage of the cause, that the purchaser's objection to the title is unreasonable. The Plaintiffs are willing purchasers and are desirous to complete on being protected by the decision of the Court.

THE MASTER OF THE ROLLS [Sir John Romilly]. The arguments which have been addressed to me have shewn me the importance of pointing out exactly [518] what, in my opinion, can and what cannot be done at the hearing of a suit for specific performance. No questions, properly speaking, of title are then to be discussed; they were formerly sent to the Master, and are now referred for consideration in Chambers, upon the usual reference of title. But all questions which affect the validity of the contract, or whether it is one which can be enforced against the Defendant, are properly raised and determined at the hearing of the cause, and can only be raised at that time. If they are passed over at the hearing of the cause and a reference is made as to the title, the Court will not allow such questions to be raised at a subsequent period. If therefore, in the present case, I were to direct a simple reference as to title, and the title appeared unobjectionable and the Defendant were, on a future occasion, to insist that this was a case in which there ought to have been no decree at all and that the contract ought not to be enforced against him, the Court would, speaking strictly, say that it was too late to take that objection, and that the contract must be performed. Accordingly, where there is an objection to title which affects the validity of the contract, or where the contract has been entered into by mistake or under such circumstances that this Court will not enforce it, such questions are determined at the hearing of the cause. The only question which this Court has to consider at the hearing, upon an objection to title, is, whether it is such an objection to the title as would make it inequitable for the Court to bind the person who has entered into it to the performance of his contract. That was exactly the question which arose in *Howell v. George* (1 Madd. 1). There the Defendant had entered into a contract to sell an estate which he could only perform [519] by purchasing another estate and settling it on like uses. The Defendant swore that he had entered into the

contract in the belief that he had power to sell the estate absolutely without any restriction whatever, and the Court said that it was inequitable to compel the Defendant specifically to perform a contract which he had entered into under such a mistake.

In this case, much has been said about the requisition; but the essence of it is this, "If you sell the estate, you must invest the purchase-money in another estate." The objection, therefore, is exactly the same as that in *Howell v. George*. The Defendant is required, not to sell the property and receive the purchase-money, but to exchange one estate for another which will be in exactly the same situation and which he cannot afterwards sell, except for the purpose of investing the produce in some other estate. It will, in fact, be simply an exchange of one estate for another. If a person enters into a contract, not being aware of the effect of what he is doing, I am of opinion that the decision in *Howell v. George* relieves him of the obligation of specifically performing it. If a person contracts to sell, thinking he has an estate in fee-simple and that he will receive the purchase-money on completion, the Court will not compel him to perform it, if it should turn out that he can only exchange one estate for another. It is said that in *Howell v. George* the vendor was tenant for life only, and that here the vendor is tenant in fee-simple. But the distinction is merely technical and nominal, because though the vendor here has an estate in fee-simple, still he cannot part with it except to get another estate in the same situation, so that, so far as the beneficial enjoyment is concerned, it reduces it into an estate for life without impeachment of waste to be transferred from one party to another.

[520] I am not, I confess, prepared to express any opinion upon the question of construction. I am, therefore, disposed to think that the sole question is, whether the contract is one which ought to be enforced against the Plaintiff, and I shall take time to consider it. If I should think that it ought, I shall make the ordinary reference as to title, but then I shall not allow this objection to be repeated, because in my opinion it could only properly be raised at the hearing of the cause.

April 28. THE MASTER OF THE ROLLS. I have looked into this case, and I still retain the opinion that I cannot compel Sir Henry Oglander to perform this contract. Assuming that he has not the absolute control over this property, and that, in substance, he can only exchange one property for another, I am of opinion that he entered into this contract by mistake, and that he cannot be compelled specifically to perform it.

By arrangement, the case was argued on the simple point as to the construction of the will.

Mr. Selwyn and Mr. Peck argued that the will created a trust binding on the Defendant; *Knight v. Knight* (3 Beav. 148, and 11 Clark & Fin. 513); *Pyot v. Pyot* (1 Ves. sen. 335); Jarman on Wills (vol. 1, 3d edit. p. 358); and see Lewin on Trusts (4th edit. pp. 100, 101); and in case of his not leaving issue male of his body surviving him, he was bound to settle the [521] estates in the way pointed out by the will; *Griffiths v. Evan* (5 Beav. 241).

Sir Hugh Cairns, Mr. Baggallay and Mr. Bagshawe were not called on, but during the previous argument they cited *Harland v. Trigg* (1 Bro. C. C. 142); *Sale v. Moore* (1 Sim. 534); *Williams v. Williams* (1 Sim. (N. S.) 358); *Macnab v. Whitbread* (17 Beav. 299); *Reeves v. Baker* (18 Beav. 372), to shew that the expressions were so obscure and so wanting in precision and distinctness as to the object, as not to create any precatory trust binding on the Defendant.

THE MASTER OF THE ROLLS. I do not think it necessary to call on the Defendant upon this point, for since this matter was before me upon a former occasion, I have had an opportunity of looking into it, and I have now made up my mind upon the subject.

In the first place, there is this singularity in this case:—The Plaintiffs file a bill for the specific performance of a contract, and their argument is that the contract cannot be performed, and although the Plaintiffs are desirous to have the contract performed, their contention is that the Defendant has no title. The Defendant answers, I have a title but I do not wish to part with the estate. So that the matter comes before me in a very singular form. I cannot finally dispose of the question in

the absence of the persons who may have a claim under this will, and who will not be bound by this decree, which is *res inter alios acta*.

[522] But I will state shortly the reasons why I think the Defendant has an absolute interest in this property. The clause of the will in question may be divided into two branches; one relates to what is to be done during Sir Henry Oglander's life, and the other to what is to be done upon his decease.

First, as to what is to be done during his life. There is a devise to him, his heirs and assigns for ever. Then comes the expression of the testator's earnest hope and particular request. I will read this as being an express direction, and as if the testator had said, "I expressly desire and direct" that my said son shall keep all the real estate, and shall not sell, alienate, or dispose of the same, or any part thereof, except by way of exchange, or for reinvesting the value in the purchase of other estates.

So reading it, I am of opinion that it is a condition repugnant to the gift of this estate, for a person cannot give to another an estate in fee-simple, and say, but you shall not sell, alienate, or dispose of it. If a testator is desirous of imposing such a restriction, he must do it in a different form, giving a limited estate as for life; if he gives an absolute estate in fee-simple, and annexes such a condition to it, the condition is altogether repugnant to the gift of the estate itself and wholly inoperative.

Next, what is to be done on the decease of the Defendant? The testator says:—

"And in case he shall die without leaving issue male of his body him surviving, it is my anxious desire that he will so settle and devise the same manors, &c., so devised to him as aforesaid, and also the manors, &c., to which he is or may become entitled as aforesaid, in [523] such manner and to such persons, that the same manors, &c., and every part thereof may continue in the name of Oglander."

Now the first thing to look at is, what is the property which he is to settle and devise? It is the property "so devised to him as aforesaid," which is, the hereditaments "to which he is entitled under the said settlement or otherwise howsoever." It appears therefore to include not only the property settled, but also any property he may buy or which may be left to him by any other person. It is obvious that this is a clause which cannot, by possibility, be carried into effect penalty. There is no penalty imposed in case he does not perform the condition, and no gift over and no direction as to what is to happen if he should neglect to comply. Suppose the Defendant should die without leaving issue male of his body, and without making a will, and so die intestate, would not this property go to his heir, although his heir might not be an Oglander?

It is obvious that this clause cannot be enforced, it expresses a mere desire, and was not intended to be in the form of a trust which the testator could enforce. Having given the estate to his son in fee-simple, the testator expresses his anxious desire merely in the way of parental advice, he says:—"Get as much land as you can, never part with it, and, at your death without issue, give it to some person of the name of Oglander. I leave that, however, entirely with you to do as you think fit; I can only affect the lands which I devise to you in fee-simple; I have no power of disposition or control over the lands which you may hereafter acquire by purchase or from any other person." In that view, it is obvious that this was never intended to be the sort of trust contended for, [524] even putting it in the strongest way, upon the authorities which are to be found in the books upon the subject.

I am of opinion that Sir Henry Oglander is owner in fee-simple of this property and may deal with it as he pleases during his lifetime or by his will.

I think the proper thing for me to do is to make a decree for specific performance of the contract; and as my opinion is that this suit has been instituted solely for the purpose of determining this one point, which is the real point at issue between the parties, the Plaintiff who fails ought to pay the costs of the suit up to and including the hearing.

[525] *In re THE MIDLAND RAILWAY COMPANY. Re THE OTLEY AND ILKEY BRANCH. June 10, 12, 1865.*

[S. C. 34 L. J. Ch. 596; 12 L. T. 659; 11 Jur. (N. S.) 818; 13 W. R. 851; 6 N. R. 244. See *Miles v. Miles*, 1866, L. R. 1 Eq. 466; 35 Beav. 196. *Dichum* (34 Beav. 527) disapproved, *Wagstaffe v. Wagstaffe*, 1869, 38 L. J. Ch. 528. See *Castle v. Fox*, 1871, L. R. 11 Eq. 549; *In re Portal and Lamb*, 1889, 27 Ch. D. 602.]

A testator devised a messuage or dwelling-house, wherein D. C. "now resides, with the stables or appurtenances thereto belonging and therewith occupied." Between the date of his will and his death, the testator purchased a garden, which he attached to the messuage. Held, that the garden passed under the devise.

The testator, by his will, dated the 17th of February 1849, devised "all that messuage or dwelling-house situate in Bordgate, in Otley, wherein my son David Chippendale the younger now resides, with the stables or appurtenances thereto belonging and therewith occupied."

In September following he bought a copyhold piece of land adjoining the messuage, and converted it into a garden, which he attached to the house.

The testator died in 1851, at which time his son still remained in occupation of the whole of the premises, and the question was, whether the copyhold garden passed under this devise, or descended to the testator's heir. The property had been taken by a railway company, and the purchase-money had been paid into Court.

By the 1 Vict. c. 26, s. 24, it is enacted, "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

[526] Mr. Baggallay, in support of a petition to pay the money out of Court. *Cole v. Scott* (1 Mac. & Gor. 518).

Mr. Kekewich, for trustees. *Hutchinson v. Barron* (9 W. R. 538).

Mr. Williamson, for the company.

[THE MASTER OF THE ROLLS referred to *Hibon v. Hibon* (9 Jur. 511).]

Mr. Baggallay, in reply.

THE MASTER OF THE ROLLS. You both argue in the same way, but my impression is against you both.

June 12. THE MASTER OF THE ROLLS [Sir John Romilly]. The question is whether this copyhold garden passed under the devise, and I am of opinion that it did.

The words of the statute are these :—[See *ante*, p. 525.]

The burthen of proof lies, therefore, to shew that it did not pass, and this from the will itself. I think the word "now" is solely descriptive of the messuage, exactly as if he had said "I give my farm Whiteacre, now in the occupation of J. Smith." It is merely descriptive of [527] the subject-matter of the devise, and not used as confining the extent of the devise; the devise means the house, and in my opinion the words "messuage or dwelling-house" includes the garden. This also is confirmed by the case of *Hibon v. Hibon* (9 Jur. 511), and many other cases to the same effect might be cited. In fact, I doubt whether the question would have been seriously contested, had it not been for the case of *Cole v. Scott* (1 Mac. & Gor. 518). But, in truth, that case, though in my opinion correctly decided, has, when it is carefully examined, no bearing on the present question; there the whole scope of the will shewed that the testator intended to confine the devise to the land he then possessed, and that it was not to include after-acquired property. The clause in the statute meant, in that respect, to put real estate on the same footing as personalty. If a testator had, by his will, said, "I leave all the money I now possess in the £3 per cent. consols to A. B.," it would, I apprehend, be properly confined to the stock he held at the date of the will. But if he said "all my money in the £3 per cent. consols," it would then be ascertained at the date of his death. Here, if the devise had been of the messuage or dwelling-house as it now stands, and the lands now held

therewith by David Chippendale, it would not have included the after-acquired garden, but he leaves the messuage and dwelling-house, merely pointing out by the description what messuage he means, the consequence is that all the additions he makes to it, and which properly belong to the messuage as it stood at his death, pass by the word messuage, and these additions include the garden.

[528] WILLIAMS v. GLENTON. July 1, 17, 1865.

[S. C. on appeal, L. R. 1 Ch. 200; 35 L. J. Ch. 284; 13 L. T. 727; 12 Jur. (N. S.) 175; 14 W. R. 294. See *In re Riley to Streetfield*, 1886, 34 Ch. D. 388.]

Where a purchaser agrees that if, "from any cause whatever," the purchase shall not be completed on the day fixed, he will pay interest, the rule is this: he must pay such interest, unless the delay has been occasioned by any misconduct on the part of the vendor.

The purchaser of a reversion must pay interest from the time at which the contract ought to have been completed.

A delay of eleven years occurred in the completion of a contract for the sale of an estate, but which was occasioned by the state of the title. Held, that the purchaser was not, after this delay, compellable to complete; but that, if he did, he must pay interest on the purchase-money according to the contract, his money not having in the meanwhile been lying idle.

Mr. Hobhouse and Mr. Daunev, for the Plaintiffs.

Mr. Baggallay and Mr. F. N. Colt, in the same interest.

Mr. Southgate and Mr. W. Barber, for the Defendant Glenton.

The following cases were cited:—*Esdaile v. Stephenson* (1 Sim. & Stu. 122); *De Visme v. De Visme* (1 Mac. & G. 336); *Sherwin v. Shakspeare* (17 Beav. 267, and 5 De Gex, M. & G. 517); *Bailey v. Collett* (18 Beav. 179); *Vickers v. Hand* (26 Beav. 630); *Wells v. Maxwell* (32 Beav. 408); *Lord Palmerston v. Turner* (33 Beav. 524); *Bannerman v. Clarke* (3 Drew. 632); *Sugd. Vend. & Pur.* (p. 637 (14th edit.)); *Dart, Vend. & Pur.* (p. 418 (3d edit.)).

THE MASTER OF THE ROLLS [Sir John Romilly]. The question in this case is, the time from which interest is to be calculated on the purchase-money for the property sold. The contract bears date the 27th of March 1854, it is by Samuel Williams, since deceased, to sell to the Defendant all that his, Williams,' undivided moiety in Arnold's farm situate at Charlton in Kent. The estate sold was the moiety of a property which was subject to a lease by John and Samuel Williams to E. B. Collins for seven or fourteen years from 12th September 1851, at a rent of £207, 10s. 6d. for [529] the first seven years, and £249 for the second seven years; consequently, under this lease, the owner of the property sold was entitled to a rent of £124, 10s. The price agreed to be given for this moiety was £9000, which, at £4 per cent., would be £360, for that which only produced a rental of £124, 10s., and which, in addition to this, was only an undivided moiety.

The contract contained the following condition of sale relating to interest, viz.:—

"If, from any cause whatever the purchase shall not be completed on the said 24th of June [1854] the purchaser shall pay to the vendor interest on his purchase-money after the rate of £4 per cent. per annum from the said 24th of June until the time of such completion."

The abstract was sent on the 20th of April 1854. Application was made to compare the abstract with the deeds; this was not complied with, by reason that John Williams (the elder brother and co-heir in gavelkind of the vendor) had possession of the deeds, and also had set up a claim to be entitled to the whole of the farm itself as land in socage and not of gavelkind tenure, although, three years previously, he had joined with his brother in granting the lease in question to Collins of the whole. This request respecting the deeds not being complied with, the Defendant, on the 20th June 1854, by his solicitor, wrote a letter declining to pay any more interest.

After much useless negotiation between the two brothers, Samuel Williams, in 1857, filed a bill against his brother, John Williams, to enforce his right and to obtain a partition of the farm in question. Pending the suit, and on the 24th March 1858, Samuel Williams, the vendor, died. A delay of three years, quite un-[530]-explained, occurred, and the suit was revived in March 1861. On the 5th of July 1862 a decree declaring the rights of the devisee of the vendor and for partition was obtained in the suit of *Williams v. Williams*. In July 1863 a certificate of partition was obtained and the partition duly effected. Before this, the Defendant, the purchaser, had been made a party to that suit for the purpose of causing him to be bound by the partition, and his costs were paid in it.

When this was effected, the present Plaintiffs called upon the Defendant either to abandon the purchase altogether, or to perfect it, with the condition of paying interest from the date prescribed by the contract to the present time. The Defendant refused to abandon the contract, he insisted on its specific performance, but contended that no interest was payable since the date of his letter in June 1854.

The question I have to determine is whether, in the circumstances I have stated, any interest is payable by the Defendant since the 20th of June 1854, and if so, for what period. On the part of the Defendant, it is contended, amongst other things, that, in fact, the vendor knew of the difficulty when he entered into the contract, that he did not disclose this circumstance to the Defendant, and that, by reason of this concealment, he cannot now be allowed any interest on the purchase-money. This, if established, would be a personal bar to the claim of the Plaintiffs, who must stand in the same situation as their testator; but it is not, in my opinion, established by the evidence in the cause. Three years before the contract, the two brothers had joined in the lease to Collins, and I have found nothing in the evidence to satisfy me that any fact existed which was known to the Plaintiffs, and not known to the Defendant [531] or which was concealed from him, which could induce the vendor to believe that his brother would interpose any obstacle towards the completion of the sale. I must, therefore, regard the case as free from any personal misconduct on the part of the vendor, which would distinguish this case in particular in that respect from the cases cited, and I must determine the question upon the other facts I have stated.

I think the rule is this: *prima facie* the words of the contract—"if from any cause whatever the completion is delayed the purchaser must pay interest"—must prevail. The purchaser agreed to this, he knew of it when he entered into the contract, and he agreed to be bound by it.

The exception is this: that when the delay is occasioned by the misconduct of the vendor, it is inequitable that he should profit by his own wrong, and consequently, in such cases, the terms of the contract must be varied, or, if not varied, it must be understood to imply that the words used include every case except the misconduct of the vendor. This is, in fact, understood in all contracts, for it is never allowed in equity that a person should be able to profit by his own misconduct.

Except in such cases, the rule is thus stated by Lord St. Leonards:—"If the delay is occasioned by the state of the title and is not wilful that seems to fall within the provision of *any cause whatever*." This is approved by Lord Justice Knight Bruce as the true and proper statement of the rule. It seems to be a very just and reasonable one, it is very distinct, and every person who enters into a contract knows what it is that he undertakes. There may be cases where the vendor, knowing of obstacles which he has intentionally [532] concealed, induces an ignorant purchaser to enter into these contracts; this is in the nature of fraud, and would constitute an exception; but, as I have already stated, there is not, in my opinion, any such case existing here. If the vendor had known that his brother would refuse to produce the title-deeds, such a case might have been adduced, but I have already stated that there is nothing to shew this.

The question then resolves itself into this:—Whether the delay, in this case, was or was not occasioned by the state of the title, and whether it was or was not wilful? I think it was occasioned by the state of the title. The thing sold was an undivided moiety, the purchaser therefore knew that another part-owner of the whole farm existed, and that he probably would possess the means of incumbering and

impeding the completion of the sale; he took his chance whether that power would be exercised. The delay, in my opinion, was not wilful on the part of the vendor; on the contrary, all the evidence is the other way, and although, after his death, a delay of three years is unexplained, I see no reason, on the whole, to doubt that everything was done that could be to complete the sale. The steps taken for that purpose involved a law suit against the brother, but it must not be forgotten that the result of this suit has been to supersede the necessity of the purchaser's obtaining a partition of the farm, which he would have been compelled to do alone had the purchase been completed immediately after the contract, and he had become the owner of an undivided moiety.

There is also another ingredient in this case, which, in my opinion, makes it incumbent on the Court to decree the Defendant to pay interest from the date [533] specified by the contract, and that circumstance is this:—It is plain that the transaction was, in effect, the purchase of a reversion. In March 1854 he gave £9000 for a property, subject to a lease which was to expire at Michaelmas 1865, eleven years and a half after the date of the contract, which only produced a rent of £124, 10s. If the purchaser got but three per cent. for his money, it was more than double the rental of the farm he bought. He was and is a builder in large business, and he admits that he bought the property with a view to building speculations. He admits that his money has not been lying idle, but that during the whole of this time it has been profitably employed by him in his profession. It is quite settled that when a man buys a reversion he must pay interest from the time when the contract ought to have been completed, because the wearing out of the lives or of the term is an equivalent to him for the increased value of the property. It is true that, in this case, there is nothing to shew that the lease was not, at the time, granted at a rack rent, for the full agricultural value of the farm. But this will not, in my opinion, alter the case, the facts in this case shew that the reversion subject to the expiration of the lease had become of very much greater value than it possessed at the time of the granting it; and though it is not the purchase of the land after the expiration of the lease, and therefore, in some respects, it must be treated as a purchase of an existing interest, still the great disproportion between the value of the reversion and the income at the date of the sale is sufficient, in my opinion, to make the rule apply.

If I made a decree in the Defendant's favour now, without subjecting his title to payment of interest, he would, although his money has been profitably employed during the whole eleven years, through my order be enabled to buy, in possession, a property for £9000, which eleven years ago was worth that amount, though possession of it could not be obtained for eleven and a half years, during the whole of which time the purchaser would have got less than one and a half per cent. for his money.

The Defendant says that if his purchase had been completed eleven years ago, he might have made an arrangement with the tenant to purchase his interest; but this observation applies equally to all cases or almost all cases where a man buys a property subject to a subsisting interest, which absorbs the whole or a large part of the annual value of the property.

I am of opinion that the Defendant's letter of the 20th of June 1854 does not vary the case. If he had laid his money by and had given notice of this, the case would have been different; but as he has not done so, the letter of the 20th June 1854 cannot vary the right of the purchaser in this respect. It is merely the assertion of a legal conclusion to result from the circumstances which is to be determined by the decision of a Court of Justice.

I think that the Defendant is not after this delay compellable to complete the contract, but if he chooses to do so, he must pay interest according to the contract, from the time when it ought to have been completed.

There are, however, one or two other matters to be mentioned, which are consequent upon this amount [535] of interest. It appears that the tenant Collins and his assignees, for he became bankrupt, have not paid all the rent due, and that waste has been committed on the premises, by digging and removing brick earth.

I think that the Defendant is entitled to an account of the rents, not with wilful

default, which was rejected in the case of *Sherwin v. Shakespeare* (5 De G. M. & G. 517), but to an account of the rents and profits received, and which, having regard to the circumstances proved, ought to have been received by the vendors; and further, that he is entitled to an inquiry to ascertain whether by reason of any act done on the land, the value of the property sold has been, to any, and what extent, depreciated. The Defendant is then entitled to have the amounts to be found due on the two inquiries set off against the amount of the interest due from him.

I think the suit has been occasioned by the question of interest, in which the Plaintiffs succeed, and that the Defendant must pay the costs of the suit up to and including the hearing.

Affirmed by the Lords Justices, 17 Jan. 1866, except as to costs. [L. R. 1 Ch. 200.]

[536] STANILAND v. STANILAND. June 6, 1865.

Gift to a widow, she maintaining and educating the testator's son and two daughters thereout, until the son attained twenty-one: Held, that the son, who had married and ceased to reside with his mother, but was still a minor, was not entitled to maintenance.

The testator devised his real estate to trustees on the following trusts:—

"Upon trust to permit and suffer my wife to receive the rents and profits thereof, or otherwise, at their discretion, to pay the rents and profits thereof unto my wife until my son Joseph shall attain the age of twenty-one years, *she, my wife, maintaining and educating my said son and my two daughters, thereout until my said son attains his said age of twenty-one years.* And from and after his attaining that age, upon trust to pay thereout the annuity or yearly sum of £40 to my said wife, during the term of her natural life, and subject thereto" he devised his estate to his son and daughters in fee.

The testator died in 1853. The three children were maintained and educated by their mother, but in October 1863 the son, who was still an infant, married and ceased to reside with his mother.

His mother insisted that her son had thereby become forisfamiliar, and had lost all right to be maintained by her; she offered to maintain him if he would return to her house and reside with her, but she refused to receive his wife into her house or to contribute to their separate maintenance.

The son however insisted that, under the express words of the will, he was entitled to maintenance until he attained twenty-one.

[537] Mr. Selwyn and Mr. Bagshawe, for the Plaintiffs.

Mr. Southgate and Mr. W. Pearson, for the Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the son, having left the family, is not entitled to a sum of money to maintain him elsewhere.

[537] DIXON v. BARKSHIRE. May 29, June 3, 1865.

When clauses in a settlement are conflicting, the rational presumption is that a child attaining twenty-one takes a vested interest.

In a settlement, the limitation was to the children "who should be living at the time of the decease of the father;" this was controlled by the gift over. Held, that a child who died in the life of her father, having attained twenty-one, was held entitled to a share.

By the settlement, made in 1827, on the marriage of James Thomas Gardiner and his wife, a sum of money was vested in trustees, upon trust for Mr. Gardiner for life,

and after his decease, "*in case he should leave any child or children him surviving,*" to pay Mr. Barkshire an annuity of £200 for life, and apply the surplus in the maintenance, &c., "*of such child or children*" during minority, and to accumulate the surplus.

The gift to the children of the fund and of the accumulations after the death of the survivor of the husband and wife, was to pay, assign and transfer it as follows:—

Unto the child, if only one, and if more than one, then unto or between and among all the children of the said James Thomas Gardiner lawfully begotten and *who should be living at the time of his decease*, to be divided between or among the same children, if more than one, in equal shares as tenants in common, [538] to be vested in such of the same children, respectively, as should be a son or sons, when and as he and they respectively should attain his or their age or respective ages of twenty-one years or die under that age leaving issue living at his or their death or respective deaths, and in such of the same children, respectively, as should be a daughter or daughters, when and as she and they respectively should attain her or their age or respective ages of twenty-one years, or day or respective days of marriage, which, as to each of them, should first happen, and to be payable and paid as soon after the said respective ages or days should be attained and also after the death of the survivor of said James Thomas Gardiner and Ann Barkshire as conveniently might be.

"And upon this further trust that *in case any one or more of the said children of James Thomas Gardiner*, being a son or sons *should die* under the age of twenty-one years without leaving any issue of his or their body or respective bodies living at his or their death or respective deaths, or, being a daughter or daughters, *should die* under that age and also before she or they respectively should have been married, then" the trustees were to pay and transfer the original and accrued share or shares of such child or children unto the other or others of them.

There was no gift to the issue but there was a power of maintenance, &c., out of the then vested or expectant shares.

The gift over was in the following words:—

And in case there should not be any child of the said James Thomas Gardiner lawfully begotten living at his decease, or no child who being a son should [539] attain the age of twenty-one years or die under that age leaving issue living at his death or who being a daughter should attain that age or be married, then the said last-mentioned trust funds and securities and the accumulations, dividends and income thereof should be in trust for the executors, administrators and assigns of the said James Thomas Gardiner.

Mr. Gardiner died in 1858, his widow was still living.

Mary Deborah Gardiner attained twenty-one, but she died a spinster in the lifetime of Mr. Gardiner, and her executor claimed a share in the fund. There were five other children still living, some of whom had attained twenty-one.

Mr. Southgate and Mr. Nalder, for the Plaintiff. *Howgrave v. Cartier* (3 Ves. & B. 79); *Woodcock v. The Duke of Dorset* (3 Bro. C. C. 568); *Powis v. Burdett* (9 Ves. 428); *Bailie v. Jackson* (1 Sm. & G. 175); *Perfect v. Lord Curzon* (5 Madd. 442); *Torres v. Franco* (1 Russ. & Myl. 649); *Swallow v. Binns* (1 Kay & J. 417); *Remnant v. Hood* (27 Beav. 74); *Meacher v. Young* (2 Myl. & K. 490).

Mr. Eddis, Mr. Hobhouse, Mr. Cotton and Mr. Speed, for the Defendants. *Farrar v. Barker* (9 Hare, 737).

Mr. Southgate, in reply.

[540] June 3. THE MASTER OF THE ROLLS [Sir John Romilly]. After the death of the husband, the next gift is "*in case he should leave any child or children him surviving.*" To this point, the settlement is unambiguous, the limitations in favour of the children are to take effect only in case James Gardiner should leave any child surviving him.

The next limitation, which disposes of the capital after the death of the survivor, is to this effect: "Unto the child," &c. (see *ante*, p. 537). Up to this point there is no ambiguity; it is still amongst children who should be living at the decease of the father.

The next clause is more doubtful, it is to this effect: "And upon this further trust," &c. (see *ante*, p. 538). If the word "said" applies to children who survived Mr. James Gardiner, it would still be clear; but "the said children" may apply to all the children born of Mr. James Gardiner, and that would be so, undoubtedly, but for the gift over in the event of failure of children, which is in these words:—"And in case there should not be any child," &c. (see *ante*, p. 538). It is clear that the word "or" is disjunctive; it is equally clear that the gift over is not to take effect in the exact words of this will, if James had any child who predeceased him leaving a child. It is equally clear that I cannot introduce any words into this settlement for the purpose of making the gift to the executors of James Gardiner depend upon the fact of no child surviving him, or that, if they died, they died under twenty-one without issue. To do that, I must introduce such words as these:—"If there should be no child living at his decease or *being such, no such* [541] child," &c. The result would be that I should be compelled to hold that if James had had an only child who had predeceased him leaving issue, that child and his issue would be excluded, and that the settlor died intestate.

I think that this case comes within the principle laid down in *Hougrave v. Cartier* (3 V. & B. 79), and the cases there cited by Sir William Grant. The case of *Torres v. Franco* (1 R. & M. 649), to which I was referred by Mr. Southgate, is still stronger than the present, and which, in the circumstances, is very close to the present case. I am of opinion that the words of the Master of the Rolls, in that case, are strictly applicable to the present, viz., the "gift over is not to take effect unless all the children die under age and unmarried. This is inconsistent with the clause which imports that a child to take must survive" Mr. James Gardiner, "and where clauses are conflicting, the rational presumption is, that a child attaining twenty-one takes a vested interest."

I am of opinion, therefore, that Mary Deborah Gardiner, who attained twenty-one and died before her father, took a vested interest, and that the payment of £350 to her executor was correct and ought to be allowed.

[542] PETTINGER v. AMBLER. March 23, 1865.

[S. C. 12 L. T. 133.]

A testator gave to the Plaintiff an annuity of £100 for life, "to be raised out of his freehold property." This consisted of a reversion, subject to a life-estate, in freeholds which trustees had power to lease, sell and exchange. Held, that the annuity was payable from the testator's death, and that the Plaintiff was entitled to have the payment of it provided for by a sale of the reversion.

In August 1862 John Bunn conveyed his freeholds to trustees in fee, in trust for himself for life, with remainder to Mrs. Ambler for life, with remainder upon such trusts as he should by his will appoint, and in default, upon trust for Mrs. Ambler in fee. The deed gave to the trustees powers of leasing, selling and exchanging.

By his will, made in November following, John Bunn, after referring to the power, "gave, devised and bequeathed to his dear sister Anne Pettinger, during her life, an annuity or annual payment of £100, to be raised out of his freehold property."

The testator died in July 1863.

The annuity to Anne Pettinger having fallen into arrear, she instituted this suit to have the reversion sold and the produce applied in payment of the arrears and future payments of her annuity.

Mr. Selwyn and Mr. Hardy, for the Plaintiff, asked for a sale and a direction for payment of the annuity. See *Cypit v. Jackson* (McClelland, 495); *Picard v. Mitchell* (14 Beav. 103); *White v. James* (26 Beav. 191).

Mr. Southgate and Mr. Swanston, for Mr. Bunn [543] and a trustee, argued that the annuity was postponed. They resisted the sale, which they said would render ineffectual the powers vested in the trustees.

THE MASTER OF THE ROLLS made a declaration that the Plaintiff was entitled to

a life annuity of £100 from the death of the testator, and he ordered a sale of the reversion of the freeholds, expectant on the decease of Mrs. Ambler, in order that the proceeds might be applied in discharge of the arrears and future payments of the Plaintiff's annuity.

Reg. Lib. 1865, B. fol. 784.

[543] POTTS v. SURR. June 7, 8, 23, 1865.

[S. C. 13 W. R. 909.]

A son attained twenty-one in 1855, and in 1857 he conveyed to his father his reversionary estate and interest, in consideration of moneys advanced for his commission, outfit and debts during his minority, and a further sum of £500 then advanced: Held, that the deed could not stand except as a security for the £500. The doctrine laid down in *Hoghton v. Hoghton*, 15 Beav. 278, adhered to.

Transaction between father and son, seven years after the latter came of age, by which the father obtained a benefit of £5790 in the event of the son dying without children, supported; there being a valuable consideration on the part of the father, the settlement being a fit and proper family arrangement, and the transaction not having been impeached until after the death of the father.

The facts of this case are fully stated in the judgment. It was argued by

Mr. Southgate and Mr. George W. Collins, for the Plaintiff, who cited *Tweddell v. Tweddell* (1 Turn. & R. 1); *Hoghton v. Hoghton* (15 Beav. 278); *Carpenter v. Heriot* (1 Eden, 338); *Baker v. Bradley* (7 De G. M. & G. 621).

[544] Mr. Hobhouse and Mr. Pearson, for Mr. Surr. They cited *Bellamy v. Sabine* (2 Phill. 438); *Stewart v. Stewart* (6 Cl. & Fin. 911); *Lawton v. Champion* (18 Beav. 87).

Mr. Everitt, for Reed.

Mr. Colt, for the Plaintiff's brothers, referred to *Petre v. Espinasse* (2 Myl. & K. 496); *Dimsdale v. Dimsdale* (3 Drew. 566).

Mr. Torriano, for the infant children.

Mr. Southgate, in reply.

June 23. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit seeking to set aside a deed dated the 26th February 1862, which the Plaintiff alleges he was induced to execute by the influence exercised over him by his father. In form, the bill prays relief in respect of two former deeds which I shall have occasion to mention, but, in truth, this is only ancillary to the relief asked in respect of the deed of February 1862, which is the only deed binding the Plaintiff, if the transaction relating to it be valid. If, however, this deed be declared to be invalid, then it will require a consideration to what extent the other deeds can be allowed to have any force or effect.

Under the will of a gentleman of the name of John Bayley, who died in February 1827, and by reason of the determination of the previous estates, considerable [545] real and personal property were vested in trustees, which in the year 1855 were held in trust for George Potts, the father of the Plaintiff, for life, with remainder to the children of the said George Potts, and their heirs, executors and administrators, equally to be divided between them, to be vested interests on attaining twenty-one. Besides this, on the marriage in November 1828, of Mr. George Potts with the since deceased mother of the Plaintiff and by a settlement bearing date the 10th November 1828, £5000 consols were settled in trust for George Potts for life, and after his decease in trust for his wife for her life, and upon the decease of the survivor, in trust for the children of the marriage, as the husband and wife should jointly appoint, and in default as the survivor should appoint, and in default of any appointment equally between them.

George Potts had three children, the Plaintiff George Edward B. Potts, who was the eldest, Walter Jeffery Potts the second son, and Charles Denis Potts the third son, who are both Defendants on this record.

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Walter Jeffery Potts has married and has four children, who are also Defendants, by reason of the interest they are supposed to take under the instrument of February 1862, which is sought to be set aside.

In 1855 the Plaintiff attained twenty-one, and in the latter end of 1856 the Plaintiff, being in embarrassed circumstances, applied to his father for assistance, which he consented to afford, on having an assignment of the Plaintiff's reversionary interest under the will of Mr. Bayley. This was assented to by the Plaintiff, and accordingly, by an indenture dated the 3d January 1857, and made between the Plaintiff of the first part, [546] George Potts of the second part, the Defendant Surr of the third part, and two trustees of the fourth part, after reciting that George Potts had, in 1849, obtained from the Plaintiff a commission in Her Majesty's Navy, and whilst he continued in the Navy, viz., until the year 1854, when he left the service, had expended in the whole upwards of £2000 in providing outfits and paying the debts of the Plaintiff, and that in the year 1854 George Potts, at the request of the Plaintiff, had paid and advanced and lent the sum of £1296 for a commission in the Hussars, and had afterwards, at the like request, paid, advanced and lent further sums, amounting in the whole to £2500, for and on account of the Plaintiff, for outfits for him and for his debts, and that the Plaintiff had since contracted further debts which he was unable to meet, and had applied to George Potts to advance him the sum of £500, to enable him to pay such debts, which George Potts had agreed to do, on having an absolute assignment of all and singular the share and interest of the Plaintiff under the will of John Bayley, and under the settlement of the 10th November 1828 made to him: *It was witnessed* that, in consideration of the two sums of £1200 and £2500 (making together £3790, and of the £500 paid), the Plaintiff conveyed his reversionary estate in the real estate of John Bayley and his contingent interest under the indenture of the 20th of November 1828 to his father absolutely.

Upon the evidence, I have no doubt that the Plaintiff understood the effect of this deed, but having regard to the circumstance that only £500 was paid to the Plaintiff, and that the father claimed to be a creditor for commission purchased and for sums paid for the benefit and outfit and advancement of his son while a minor, which he certainly was not entitled to do, if this deed [547] were the only matter complained of, I should be of opinion that it could not stand as an assignment of the Plaintiff's reversionary interest, otherwise than as a security for the sum of £500, which was advanced on the occasion of the execution of that deed.

In the year 1860 Mr. George Potts, the Plaintiff's father, was desirous of borrowing £2600 on the security of this property left by Mr. Bayley, and, through Messrs. Surr & Gribble, he applied to Mr. Samuel Clark, a Defendant who has since been dismissed, to lend this amount. The conveyancer of that gentleman, to whom the papers were sent, objected to the deed of 3d of January 1857, as being only valid as a security for £500; but stated, that if the Plaintiff would now, instructed by independent advice, knowingly and voluntarily confirm that deed to Mr. Clark, he might safely advance his money on the security of it. This accordingly the Plaintiff agreed to do, and thereupon, on the 14th December 1860, a deed was executed by and between George Potts of the first part, the Plaintiff of the second part, and Mr. Clark of the third part. This deed recited the proposal to Clark to advance the £2600, all the objections taken to the deed of 3d of January 1857, and that it might possibly be impeached by the Plaintiff, on the ground of the same having been obtained from him under personal influence while under the pressure of pecuniary difficulties, but the Plaintiff having been fully informed of such objection and the nature and bearing thereof, and having well considered the same under adequate independent professional advice from a solicitor appointed by himself for that purpose, and being also free from all parental influence or other undue pressure (as he thereby acknowledged), he had, in order to induce Mr. Samuel Clark to waive such objection and to advance the said sum on the said security proposed, [548] agreed to join therein in manner thereafter mentioned, but without prejudice to any arrangement which might be come to between him and George Potts (subject to the said security) in regard to the said indenture. The Plaintiff and his father concurred in giving to Clark a mortgage for £260 on the property contained in the will of Bayley and the settlement.

Unquestionably, as regards Mr. Clark, this was a valid transaction binding on the

Plaintiff, who executed this deed with his eyes open ; it appears however that he only got £50 from his father in consideration of his joining in the conveyance.

The third deed was executed a little more than one year after this transaction. It bears date the 26th February 1862, and was made between George Potts, the father, of the first part, the Plaintiff of the second part, and the Defendants Surr and Reed of the third part. It was to this effect:—It recited the will of the testator, and the settlement made on the marriage of George Potts, and the interest of the Plaintiff under these instruments. It recited that since the indenture of 3d of January 1857 George Potts had advanced sums of money amounting in the whole to £476, unto or for the benefit and at the request of the Plaintiff, for which he, George Potts, held promissory notes, and these sums, with interest on them, remained due to him. It recited the indenture of 14th December 1860, and it then continued to the following effect:—That further questions having arisen, or being still subsisting between George Potts and the Plaintiff, touching the validity and operation of the indenture of the 3d of January 1857, and the adequacy of the consideration for the conveyance and assignment thereby made, George Potts and the Plaintiff, with a view to an [549] amicable adjustment of such questions, and to a family arrangement between them in regard thereto, had proposed and agreed to join in conveying and assigning the said reversionary share and interest late of the Plaintiff, which, by the indenture of the 3d of January 1857, were expressed to be conveyed and assigned by him to George Potts ; *It was witnessed* that George Potts and the Plaintiff conveyed and confirmed to trustees the Plaintiff's share in the property, subject to the life interest of George Potts, and to the mortgage of £2600, upon trust to sell, realize and invest, and then to hold upon such trusts as the father and son should appoint, and subject thereto, for George Potts for life, and then upon certain uncontrolled discretionary trusts for the maintenance of the Plaintiff, his wife and issue, and after his death upon certain trusts for his issue, and in case there should be no child of the Plaintiff who should live to attain a vested interest in the trust funds, then upon trust that the trustees should, after the decease of George Potts, and upon the failure or determination of the trusts aforesaid in his lifetime if they should so determine, raise the three sums of £2000, £1290, £2500, making together the sum of £5790, so paid or expended by George Potts for the benefit of the Plaintiff mentioned in the indenture of the 3d of January 1857, together with interest thereon at £5 per cent. per annum, from the time of the failure of such trusts, and should pay this sum to him, George Potts, his executors, administrators and assigns, as part of his personal estate, in full discharge of all George Potts's claim, and subject thereto, as to the residue of the trust funds, upon trust for all the children, grandchildren, or more remote issue of the said George Potts, other than those of the Plaintiff, and of the Defendant James William Reed, as the Plaintiff should, by deed or will, appoint, and in default, upon trust for all the [550] children, grandchildren, or more remote issue of the said George Potts, being within the limit of perpetuities, as George Potts should by deed or will appoint, and in default for all the children of George Potts, other than and except the Plaintiff, in equal shares.

The deed contained a hotchpot clause, and also a clause to this effect:—That if the Plaintiff should become bankrupt, or sell, &c., or anticipate the income payable during his life, and in certain other like events, the trusts of the income during his life should cease, and the income should be applied as if he were actually dead.

On the following day, and as part of the same transaction, an indenture bearing date the 27th February 1862 was executed by George Potts and the Plaintiff of the first part, Messrs. Surr & Gribble of the second part, by which the Plaintiff and his father executed the power of appointment contained in the deed in favour of the Plaintiff, and raised £1000 for Messrs. Surr & Gribble, with interest at £5 per cent. per annum to be paid to him. Of this £1000 £500 was paid to, or on behalf of, the Plaintiff, and the remaining £500 was paid to George Potts—£250 on account of moneys alleged to have been paid by him on behalf of the Plaintiff since the indenture of the 3d January 1857 ; £250 on account of the interest to be paid to Messrs. Surr & Gribble for five years on the said loan, which the father undertook to pay.

On the 20th of September 1863 George Potts died, and the Defendants James

William Reed and Walter Jeffery Potts are the executors of his will, and they have duly proved it.

By the will of George Potts, no appointment is made [551] of £5000, but it recites and confirms the deed of the 26th of February 1862.

The first question to be considered is, whether the deed of 26th of February 1862 is valid or invalid? If invalid, the validity of the deed of January 1857 will have to be considered; if valid, a question will arise whether, under it and the transaction which took place contemporaneously, the Plaintiff has any and what claim against the estate of George Potts his father.

It is properly observed that, in cases of this description, two things are to be examined into; the first is, whether the person who made the settlement understood the full effect of it; and the second is, whether if he did so understand it, he was subjected to undue influence or pressure, which induced him to join in the transaction and to execute the conveyance.

With respect to the former question, it must be answered against the Plaintiff. It is, I think, clear, that he understood the full effect of all these deeds at the time when he executed them. On examining the deed of 1862, the only objectionable part of it is the securing £5790 to George Potts, of which, as far as I can gather from the evidence, £500 paid to or for the benefit of the Plaintiff in the first transaction, £50 paid to him in the second, and £426 paid for his benefit in the third transaction, was all that could be lawfully claimed by Mr. George Potts as being due to him from his son. But this is certain, that when the Plaintiff executed the second indenture of December 1860, he had independent advice, and the right he had to set aside the deed of January 1857, or rather to make it stand as a security for £500 only, and the grounds of its invalidity, [552] except to the extent above mentioned, were fully and accurately explained to him. Knowing this, he consented to execute the third deed of February 1862.

The next question is, whether he was under undue influence at the time he executed this deed, and if he was, whether, having regard to the character and scope of the deed, such influence is sufficient to enable him to call on this Court to relieve him from the effect of it. He attained his age of twenty-one years in 1855, at what time I have not been able to discover, at the end of February 1862 he was above twenty-six years of age, and probably nearly twenty-seven, he was an officer in the army acquainted with the world. On the other hand, he was in great pecuniary embarrassment, and had no hope or means of escaping from it, except through the assistance of his father; and his father refused to afford any such assistance, except on the condition of the Plaintiff's executing this deed in question. I think, on the evidence, that this would be sufficient to set aside the deed, or to make it stand merely as a security for the money actually advanced to or for the benefit of the Plaintiff, if the deed were a mere one-sided deed for the benefit of the father. But this is not so, and although I have fully stated this deed, it becomes necessary to refer again to the provisions of it and to the situation of the parties.

The manner in which I stated the law on this subject, in the case of *Hoghton v. Hoghton* (15 Beav. 278), appears to me, on reflection, to be correct. It is in these words (15 Beav. 305):—"The rule to be drawn." [His Honor read the passage.]

It would appear, at first sight, that these observations, [553] when applied to this deed, would establish that the sum of £5790 secured to the father was a benefit obtained by him, not already possessed by him, and that, therefore, the deed would be bad; but, on the other hand, it is necessary to look at what the Plaintiff got or secured by this deed which he did not already possess. It is not a voluntary deed, the deed was not without consideration, if the son had derived no benefit from the transaction, it might be difficult to sustain it; but the limitations which appear on this deed, as well as the consideration given to the son for the execution of it, considerably modify the inference to be drawn from the advantage obtained by the father. In the first place, this sum in question is secured to the father, only in the event of the Plaintiff having no children. It was, therefore, highly improbable that the father should, during his life, derive any personal benefit from this stipulation. In the second place, the father had the power of appointing £5000, under the marriage settlement, in such a manner as wholly to exclude the Plaintiff from deriving any benefit from it. Though

he was not prevented from doing this by any covenant in the deed, he seems to have considered that he was bound not to do so, and he has died accordingly without making any appointment to exclude the Plaintiff.

In the third place, it was part of the same transaction that the father should assist the Plaintiff in raising £1000, which was required for his necessities, and this was accordingly done. For the purpose for which I am now considering the question, the circumstance that only £500 of this was paid to him is immaterial; without the assistance of his father, this sum could not have been raised by the Plaintiff, except at a ruinous sacrifice.

[554] In the fourth place, the father was virtually a creditor of the son for £976, which he gave up for the reversionary sum of £5790, secured to him after the death of his son without leaving issue.

And lastly, in all other respects, except the securing this £5790 to the father, the settlement is a fit and proper one, and one which, having regard to the state of the family, might properly be required by the father from his son. These peculiarities diversify the case from almost all which are to be found in the books.

In addition to all this, although the delay is not great, still the fact is that the bill is not filed till after the death of the father. It is impossible to know what course he would have adopted with regard to the appointments he had the power of making, if he had known that the deed could not be maintained. If it had been expressly stated on the face of the deed that it was executed in consideration of the father not excluding his son, the Plaintiff, from any share of the £5000; and also in consideration of his assisting his son in raising £1000 to be paid to him at once, and in consideration of his father relinquishing the debt of £976 then due to him from the Plaintiff, I should have considered that this was a sufficient consideration to support the deed, though the £5790 had been a gift to the father out of the son's estate in the event of the son having no children; provided of course, and on the assumption that the contents of it were fully known to the son at the time when he executed it, which, as I have stated already, cannot, on the evidence, in my opinion, be doubted.

I am, therefore, of opinion that I cannot make any [555] decree to direct this deed to be delivered up to be cancelled.

The next question is, the effect of it? And this resolves itself solely into a question of account between the estate of George Potts and the Plaintiff. With respect to the £2600 mortgage which was raised and paid to Mr. Potts and which by this deed was made or continued a first charge on the property of the Plaintiff, and which has since been paid to the mortgagees, I see nothing in this deed to make this the debt of the son in lieu of the debt of the father, and the estate of the father will consequently be liable to repay that amount to the Plaintiff. I am also of opinion that as only £500 of the £1000 was paid to the son, the remainder, which was retained by or paid to the father, must be paid to the son, who is liable to repay the £1000 and interest advanced by Messrs. Surr & Gribble. The estate of the father, therefore, is liable to repay that amount to the Plaintiff; but beyond this I am of opinion that I cannot go.

I am willing to make a declaration to the effect of what I have stated. I think that the costs of all parties now before the Court must be paid out of the fund in question, that is, the fund settled by the deed, and that the residue of it must be invested on the trust of the deed itself, viz., in favour of the Plaintiff for life, and afterwards for his wife and children, if he should have any, and subject thereto, to pay £5900 to the estate of the father, for the other children of the father, George Potts, and their issue.

[556] *In re THE BANK OF GIBRALTAR AND MALTA (LIMITED)*. June 3, 5, 22, 1865.

[Affirmed, L. R. 1 Ch. 69; 35 L. J. Ch. 49; 13 L. T. 386; 11 Jur. (N. S.) 916; 14 W. R. 69. See *In re Beaujolais Wine Company*, 1867, L. R. 3 Ch. 21; *In re Royal Hotel Company of Great Yarmouth*, 1867, L. R. 4 Eq. 249; *In re Brighton Brewery Company*, 1868, 37 L. J. Ch. 279; *Stringer's case*, 1869, L. R. 4 Ch. 480 (n.); *Rance's case*, 1870, L. R. 6 Ch. 114; *In re Gold Company*, 1879, 11 Ch. D. 716; *Silber Light Company v. Silber*, 1879, 12 Ch. D. 724.]

The 165th section of "The Companies Act, 1862" (25 & 26 Vict. c. 89) which enables the Court to compel a director, &c., to repay any moneys of the company misapplied or retained, can only be exercised where the winding up is compulsory.

The above section was intended to apply to cases free from much complication and difficulty.

Petition by shareholders, under a voluntary winding up, to make directors repay moneys applied by them improperly and *ultra vires*, dismissed, the proper remedy (if any) being by bill.

The company was registered and incorporated in 1863.

By the articles of association sums of £2000 and £1000 were to be paid to Mr. Cookson (the projector) for preliminary expenses, &c., when the capital (£250,000) had been subscribed for, and the deposits of £2 per share paid thereon, but they had never happened.

In 1865 the company resolved upon winding up voluntarily, and two liquidators were appointed for that purpose. They had proceeded so far as to pay the debts, and very little remained to complete the winding up, but they had taken legal proceedings to recover calls.

This was a petition presented by five shareholders against the four directors, the liquidators and the company, praying that the company might be wound up by the Court, or if not, under the supervision of the Court, and that Mr. Cookson and the four directors might be respectively ordered to account for and pay to the official liquidator "all sums of money belonging to the company improperly received by or paid to them," together with interest.

The petition alleged that the following acts had been [557] done by the directors, which were altogether *ultra vires*:—

That they had returned Mr. Evitt his deposit of £60 paid in respect of shares applied for and allotted to him, and had reduced by half the number of shares held by three other members.

That they had paid Mr. Cookson £492 for preliminary expenses contrary to the articles, £250 for offices and services, and had compromised his claims by a further payment of £1000, though, in the events provided by the articles, nothing was payable to him.

That they had handed a cheque of the company for £3200 to a projected company called the Levant Bank, in exchange for a cheque for £2500, with a view to an amalgamation which never took effect.

The claim to compel the directors to refund was based on "The Companies Act, 1862," which, by the 138th section, enables contributories to apply to this Court, where a company is being wound up voluntarily, to determine any question arising in the winding up. The 165th section enacts that when, in winding up, it appears that any director, &c., has misapplied any moneys of the company, the Court may examine into his conduct, and compel him to repay any moneys so misapplied or retained.

Mr. Jessel and Mr. C. A. Holmes, in support of the petition.

Mr. Southgate and Mr. Fischer, for the directors.

Mr. Baggallay and Mr. Pearson, for the liquidators.

[558] See Lindley on Partnership (p. 1070); *Ex parte Chadwick* (15 Jur. 597); *Ex parte Johnson* (1 Jur. (N. S.) 913); *The Madrid and Valencia Railway Company* (2 Mac. & Gor. 169).

THE MASTER OF THE ROLLS. I shall consider the case, which I think involves very important considerations.

The first question is, whether a bill is not necessary for the purpose of obtaining the relief asked against the directors.

Assuming that difficulty to be got over, the next question arises under the Act of Parliament, which is, whether, assuming the charges to be made out on the evidence, I can inquire into them without taking cognizance of the whole matter by making an order for the compulsory winding up of the bank, and thus transferring the whole matter to Chambers, or whether I ought to act in a manner ancillary to the present proceedings, and direct what ought to be done by those who have the conduct of them.

Assuming all these difficulties got over, then comes the question, whether such a case is made out on the merits that I ought to interfere.

June 22. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a petition by five contributories to this bank, [559] which is now in course of liquidation under a voluntary winding up, praying in terms a compulsory winding-up order under the authority of the Court, and for payment of certain sums by the directors. In fact, what is asked for at the Bar is an order under the 138th section of the Act 25 & 26 Vict. c. 89, which is to this effect: "Where a company is being wound up voluntarily, the liquidators or any contributory of the company may apply to the Court in England, Ireland, or Scotland, or to the Lord Ordinary on the bills in Scotland in time of Vacation, to determine any question arising in the matter of such winding up, or to exercise, as respects the enforcing of calls, or in respect of any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court, and the Court or Lord Ordinary in the case aforesaid, if satisfied that the determination of such question or the required exercise of power will be just and beneficial, may accede wholly or partially to such application on such terms and subject to such conditions as the Court thinks fit, or it may make such other order, interlocutor or decree on such application as the Court thinks just."

But the object really is that which is mentioned in the latter part of the prayer of the petition, and this is required to be done under the 165th section of the Act, which is to this effect:—

"Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official or other liquidator, or any officer of such company, has misapplied or retained in his own hands, or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the [560] Court may, on the application of any liquidator or of any creditor or contributory of the company, notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager or officer, and compel him to pay any moneys so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the Court thinks just."

What the Petitioners complain of is that the directors have improperly applied the assets of the bank, that £1750 were improperly paid to Faithful Cookson, by whom the company was originally got up, and also that they returned half the deposits to two shareholders by letting them off for half the number of shares which had been allotted to them.

Upon giving this case the best consideration I can, I am of opinion that the combined effect of the 138th and the 165th sections does not enable me to give the Petitioners the relief which they ask on this petition. It is, in fact, a bill for an account against the directors in the form of a petition, and the account is one of a nature which, in my opinion, would require that a bill should be filed for the purpose of taking it. The 165th section was, in fact, as I understand it, intended to get rid of the objection taken in the case of *The Madrid and Valencia Railway Company*; but though I do not mean to lay down that it was not intended to extend to giving power to every contributory in a winding-up case to call upon the directors to account for such sums as might be shewn to have been retained or improperly applied by [561]

such director, I do not think that the object or scope of the clause is, to supersede, in every case, the necessity of filing a bill against directors for an account, when the affairs of the company are in the course of winding up, either voluntarily or under a compulsory order for that purpose.

As I understand the clause in question, a considerable discretion is given to the Court in these cases. In some cases which may be disposed of simply during the winding up, the Court may properly take upon itself this duty; but, in cases of difficulty and complication, the Court would probably consider that the proper course to be adopted would be, by directing or giving leave to the official liquidator to file a bill. But in any case, I think the Court could only properly exercise the power given by the 165th section of the Act, after it had taken entire possession of the whole matter, by making a compulsory winding-up order, and taking the management of the whole matter into its own hands. Unless this be done, the 138th section does not, in my opinion, enable the Court to direct, imperatively, that any steps to enforce such account shall be taken in the course of winding up the company.

It is under this section that the present contributories, who are Petitioners, ask the Court to empower them to proceed against the directors in the manner pointed out by the 165th section. I do not think that a sufficient case is made out for that purpose; but assuming it to be so, I could not compel the directors to submit to such account, unless I were to put an end to the voluntary winding up, and take possession of the whole matter, to do which, in my opinion, no sufficient case has been made out. The 165th section was, I apprehend, intended to apply to cases free from [562] much complication and difficulty, and not to cases where questions of nicety, both of law and fact, would have to be tried.

For the purpose of considering this question, I have read the memorandum of association, the affidavits made, and looked into the accounts furnished to me, and it seems to be that a question of nicety, both of law and of fact, would have to be determined against these directors, in order to make them personally liable, and I consider it clear that, in such a case, the directors are entitled to have the whole matter distinctly put in issue against them by a bill before they are called upon to answer the case alleged.

As for a supervision order, as asked for by Mr. Jessel, I am of opinion that no order of that description (assuming that I have power to make it under this statute), would be advisable. If it is meant, by a supervision order, that this Court is merely to see what is done by the official liquidator in a voluntary winding up, and to sanction his proceedings, it would, in that case, be an idle expense. If more than that be meant, it would put an end to the voluntary proceedings altogether. In my opinion, either this Court should take the whole control of the matter, or it should be left to its present mode of winding up.

I think no case is made out for disturbing the present course of proceeding, and though it will still remain open to the Petitioners to file any such bill as they may be advised against the directors, I must decline to make any order on this petition. The costs must follow the event.

NOTE.—Affirmed by the Lords Justices, 17th Nov. 1865. [L. R. 1 Ch. 69.]

[563] BAINTON v. BAINTON. June 15, 1865.

Leaseholds for life were settled by deed on the parents for life, with remainder to the children of the wife equally and the heirs of their bodies, and if but one child then to such child and the heirs of his body, and in default of such issue, to the heirs of the wife. Held, that there were no cross-remainders between the children, and that on the death of a child without issue and without having made any disposition, his share went to the heir of the wife.

In 1827 some leaseholds for lives, limited to one and his heirs, were conveyed to the use of Mrs. Elizabeth Bainton for life, with remainder to her husband, Mr. Thomas Bainton, for life, with remainder to the use of all and every the child and

children of Elizabeth (the wife of Thomas Bainton), lawfully begotten or to be begotten, and if more than one, equally to be divided amongst them, share and share alike, as tenants in common, and not as joint-tenants, and of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and if there shall be but one such child, then to the use of such only child, and the heirs of his or her body lawfully issuing, and in default of such issue, to the use of the heirs of the said Elizabeth, the wife of the said Thomas Bainton, for ever.

Mr. Bainton died in 1842; his wife Mrs. Bainton survived him, and died in 1864.

Mrs. Bainton had eight children, and two of them, Thomas and Martha, had died in their mother's lifetime, without having married and without having executed any assurance of their shares in the property.

By this special case, it was contended by one of the children, Henry William Bainton, who was the heir at law of Mrs. Bainton, that the property was divisible into eight shares, and that the two-eighth shares, on the [564] deaths of Thomas and Martha without issue, resulted to their mother, and had devolved upon him as special occupant.

Other parties contended, that in the events which had happened, the property was now divisible into six shares, and that each of the six surviving children were entitled absolutely to, or at any rate to a base fee in, one of such six shares.

The question for the opinion of the Court upon this special case was, in what shares the Plaintiffs and Defendants were respectively entitled to the property, and to whom and in what manner the trustees ought to convey the same.

Mr. Bury. The property is divisible into sixths. It is not intended to argue that cross-remainders can be implied, because this is the case of a deed, but cross-remainders may, nevertheless, be raised by the general words in a deed; *Doe d. Watts v. Wainwright* (5 Term Rep. 427, and 4 Cruise, Digest. 459). No precise words are necessary for that purpose, and those here used are sufficient. The deed says that the estate is to go to the children equally in tail, but if there shall be but one such child, such child is to take the whole, and there is no gift over unless the issue of all should fail. These words amount to a sufficient declaration, that unless there should be a total failure of all the children, the property is not to go over. This object could not be effected, except by keeping the estate together, and by giving over, upon the death of any child without issue, his share, whether original or accrued, to the survivors. The Court must consequently hold that there are cross-remainders as to the accruing and original shares.

The case is distinguishable from *Edwards v. Alliston* (4 Russ. 78; and see *Doe dem. Clift v. Birkhead*, 10 Exch. 110), in which the express cross-remainders were only of the original shares. Here there is a limitation of the whole to an only child in tail.

Mr. Macnaghton, for the heir at law, was not heard.

THE MASTER OF THE ROLLS [Sir John Romilly] held that the property was divisible into eighths, and that Henry William Bainton was entitled to two-eighths as heir of his mother, and one-eighth in his own right.

Reg. Lib. 1865, A. fol. 1248.

[566] BANKS v. GIBSON. July 18, 19, 21, 1865.

[S. C. 34 L. J. Ch. 591; 13 W. R. 1012. See *Scott v. Rowland*, 1872, 26 L. T. 391; *Levy v. Walker*, 1879, 10 Ch. D. 442; *Chappell v. Griffith*, 1885, 53 L. T. 459; *Burchell v. Wilde* [1900], 1 Ch. 557.]

A partnership was carried on for fourteen years between B. and G. under the style of "B. & Co." On the dissolution, the assets were divided, but no arrangement was come to as to the style. Held, that the name or style of "B. & Co." formed an undivided asset of the partnership which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of "B. & Co." in his business.

In 1850 Mr. Banks and Mr. Gibson, the Defendant, entered into partnership for fifteen years, as manufacturers of pencils at Keswick, and on the death of either, during the term, his executors or administrators were to have the option of either retiring from the business or continuing it with the survivor. The business was carried on under the firm of Banks & Co.

In 1860 Mr. Banks died, and the Plaintiff, his widow and administratrix, continued to carry on the business with Mr. Gibson, the Defendant, but misunderstandings having arisen, the partnership was dissolved on the 15th of June 1864.

In September 1864 the Plaintiff and Defendant agreed on a division of the stock-in-trade, and that the trade labels and stamps should be destroyed.

The Plaintiff afterwards carried on the same business at Keswick, under the name of Banks & Co., and of which firm she represented herself to be the successor. The Defendant also carried on the same business, at the old premises, under the name of Banks & Co. The Plaintiff Mrs. Banks instituted this suit against Mr. Gibson to restrain him using the name of Banks & Co., or the name of Banks, in connexion with his business.

The Defendant, by his answer, submitted that he ought not to be restrained from using the name of [567] Banks & Co., as the same was being used by him, and he insisted that the Plaintiff, by holding herself out to the public as the successor of the late firm of Banks & Co., in her price lists and circulars, and by otherwise representing to the public the nature of her connexion with the said late firm, and by herself using the name of Banks & Co., as she had done, had disentitled herself to relief in respect to the matters complained of in her bill.

Mr. Selwyn and Mr. Speed, for the Plaintiff. The Defendant has no right, after the dissolution of the partnership, to continue to use the name of the old firm, nor is he entitled to use the Plaintiff's name of "Banks," in connexion with his own private business. It is both an injury to the Plaintiff and a deception on the public, and which the stipulation for the destruction of the labels and dies was intended to prevent. They cited *Smith v. Everett* (27 Beav. 446); *Millington v. Fox* (3 Myl. & Cr. 338); *Churton v. Douglas* (Johns. 174); *Mellersh v. Keen* (No. 2) (28 Beav. 453); *Robertson v. Quiddington* (28 Beav. 529).

Mr. W. M. James and Mr. C. Hall, for the Defendant. This is a case of first impression. This partnership name is a trade mark and forms part of the assets of the firm, the same as would be the case in regard to the banks of Childs & Co. or Coutts & Co. The joint-tenancy in the name became severed by the dissolution, and the late partners thenceforward enjoyed, in common, the right of using the name of the firm. Until some other arrangement has been come to between them on the subject, the Plaintiff and Defendant have [568] both a right to use the name of the old firm. The Plaintiff has shewn no exclusive right, the invasion of which the Court can be called on to protect. They cited *The Leather Cloth Co. v. The American Leather Cloth Co.* (1 Hem. & Mil. 271, and H. of L. Cas.); *Webster v. Webster* (3 Swan. 490, n.); *Lewis v. Langdon* (7 Simons, 421); *Dent v. Turpin* (2 Johns. & Hem. 139); *Hancock v. Bewley* (Johns. 601); *Johnson v. Helleley* (34 Beav. 63, and 2 De Gex, J. & Sm. 446).

Mr. Selwyn, in reply, referred to *Mathers v. Green* (34 Beav. 170); *Croft v. Day* (7 Beav. 84); *Clark v. Freeman* (11 Beav. 112); *Bradbury v. Dickens* (27 Beav. 53); *Hall v. Barrows* (32 L. J. Ch. 548, and 33 L. J. Ch. 204); *Bury v. Bedford* (33 L. J. Ch. 465).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Plaintiff is not entitled to require the Defendant to discontinue using the style of Banks & Co. The principles upon which this depends are plain, and have been settled in the cases which have been referred to. The state of the case seems to be this:—The Plaintiff's husband entered into partnership with the Defendant for the term of fifteen years, and they carried on business until the death of the Plaintiff's husband in 1860. The articles of partnership contained a proviso that, in the event of the death of either of the partners, before the expiration of the term of fifteen years, his executors or administrators should have the option either of retiring from the partnership, or of continuing it with the surviving partner.

[569] What took place was this:—The Plaintiff's husband died in 1860, and the Plaintiff, as his administratrix, continued the partnership with the Defendant for four

years; they then dissolved the partnership and divided the assets between them as they thought fit. The name or style of the firm of Banks & Co., in which the Defendants had been engaged for a period of fourteen years, was an asset of the partnership, and if the whole concern and the goodwill of a business had been sold, the name, as a trade mark, would have been sold with it. If, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before. It is the same as if two persons, who alone carried on the business of Child & Co., thought fit to separate, each would be entitled to use the name by which they carried on their business.

The case here would have been different if the Plaintiff had stipulated that the Defendant should not use the name; but they have divided the rest of the partnership property, and have left the name or style to be enjoyed in common. I am of opinion that the Plaintiff is not entitled to an injunction, and the bill must be dismissed with costs.

[570] *Re CRUMP. July 1, 18, 1865.*

Stock in Court, settled absolutely to the separate use of a married woman, ordered, upon her petition, to be transferred into the joint names of herself and her husband, her separate examination and consent being dispensed with.

By the combined effect of her marriage settlement, dated in 1823, a will of a testatrix, who died in 1864, and a subsequent deed of appointment executed in 1865, Mrs. Sarah Crump was absolutely entitled to a sum of £4000 for her separate use. This had been paid into Court under the Trustee Relief Act.

Mrs. Crump, by her next friend, together with Mr. Crump, her husband, presented a petition, praying that the sum in question might be transferred into the joint names of "the Petitioners, the Rev. Charles C. Crump, and Sarah, his wife."

The Master of the Rolls had made the order, but the registrar objected to draw up the order. He had referred to *Wordsworth v. Dayrell* (4 W. Rep. 689).

Mr. Buchanan now asked that the order might be drawn up, or, if that could not properly be done, either that a commission might issue for taking Mrs. Crump's consent, or that, upon her written request duly verified, the order might be made, as she did not desire the stock to be sold.

THE MASTER OF THE ROLLS [Sir John Romilly] made the order, saying he must assume that the solicitor had due authority to present the present petition.

[571] *NAYLOR v. ROBSON. June 10, 1865.*

Legacy to A. for life, and at her death to be equally divided between her two sons (who were named) or given to the survivor of them. Held, that the survivorship had reference to the death of the tenant for life.

Ann Banning had two sons, William and John.

The testator, her uncle, after referring to them by name, and giving them legacies, gave Ann Banning the interest of £400 for life, "and at their mother's death, the £400 to be sold out and to be equally divided between her said two sons or given to the survivor of them."

William attained twenty-one and died in 1862; Ann Banning died in 1865, and John was still living and had attained twenty-one.

By this petition, he claimed the whole £400 by survivorship.

Mr. Cutler, for the Petitioner.

Mr. Humphrey, *contrà*.

Blackmore v. Snee (1 De G. & J. 455); *Crozier v. Fisher* (4 Russ. 398); *Bouverie v. Bouverie* (2 Phillips, 349) were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a mere gift to Ann

Banning, widow, for life, [572] with remainder to her two sons or the survivor of them.

I am of opinion that the Petitioner John Banning, who was the survivor, takes the whole fund.

Reg. Lib. 1865, B. fol. 1365.

[572] COVENTRY v. COVENTRY. *June 15, 1865.*

In a suit for partition of property in which an infant was interested, the estate was sold. Held, that the costs subsequent to the first decree ought to be borne by the aggregate amount of the purchase-moneys.

One of the Plaintiffs, Charles Coventry, an infant, was tenant in common with three others of a copyhold estate. This suit having been instituted for a partition, a decree was made, on the 16th of April 1864, by which it was declared that the infant's costs were "a charge upon and ought to be raised by a sale of his one-sixth part or share of and in the copyhold hereditaments. And it appearing that it would be for the benefit of the infant that the copyholds should be sold in the entirety," and the other parties consenting, a sale of the copyholds was ordered to be made. (See *Fleming v. Armstrong*, ante, p. 109, and *Davis v. Turvey*, 32 Beav. 554.)

The property was accordingly sold and the cause came on for further consideration, when a question arose how the subsequent costs ought to be borne.

Mr. W. Pearson, Mr. Hanson, Mr. J. W. Rooth and Mr. Simmons, for different parties.

Elton v. Elton (27 Beav. 632) was referred to.

[573] THE MASTER OF THE ROLLS held that the costs of the Plaintiffs and Defendants, up to and including the costs of the original hearing, ought to be borne and paid by and out of their respective shares of the purchase-moneys, and that the costs subsequent thereto ought to be borne and paid out of the aggregate amount of the purchase-moneys.

Reg. Lib. 1865, A. fol. 1255.

[573] HOWELLS v. WILSON. *July, 12, 1865.*

[S. C. 34 L. J. Ch. 593; 12 L. T. 818; 13 W. R. 1011.]

In defence to a bill for redemption, the mortgagee set up a contract entered into with him by the mortgagor for the sale to him of the equity of redemption. This the mortgagor insisted had been abandoned. Held, that this defence could only be made available by a cross-bill.

This was a suit by a mortgagor against the mortgagee for redemption. The Defendant, the mortgagee in possession set up, as a defence, a contract for the purchase of the equity of redemption, but the Plaintiff insisted that it had been long since abandoned. At the hearing

Mr. Jessel and Mr. Blackmore asked for the usual decree for redemption, insisting that the disputed contract must be made the subject of an independent suit, and could not be used as a defence to the present suit.

Mr. Hobhouse and Mr. Bilton, for the Defendant. The Plaintiff seeks simply to enforce an equity, this the Defendant is entitled to meet by a counter equity. The decree now to be pronounced must be made consistent with the existing rights of the parties, and therefore the Defendant's right under the contract must be considered by the Court.

[574] THE MASTER OF THE ROLLS [Sir John Romilly]. The Defendant might plead a release of the equity of redemption, which would be a bar to this suit; but

a contested contract for the purchase of the equity of redemption must be made the subject of a cross-suit; it is no defence to the present bill.

I will make a decree for redemption, but without prejudice to any right the Defendant may have under the contract.

[574] *Re KING. GILBERT v. LEE. July 19, 1865.*

An executor may be deprived of his costs of suit upon a decree made on an administration summons and without a bill charging him with misconduct.

A decree had been made upon an administration summons, for the administration of the testator's estate, and the matter now came on for further consideration.

Mr. Rendall, for the Plaintiff, argued that the conduct of the executor had been so vexatious and improper as to disentitle him to his costs.

Mr. C. Brown, for the executor, argued that a Plaintiff, who sought to deprive an executor or trustee of his costs, was bound to make out a case for it by bill, in order that the Defendant might have an opportunity of meeting it.

THE MASTER OF THE ROLLS [Sir John Romilly] held that the course of conduct of the executor both prior to the suit, and in taking the accounts, had disentitled him to his costs, and that it was not necessary to file a bill for the purpose of depriving him of them.

[575] *POWELL v. OAKLEY. July 24, 1865.*

[See *In re Potter*, 1869, L. R. 7 Eq. 486; *In re Sampson and Wall*, 1884, 25 Ch. D. 488, 495.]

The 18 & 19 Vict. c. 43 renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court.

The 18 & 19 Vict. c. 43 enables infants, "upon or in contemplation of" their marriage, to make, with the approbation of the Court of Chancery, valid settlements of their real or personal property.

A female ward of Court had married without the sanction of the Court, and was still an infant, and an order had been made for the settlement of her real and personal estate. The question which now arose was, whether the above Act applied to a post-nuptial settlement.

Mr. Speed, for the trustees and wife.

Mr. Jackson, for the husband.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the words are large enough to comprise a post-nuptial settlement. But if it were otherwise, this is a case in which I should get over the difficulty by making the husband enter into a covenant.

[576] *LISTER v. PICKFORD. June 5, 6, 12, 1865.*

[S. C. 34 L. J. Ch. 582; 12 L. T. 587; 11 Jur. (N. S.) 649; 13 W. R. 827; 6 N. R. 243. See *Cuthbert v. Robinson*, 1882, 51 L. J. Ch. 241; *Churcher v. Martin*, 1889, 42 Ch. D. 318.]

Devise of lands, &c., situate, lying and being within the parish of G., "with the appurtenances," held not to pass lands thirty-three and a half acres in the parish of A., which had been allotted in respect of land in both parishes, and which had always been let and occupied together.

It is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be "appurtenant" to land, and the word "appurtenances" only includes incorporeal hereditaments such as rights-of-way, &c., but does not include additional land.

A trustee who is in possession of land is so on behalf of his *cestuis que trust*, and his making a mistake as to the persons who really are his *cestuis que trust* cannot affect the rights of the *cestuis que trust inter se*.

The testator devised his manor and advowson of Goulceby, with their appurtenances, &c., "and all and every his messuages, lands, tenements, tithes, and tithe commutation, rent-charge, and hereditaments, *situate, lying and being within the said manor and parish of Goulceby, with the appurtenances,*" to George Arthur Lister for life, with remainder to his child or children in tail. The trustees of the will (Francis Pickford and George Jackson) had, during the minority of any tenant in tail, power to lease and to enter into and hold possession of the estate and to apply the rents for the maintenance of the minor.

The testator also devised the legal estate in his residuary real estate to the trustees, Francis Pickford and George Jackson, and their heirs, upon trust to pay the rents to Matthew Henry Lister until he should dispose thereof by anticipation, with remainder over.

The testator died in 1842.

The testator had a considerable estate situate in the parish of Goulceby, and he had about thirty-three and a half acres of land in the parish of Asterby. These thirty-three and a half acres had been allotted to the father of the testator, under an Inclosure Act, in 1776. They were allotted in respect of lands held partly in [577] Asterby and partly in Goulceby, or at least respecting the position of which there existed, at that time, considerable doubt. Forty-two and a half acres had also, at the same time, been allotted in respect of lands in Goulceby. The testator, at the date of his will and of his death, had no other lands in Asterby than the thirty-three and a half acres; they had always been let with the lands in Goulceby; they had always been included in the same lease; always held under one instrument and the tenant had paid one rent for the whole, and the lease had been indorsed on the outside "lease of farm in Goulceby." At the same time, the lands were well known to be situated in Asterby, and were so expressed in the description of parcels contained in the body of the lease itself, though the testator had no other lands in Asterby except these.

On the death of the testator in 1842, George Arthur Lister entered into possession not only of the estate in Goulceby, but also of the thirty-three and a half acres in Asterby, it being supposed that the latter passed to him for life under the will, as being appurtenant to the Goulceby estate. In 1847 he granted a lease of the whole for fourteen years.

George Arthur Lister died in 1850 leaving an only child, Emily, who afterwards married Mr. Bagnell.

On the death of George Arthur Lister, his daughter being a minor, the trustees, Pickford and Jackson, under the power given them by the will, entered into possession of the Goulceby estate and of the thirty-three and a half acres at Asterby, and a suit being instituted on behalf of Miss Lister for her maintenance and guardianship, the trustees made various payments for her maintenance, out of the rents of the estate, and they accumulated the [578] surplus. In May 1861 the lease granted by George Arthur Lister expired, and the trustees, under the power given to them during Miss Lister's minority, granted a new lease in July 1861, which was still subsisting.

Miss Lister attained twenty-one in 1863, and afterwards married Mr. Bagnell. This bill was filed in 1864 by Matthew Henry Lister against the trustees and Mr. and Mrs. Bagnell, seeking a declaration that the thirty-three and a half acres at Asterby formed part of the testator's residuary estate, and for an account of the rents.

The first question was, whether the thirty-three and a half acres lying in Asterby passed under the devise in the will of lands in "the manor and parish of Goulceby, with the appurtenances." And, secondly, whether the Plaintiff's claim was barred by the Statute of Limitations.

Mr. Selwyn and Mr. Speed, for the Plaintiff. First, the thirty-three and a half acres did not pass under the specific devise of lands situate in the parish of Goulceby, for they are situate in Asterby, and a devise of lands in one parish will not pass lands in another parish, though they may be both let together; *Evans v. Angell* (26 Beav.

202); *Webber v. Stanley* (16 C. B. Rep. (N. S.) 698); *Buck v. Nurton* (1 Bos. & P. 53); Jarman on Wills (vol. 1, p. 743 (3d edit.)). Neither can they pass as appurtenant to the Goulceby property, for, in law, one piece of land cannot be appurtenant to another; *Buzzard v. Capel* (8 Barn. & Cr. 141).

Secondly. The Statute of Limitations (3 & 4 Will. 4, c. 27) has no application to this case. There is an express [579] trust of the land, which, under the 25th section, prevents the trustees from setting up the statute. *Cholmondeley v. Clinton* (2 Jac. & W. 175; 4 Bligh (O. S.), 1); *Sturgis v. Morse* (26 Beav. 562; 3 De G. & J. 1). So long as property is held by trustees the Statute of Limitations and the objection of *laches* are inapplicable; *Mills v. Drewitt* (20 Beav. 632); and it can never apply as between *cestuis que trust*. A trustee in possession holds the property for the rightful *cestui que trust*, whose title he is not allowed to repudiate, for to do so would be a breach of trust conferring no right on anyone; *Sturgis v. Morse* (26 Beav. 562; 3 De G. & J. 1). Here the trustees have not acted adversely, but under a mistake common to all, as to the rights of the parties under the will; *Downes v. Bullock* (25 Beav. 54; 9 H. of L. Cas. 1).

Mr. Southgate and Mr. Karslake, for Pickford and Jackson.

Mr. Williamson, for the assignees of the tenant in tail.

Mr. Hobhouse and Mr. Higgins, for Mr. and Mrs. Bagnell and the trustees of their settlement. First, having regard to the nature of this property, and the way in which it had been acquired, dealt with and described, it passed under the word "appurtenances" in this will; *Hibon v. Hibon* (32 L. J. (Chanc.) 374).

Secondly. The Statute of Limitations is applicable to the case. It began to run from the death of the testator in favor of those in adverse possession, and its operation has never been arrested.

Thirdly. The trustees entered only in their character of trustees for the infant, and not as trustees for the [580] Plaintiff, and their possession has always been adverse to the right of the Plaintiff.

Mr. Selwyn, in reply, referred to the more recent decisions as to the construction of the word "house" under the Lands Clauses Consolidation Act. See *Fergusson v. The London and Brighton Railway Company* (33 Beav. 105), and the cases there cited.

June 12. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the thirty-three and a half acres do not pass under the word "*appurtenances*" attached to this devise. The devise itself is strictly limited to lands in the manor and parish of Goulceby, and all that is appurtenant to lands in Goulceby passes, but nothing more. But it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word "*appurtenances*" includes all the incorporeal hereditaments attached to the land granted or demised, such as rights-of-way, of common, of piscary, and the like, but it does not include lands in addition to that granted. The case would have been very different, if the devise had been of his farm at Goulceby, and all that was appertaining thereto, when the only question would have been the extent and meaning of the word "farm" and the land appertaining to that farm; but the words of the devise are strictly confined to lands in Goulceby, and all the cases concur that, under such words, lands out of Goulceby cannot be appurtenant to lands within Goulceby. It is admitted that if the word "*appurtenances*" had preceded the words "within the said [581] manor and parish of Goulceby," there could have been no question; but, in truth, this makes no difference, for when once it is settled that land cannot be appurtenant to land, it is settled that the land in Asterby does not pass under the word "*appurtenances*" as soon as it is established that the land devised is confined to land in the manor of Goulceby. It is quite clear that if the thirty-three and a half acres do not pass under the devise of Goulceby, they do under the residuary devise.

Having come to this conclusion, another question, and one of a very different character, arises, viz., whether the right of the Plaintiff is barred by the Statute of Limitations.

The testator died on the 14th of October 1842. Goulceby was devised to George Arthur Lister for life, and he had the legal estate during his life, and he entered into possession and enjoyed the property during his life. The time under the statute, therefore, began to run immediately on possession being taken by George Arthur

Lister, and more than twenty years have elapsed before this bill was filed. But in 1850 George Arthur Lister died, leaving an infant daughter, now Mrs. Bagnell. Upon his death a trust arose under the will, in Pickford and Jackson, the two trustees under the will, to enter into possession of the specifically devised property and hold the same in trust for the daughter of Mr. George Arthur Lister during her minority. This they accordingly did, and in 1851 they caused a bill to be filed against them on behalf of that lady for her maintenance and guardianship. In May 1861 the former lease, granted by George Arthur Lister, having expired, the trustees granted a new lease on the 19th July 1861, which is still subsisting. In August 1863 [582] Miss Lister attained twenty-one, and has since married, and this bill was filed on the 10th of February 1864.

If there was nothing more in the case, the statute would obviously apply and the Plaintiff would be barred; but, by the will of the testator, the legal estate in the lands included in the residuary devise are vested in the same trustees, Pickford and Jackson, in trust for the Plaintiff for life, remainder to his eldest son in tail. If, therefore, I have come to a correct conclusion in deciding that the thirty-three and a half acres in Asterby were included in the residuary devise, the legal estate in them was vested in Messrs. Pickford and Jackson at the death of the testator, and when George Arthur Lister died in 1850, only eight years' adverse possession had elapsed. They could therefore easily without obstacle have recovered possession of these thirty-three and a half acres on behalf of their *cestuis que trust*, the residuary legatees at that time, and in truth it was their duty so to do. They did take possession of the lands, and they continued in such possession until August 1863. A distinction was attempted to be taken that they were not in possession till May 1861, because the lease granted by George Arthur Lister did not expire till then, but there is nothing in this, because the tenant attorned to them, and if he had not, they themselves granted the lease in July 1861, within twenty years after the testator's death.

But the argument principally urged upon me is, that the trustees were really in possession as trustees for Miss Lister, and that therefore their possession must be treated to have been adverse to the Plaintiff. But I am of opinion that this argument cannot be maintained. A trustee, who is in possession of land, is so on behalf of his *cestuis que trust*, and his making a mistake as to the [583] persons who are really his *cestuis que trust* cannot affect the question. Messrs. Pickford and Jackson thought the infant was the real owner, and that they held the property for her; but, in truth, in that character, they had no right to possession. Suppose that they had imagined *bonâ fide* that they themselves were personally entitled to the property, and that they were not trustees of it for anyone, it would, nevertheless, have been certain that they would have been trustees for the *cestuis que trust*, and no time would run while they were in such possession. The legal estate was vested in them, no other person could have maintained an ejectment against them; they are bound to know the law, they ought to have taken possession as soon as they saw who were the real beneficiary devisees, and being in possession, they ought to have applied the proper proportion of the rents for the benefit of such residuary devisees. The fact that they did not do so cannot, in any respect, weaken the rights of the devisees. Nor can I see the least distinction in this respect between the trustees having wilfully and fraudulently paid rents belonging to their *cestuis que trust* to a stranger, and their having done so ignorantly and *bonâ fide*. However, they obtained possession, and as soon as they did so, their possession must be attributed to their real right to possession and not to any other. Were it otherwise, it would be possible for trustees to give the property of one *cestui que trust* to another.

I must therefore make a declaration and decree accordingly, and there must be an account of the rents received in respect of, and properly attributable to, the 33a. 2r. 26p. since the death of George Arthur Lister.

I think that this is not a case for costs on either side.

[584] RAYMOND v. LAKEMAN. *March 27, 1865.*

Biddings were opened upon an advanced price, on payment by the applicant of the costs properly incurred of the purchaser. Held that the cost of perusing the abstract and of the examination of the title, prior to the first purchase being confirmed, ought not to be allowed on taxation.

A company who employed standing solicitors at a fixed salary, became the purchaser under the Court. The biddings were opened on payment by the applicant of the costs of the company. Held, that the applicant was not, on the taxation, entitled to the benefit of the private arrangement between the company and their solicitors.

On the 25th of July 1864 some property was sold under the Court. By the conditions of sale, the abstract was to be delivered "within ten days after the certificate should have become binding, and the requisitions on title were to be made within twenty-one days after the delivery of the abstract."

A company became purchasers of the property for £7500, and on the 28th of July they were certified to be the purchasers. The certificate would have become binding on the 12th of August, but on the day previous (11th August) a summons was served for opening the biddings. The abstract was delivered on the same day (11th August).

The biddings were opened by an order made on the 8th of September, and the applicant, Mr. Curling, was ordered to pay the company the costs of the application "and their costs, charges and expenses (properly incurred) occasioned by their bidding for and being allowed the purchaser of the said hereditaments."

The Taxing Master, in taxing the costs, allowed the following item, after deducting £1, 6s. 8d. :—

"Aug. 11.—Received Abstract of Title from vendors' solicitors,
perusing and considering the same, 69 brief sheets . . . £7 13 4"

He considered that the company ought to be allowed such costs as they would be bound to pay to their soli-[585]-citors, and that they would be bound to pay this charge. It appeared that the company paid their solicitor a fixed salary for ordinary matters.

Mr. Pearson, for Mr. Curling, objected to this and other similar items, on the ground that the examination of the abstract was premature, and therefore that the costs had not been "properly incurred." He also objected that inasmuch as the standing solicitors of the company were paid by a fixed salary, the company had no right to charge Mr. Curling with more than their own solicitors could have charged them.

[THE MASTER OF THE ROLLS. I do not think that Mr. Curling is entitled to the benefit of any such agreement between the company and their solicitors as to costs.]

Mr. Everitt, for the company. Until the biddings had been opened the company were purchasers, and their solicitors were bound to proceed in the examination of the title. Secondly, the applicant has no right to the benefit of the private arrangement between the company and their solicitor. He cited Seton on Decrees (p. 1205 (3d edit.)) ; Smith's Pr. (p. 1011 (7th edit.)) ; *Anon.* (2 Ves. jun. 286).

Mr. Pearson, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Taxing Master is mistaken when he says that the costs which Mr. Curling ought to pay are such charges as a solicitor could properly sustain against his employer. If that were carried to its full extent, a very large bill of costs might have to be paid on opening [586] biddings. In this case, the certificate was to be obtained and the abstract was not to be delivered within ten days after it should have become binding. Nothing would be easier than to deliver the abstract before it was necessary to do so, and then for the purchaser to say, get on with the title as fast as possible, lay the abstract before counsel and get his opinion. If that were done, costs to the amount of one hundred guineas might, in a very short time, be incurred. It is obvious that the

solicitor could charge these costs against the purchaser, because it was done by his direction and at his risk, but he could not charge them against the person who opened the biddings.

What happened here was this:—Before the sale had become binding by confirmation, it was opened, and another person was allowed to become the purchaser. The first purchasers were to have their costs properly incurred, but they were not to be allowed everything done gratuitously and unnecessarily before that time.

I am of opinion that everything relating to the perusal of the abstract and the examination of the title should be disallowed. This qualification is added to the costs payable, “properly incurred,” which limits the costs to those fairly and properly incurred as against a third person.

Mr. Curling cannot have the benefit of any private agreement between the solicitor and company as to costs. I give no costs of this application.

[587] LORD KENLIS v. THE EARL OF BECTIVE. July 5, 10, 1865.

Construction of a shifting clause.

A testator directed two estates to be purchased (A. and B.). The estate A. was to be settled on the sons of his daughter (except Lord K., the eldest), and their issue, and in default on K. for life, with remainder to his first and other sons in tail, with remainder to his issue in tail general, with remainders over to daughters of the daughter. Estate B. was to be settled on Lord K. for life, with remainder to his first and other sons in tail, and afterwards to the same uses as the estate A. There was a shifting clause determining the estate of Lord K. and his first and other sons in estate B., in case he or his issue male became entitled to estate A. K. having become entitled to estate A., it was held that his first life-estate alone in estate B. had ceased, but that his second life-estate therein, expectant on the failure of younger sons of the daughter, was still subsisting.

In 1842 the Defendant, the Earl of Bective, married Amelia, the only child of Alderman Thompson. There were issue of the marriage one son, namely, the Plaintiff, Lord Kenlis, born in 1844, and five daughters.

In 1853 Alderman Thompson made his will, by which he devised the Underley estate in Cumberland to his widow for life, with remainder to trustees, in trust for the separate use of his daughter, the Countess of Bective, for life, and after her decease to the use of each of the sons of his daughter born in the testator's lifetime (except Lord Kenlis or the eldest son for the time being of his daughter being heir apparent to Earl Bective) successively for life, with remainder to the first and other sons in tail male of each of such sons; and in default of such issue, to the use of each of the sons of his daughter born after his decease (except an eldest son for the time being of his daughter being heir apparent of Earl Bective) successively in tail male; and in default of such issue, to the use of Lord Kenlis for life, with remainder to his first and other sons in tail male; and in default, to the use of Lord Kenlis in tail general; and in default of such issue, to the use of the second and every other son of his daughter successively in tail general; and in default there followed limitations to the daughters of the Countess of Bective and to the testator's nephews, with an ultimate remainder to his own right heirs.

[588] The testator then gave the residue of his personal estate to trustees in trust to invest two-thirds of it in the purchase of hereditaments, to be settled to the same uses as were thereinbefore expressed, to take effect after the decease of his daughter, the Countess of Bective, concerning the Underley estate.

The testator then directed the trustees to stand possessed of the remaining one-third of the residue of his personal estate and to invest it in the purchase of hereditaments, which he directed them to settle in the following terms:—

“And shall and do settle the same hereditaments, or cause the same to be settled, to the use of Lord Kenlis” for his life, “with an immediate remainder to his first and other sons successively in tail male; and after the failure or determination of the said uses and estates,” then upon the same trusts, &c., hereinbefore declared to take

effect from and after the decease of my wife and daughter of and concerning the Underley estate. "And in which settlement, to be so made, shall be inserted a proviso for determining the said estate for life so directed to be limited in use to the said Thomas Lord Kenlis and his assigns as if he were dead, and for determining the said estate tail to be so limited to his first and other sons as if such tenant in tail were dead without issue inheritable to the said entail, in case the said Lord Kenlis or any issue male of him should become entitled to the possession or to the receipt of the rents and profits of the hereditaments in which the said two-third parts of the said residue of my personal estate are so hereinbefore directed to be invested as aforesaid, by virtue of the limitations so hereinbefore directed to be, in such settlement thereof, inserted or contained as aforesaid."

[589] The testator died in 1854 and his widow in 1861.

Upon the death of the Countess of Bective in 1864, a question arose between Lord Kenlis, the Plaintiff, and his sisters, the infant Defendants, as to the one-third part of the residuary personal estate and the real estates purchased or to be purchased therewith. It was contended on the part of the sisters, that inasmuch as the Plaintiff had become entitled to the possession and receipt of the rents and profits of the hereditaments in which the two-third parts of the residuary personal estate had been directed to be invested, not only his life-estate and the estate tail limited to his first and other sons in the hereditaments to be purchased with the one-third part of the residuary personal estate was determined, but that his estate in tail general in the same hereditaments was also determined, and that the hereditaments to be purchased with the one-third part of the residuary personal estate ought to be settled and conveyed to the use of the daughters of the Countess of Bective successively, according to seniority of age in tail general.

The Plaintiff submitted that upon the true construction of the will he became entitled, upon the death of his mother, the Countess of Bective, as tenant in tail general in possession, to the funds representing one-third part of the residuary personal estate and the accumulations thereof, and the hereditaments purchased or to be purchased therewith, but subject to the provisions in the will contained for the application of the income and rents and profits thereof during the interval which elapsed between the death of the Countess of Bective and the day when the Plaintiff attained the age of twenty-one years. The Plaintiff further submitted that even if this construction were not correct, then, upon the death of the [590] Countess of Bective, the one-third part of the residuary personal estate and the hereditaments purchased and to be purchased therewith became, according to the literal construction of the gift over, subject to the uses declared concerning the Underley estates, to take effect after the death of the Countess of Bective, and that thereby the Plaintiff became tenant for life, with remainder to his first and other sons in tail male, with remainder to himself in tail general, with other remainders over.

Sir H. Cairns and Mr. Macnaghten, for the Plaintiff. *Baillie v. Lockhart* (2 Macqueen's H. of L. Cas. 258).

THE ATTORNEY-GENERAL (Sir R. Palmer), for the daughters.

Mr. Rolt and Mr. Wickens, for the trustees. *Jellicoe v. Gardiner* (11 H. of L. Cas. 323).

Mr. Hobhouse and Mr. Hawkins, for the Earl of Bective, argued a question of apportionment which arose in the case.

Sir H. Cairns, in reply, cited *The Earl of Scarborough v. Savile* (3 Adol. & Ell. 965).

July 10. THE MASTER OF THE ROLLS [Sir John Romilly]. It is clear that in case Lord Kenlis, or any of his issue, became entitled in possession to the property which is to be bought by the two-thirds of the residue, then this life-estate given to Lord Kenlis, and the estate [591] given afterwards to his issue in the one-third, are to be determined, and the property is to go exactly in the same way as it is previously directed with respect to the Underley estate after the deaths of his widow and his daughter. Then, in order to consider the effect of this, I must turn back to look at the limitations expressed concerning the Underley estate, and I find them to be for the second and every other son of the Countess of Bective born in the lifetime of the testator for life, with remainder to his first and other sons in tail male, and

in default to the second and every other son of the Countess of Bective born after the death of the testator in tail male, with remainder to Lord Kenlis for life, with remainder to his first and other sons in tail male, with remainder to Lord Kenlis in tail general, and in default to the use of the second and every other son of the Countess of Bective in tail general, with remainder to the first and every other daughters of the Countess of Bective in tail general.

It has been justly observed that the testator, in this case, has been his own conveyancer, and therefore I cannot give effect to the circumstance that the will contains a direction to settle, and by means of that direction, or of any executory power, vary the limitations and estates which are here expressed in detail. I must therefore simply insert the limitations which I have enumerated, and which are contained in the will with relation to one-third of the residue, exactly as if the limitations in favor of Lord Kenlis and his issue, in the early part of this clause, had been omitted, that is, the estate to be so purchased is to go exactly as if Lord Kenlis had died without leaving issue in tail male, in which case the limitations after that event are to the younger brothers and the issue male as above mentioned, and on failure of those estates, to Lord [592] Kenlis for life, with remainder to his issue in tail male, and in default of such issue to him in tail general, and then to the second and other brothers, and then to the daughters.

It is obvious that I must insert all these limitations in the settlement which is to be executed. The event cannot in the slightest degree alter the construction of the will. Assume that there had been two or three younger sons of the Countess of Bective, then it is clear that these limitations must have been introduced and be placed after the life-estate of Lord Kenlis, and after them there would have been introduced a life-estate of Lord Kenlis. The fact that all the prior limitations in favour of younger sons fail, because there are no younger sons, does not alter the will, nor can I either omit from the settlement directed to be made, or introduce into it, any limitations except those which I find in the will itself. The limitations over in favour of the first and other daughters in tail general are only to take effect in the event of all the prior limitations failing, and the proviso only affects the life-estate and the estate to his sons given to Lord Kenlis in the beginning of the disposition of the estate to be purchased with this one-third part of the residue.

I must therefore declare, that in the events which have happened, the hereditaments which are to be bought with the one-third of the residue are to be settled upon Lord Kenlis for life, with remainder to his first and other sons in tail male, and in default of any such issue, to Lord Kenlis in tail general, with remainder to the first and other daughters of the Countess of Bective in tail general.

[593] TURNER v. GOSSET. July 10, 1865.

[See *In re Noyce*, 1885, 31 Ch. D. 75 ; *In re Crosland*, 1886, 54 L. T. 239 ; *In re Maumder* [1902], 2 Ch. 878.]

"Entitled" construed "entitled in possession."

Subject to prior life and possible absolute interests, there was a bequest of a portion of the residue to A. B., with a gift over to his children or other issue, in case of his decease before he should "become entitled." Held, that this meant "entitled in possession."

The testator gave successive interests in his residue to several persons for their respective lives, with absolute gifts amongst the children. And in case the tenants for life should happen to depart this life without leaving any child [which happened], the testator directed one-eighth of his residue to be paid to his nephew Sir Hilgrove Gosset, and one-eighth to each of the three other persons hereinafter named, and the other four-eighths amongst the children of four other persons.

The will then proceeded as follows:—And in case of the decease of either of his said nephews Sir Hilgrove Gosset, Abraham Gosset and Isaac Gosset, or of his

niece Elizabeth Lempriere, before they should severally become entitled to the said eighth share of his residuary estate and effects, then the said testator gave and bequeathed the said eighth part or share of the residue of his said trust moneys, estate and effects, unto and equally between the children or to the only child or other issue of such of them as should be then dead leaving issue, equally between such children or issue, respectively, such children or child and issue of each of them to take their, his or her respective parent's share only."

The testator died in 1831.

The tenants for life had no issue, and the last of them died in August 1862.

Sir Hilgrove Gosset had died in 1843, having had five [594] children, four of whom were living, the fifth had died in 1859 leaving one child.

The case was argued by Mr. Bevir, Mr. Colt, Mr. Wickens, Mr. Browne, Mr. Kay, Mr. Pontifax, Mr. Streeten, Mr. Hobhouse, Mr. Beck and Mr. Jessel.

Chorley v. Loveband (33 Beav. 189); *Henderson v. Kennicot* (2 De Gex & Sm. 492); *The Commissioners of Charitable Donations v. Cotter* (2 Dru. & Walsh, 615; 1 Dru. & War. 498); *Holgate v. Jennings* (34 Beav. 79), were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that the cases cited are very different from this.

The construction of this will is this: There is a gift to the tenants for life with remainder to their children, and in case they should die without children, half of the residue is given over in eighths amongst the four persons, but in case of the decease of any of them "before they should severally become entitled to the said eighth share" there is a gift over to their children or other issue. I think that by these words the testator meant, "before they become entitled in possession and to the receipt of the money." I am of opinion that the rights are to be ascertained in August 1862, and that the share of Sir Hilgrove Gossett is to be divided amongst as many children as he then left and as had previously died leaving issue, the children themselves will take one share each and the issue will take the share of the deceased parents *per stirpes*. This will be the proper division of the fund.

Reg. Lib. 1865, B. fol. 2092.

[595] NUNN v. D'ALBUQUERQUE. March 17, 18, 1865.

[Distinguished, *Tonge v. Ward*, 1869, 21 L. T. 480; *Proctor v. Bayley*, 1889, 42 Ch. D. 394 (n.).]

The Defendant having, in ignorance, infringed the Plaintiff's patent, submitted, and he offered before suit to pay the amount of profits made, which were very trifling. At the hearing, though a perpetual injunction was granted, no costs were given, and an account was granted only upon the Plaintiff's request and at his peril.

This suit was instituted by a patentee of sea lamps to restrain an infringement, and also for damages and the delivery up of the pirated articles.

The Defendant, immediately on the infringement being complained of, submitted, saying he had acted in ignorance of the existence of the patent, and expressing his regret. He promised not to manufacture any more of the lamps in question, and to account to the Plaintiff for the profits he had made.

He also furnished the Plaintiff with a solemn declaration, made by him, shewing that he had made forty-one lamps, that he had sold two, and that he had made a profit of £2, 13s. 5d. only by the sales. He also offered either to sell to the Plaintiff the stock on hand at cost price or to take them to pieces, so as not to waste such parts as were available for other purposes.

The Plaintiff, however, was not content with this, but insisted on an account and payment of the profits, on the destruction of all the stock on hand, and also that the Defendant should give him a signed apology, and pay his solicitor £5, 5s. for costs. This not being acceded to, the Plaintiff instituted this suit for the object above stated.

At the hearing, the Defendant submitted to a perpetual injunction, and the only questions were, as to the Plaintiff's right to an account and as to the costs of the suit.

[596] Mr. Baggallay and Mr. Hardy, for the Plaintiff.

Mr. Selwyn and Mr. Fischer, for the Defendant.

Millington v. Fox (3 Myl. & Cr. 338) was cited as to costs, and *Edelsten v. Edelsten* (1 De G. J. & Sm. 185) as to the right to an account.

THE MASTER OF THE ROLLS. It has been frankly admitted that the only question to be determined in this suit is that of costs, for everything that the Plaintiff could reasonably have required was offered by the Defendant before suit.

The last thing I should do would be to give the Plaintiff any costs, and the only point is, whether he is entitled to an inquiry as to the damages he has sustained.

March 18. THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot give the Defendant his costs in this case. I felt desirous of doing so, because I am convinced that the bill has been filed for the mere purpose of obtaining costs. But I must bear in mind that the suit has arisen from the conduct of the Defendant, and that if he had not violated the Plaintiff's rights, the litigation would not have happened. I also think that the Defendant ought to have offered to pay the Plaintiff's costs of going to his solicitor, though they were not costs in the suit.

The Plaintiff may have an account, but it must be at his own peril as to the costs of it, if it turn out that the Defendant has stated the truth. The Defendant has sworn to the account and has offered an inspection of [597] his books and to pay the profits made. He has also offered either to sell the lamps to the Plaintiff at the cost price or to have them taken to pieces.

I will make an order for a perpetual injunction, and, upon the Plaintiff's request and at his peril, I will direct the account, but I will give no costs on either side.

[597] *Re THE IRON SHIPBUILDING COMPANY.* July 20, 21, 1865.

Form of removing the name from the register of shareholders under "The Companies Act, 1862."

The Court had ordered the name of an infant, the mere agent of the directors, to be removed from the register of members under "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 35). The question was as to the form in which this was to be effected.

Mr. Selwyn, Mr. Hobhouse and Mr. Rudge, for different parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. The name must be erased. The best way of doing so will be to strike through the name with a pen and ink, and then add a short abstract of my order thus:—"By an order of the Court of Chancery, dated, &c., this name has been erased." Let it be signed by the secretary.

I object to its being erased by a penknife so as to make it appear that the name was never there.

[598] *PARSONS v. JUSTICE.* June 1, 5, 1865.

Gift to A. for life, and after her decease to all the children of B., who should be living at the testator's death or be born afterwards who should attain twenty-one, with a direction that no child should be excluded in consequence of any other child having attained a vested interest. Held, that the class was to be ascertained upon the latter of these two events, viz., a child of B. attaining twenty-one and the death of A., and that a child born after that period was excluded.

The testator gave his real and personal estate to trustees, upon trust to convert and invest, and to stand possessed of the trust moneys upon trust to pay the interest, dividends and annual produce thereof unto his wife for her life, and from and after her decease, then he directed that his trustees should stand possessed of and interested in the trust moneys "upon trust for all and every the child or children of his brother

James Buckland who should be living at his the said testator's decease or born afterwards, who should live to attain the age of twenty-one years, and if there should be two or more such children, then equally to be divided between or among them, share and share alike, as tenants in common, and if there should be but one such child then in trust for such only child," and to apply the income of the share of such children towards their maintenance and education until they should attain a vested interest in such share or previously die.

"And he thereby directed that no child of his brother attaining the said age of twenty-one years should be excluded from his or her share of the trust premises, in consequence of any other child or children of his brother having previously obtained a vested interest in his or her share or shares; but that each child of his brother attaining, in the lifetime of his said brother, a vested interest in his or her share, should thenceforth, during the life of his brother, be entitled to receive the whole of the interest, dividends and annual produce of his or her vested share for the time being, subject to the con-[599]-tingent right or interest of any after-born child of his said brother to such vested share."

The testator died in 1831, and his widow died in 1863.

The testator's brother, James Buckland, was still living. He had had ten children, the eldest of whom was forty-eight years of age and the youngest was under age.

Mr. Baggallay and Mr. Townsend, for the Plaintiffs.

Mr. Selwyn and Mr. Speed, for the principal Defendants.

Mr. Shebbeare, for trustees.

June 5. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the class of children is to be ascertained at the period of distribution, which is, when, after the death of the tenant for life, the eldest child of James Buckland attained twenty-one. In other words, upon the happening of the latter of two events, first, the attainment of twenty-one of a child, and, secondly, the decease of the testator's widow. Thus, if any one of James Buckland's children attained twenty-one before the widow's death, the money was not then to be distributed, but the class was to be ascertained at the death of the widow, and no child born after her death can participate.

The shares of infants are subject to be divested if [600] they should not live to attain twenty-one. I think all the cases clear on the subject. (Jarman, ch. xxx. s. 2.)

I must declare that all the children of James Buckland, who were born prior to the death of the widow, attained vested interests, and that the period of distribution arose, in this case, on the death of the widow, and that no child born subsequently to that period took any interest in the estate.

Reg. Lib. 1865, B. fol. 1381.

[600] *Re GREGORY'S SETTLEMENT AND WILL* June 13, 14, 1865.

[S. C. 11 Jur. (N. S.) 634; 13 W. R. 828; 6 N. R. 282.]

Bequest to "Francis, the youngest son of F. G." He had no son Francis, but he had an eldest named Arthur Francis and a youngest named Arthur Charles, who was the testator's godson. Held, that the youngest was entitled to the legacy.

Family repute admissible to shew that a legatee was the godson of the testator.

A former will of a testator held admissible evidence on a question as to which of two persons was intended to take as legatees.

By his will, dated the 2d of December 1825, the testator gave as follows:—

"I give and bequeath unto Francis Gregory, *the youngest son of my brother* Francis Gregory, from and after the decease of myself and Caroline Gregory my wife, all and singular the moneys to arise," &c., from the sale of certain property.

The testator died in 1847 and his wife in 1861.

Francis Gregory, the brother of the testator, had three sons only. The eldest was

named Arthur Francis Gregory, the second was named Arthur William Gregory and the youngest Arthur Charles Gregory. They all survived the testator.

[601] The question was, which of the sons was entitled under the above bequest to Francis, the youngest son, it being claimed both on behalf of the eldest, Arthur Francis, and the youngest, Arthur Charles.

There was evidence that, in a prior will, dated the 13th of February 1825, the testator had devised the property to "Charles Gregory, the youngest son of his brother Francis Gregory." There was evidence that it had always been believed in the family that the testator was the godfather of the youngest son, but there was no strict proof of the fact. The reception of this evidence was objected to.

Mr. Hobhouse and Mr. Dickinson, for the representatives of Arthur Charles Gregory, the youngest son. First, extrinsic evidence is admissible to shew the state of the family and the knowledge of the testator. Secondly, the description of "youngest son" must prevail, for the name is inaccurate as applied to either.

Mr. Baggallay and Mr. Herries, for the representatives of Arthur Francis. Evidence of intention to be derived from a former will is inadmissible, and the fact of being a godson is not proved. Secondly, the rule "*veritas nominis tollit errorem descriptionis*" must prevail, the name is more to be relied on than the description.

Mr. Elderton, for the trustees. *Drake v. Drake* (8 H. of L. Cas. 172; 25 Beav. 642); *Bennett v. Marshall* (2 Kay & J. 740); *Bernasconi v. Atkinson* (10 Hare, 345); *Hodgson v. Clarke* (1 De G. F. & J. 394); *Bradshaw v. Bradshaw* (2 Y. & C. (Exch.) 72); [602] *Jarman on Wills* (vol. 1, pp. 407, 408 (3d edit.)); *Doe d. Hiscocks v. Hiscocks* (5 Mee. & W. 363); *Newbolt v. Pryce* (14 Sim. 354); *Garner v. Garner* (29 Beav. 114), were cited.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the evidence is admissible, and that it is sufficient to turn the scale in favor of the youngest son. One piece of evidence, I am clear, is admissible, namely, that the youngest was the godson of the testator; and I think that, in the absence of evidence on the other side, it is proved that the youngest son was the godson. The relation between godfather and godson is often acted on by testators, and nothing is more common than for a person to leave a legacy to his godson. It is a course so frequently adopted that I think it is sufficient, in a case of ambiguity, to induce the Court to select one and say that it is more likely that the godson should have been intended than the other.

The testator knew perfectly well that the youngest son was Charles, but this would be as much in favor of one as the other. We have the fact that, a few months previous, by another will, he gave the property to "Charles Gregory, the youngest son of his brother." I think that the first will is admissible to shew that the testator knew of the state of the family, and having once admitted it, I cannot do so in part.

On the whole, I think that the evidence is admissible, and that it is sufficient, in this case, to make the *demonstratio* prevail over the *nomen*. I am therefore of opinion [603] that the legacy is given to Arthur Charles, and I shall declare accordingly.

The cases turn on such small matters, that it may be said to be impossible to reconcile them all, the distinctions are so shadowy that each case must depend on its own facts.

[603] BERDOE v. DAWSON. Jan. 30, 31, Feb. 8, 1865.

[S. C. 12 L. T. 103; 11 Jur. (N. S.) 254; 13 W. R. 420. See *Bainbrigge v. Browne*, 1881, 18 Ch. D. 197; *Readdy v. Pendergast*, 1886, 55 L. T. 768.]

Securities obtained from sons for their father's debt set aside, the creditors failing to prove (as they were bound to do) that the sons knew the true nature of the transaction, and that no undue influence had been exercised by the father.

The outline of this case was as follows:—The Plaintiffs, Walter Berdoe the younger, and James Berdoe, were entitled, subject to the life interest of their father, Walter Berdoe the elder, to an interest in a sum of £16,666, 13s. 9d. consols, bequeathed in 1833 by a Mr. Payne.

In 1857 Walter Berdoe the elder, a tailor, was indebted to the executors of a

Mr. Dawson in a sum of £5350, and being pressed for payment, he induced his two sons, who were then of the respective ages of twenty-five and a half and twenty-three, to join in securing his debt. This was effected by an indenture, dated the 1st of January 1858, whereby the Plaintiffs and the father assigned all their interests under the will of Mr. Payne to secure the £5350 and interest, which they likewise covenanted to pay.

The Plaintiffs were resident with and maintained by their father down to his death in 1860, when he died insolvent.

This suit was instituted by the two sons against the executors of Dawson, in December 1863, to set aside [604] the security of 1858, on the ground that they were ignorant of the nature and effect of the deed, that it had been obtained while they were entirely in the power of their father, whom they represented to have been "a man of determined and austere temper," whose word with them was law, and that "they did not act as free agents or exercise any will of their own, but simply obeyed their father's command."

The facts are more fully stated in the judgment of the Court.

Mr. Selwyn and Mr. Hardy, for the Plaintiffs.

THE ATTORNEY-GENERAL (Sir R. Palmer), Mr. Renshaw and C. Browne, for the Defendants.

Baker v. Bradley (7 De Gex, M. & G. 597); *Cooke v. Lamotte* (15 Beav. 234); *Hoghton v. Hoghton* (15 Beav. 278) were cited; and see *Sercombe v. Saunders* (*ante*, p. 382).

THE MASTER OF THE ROLLS [Sir John Romilly]. I will read the papers before I call for a reply. The law is settled, that a person who takes a benefit obtained without consideration by a father from his child incurs the obligation, in the strongest possible sense of the word, of proving that the transaction as between the father and child was a righteous one. He must prove, not only that the son understood the transaction, but also that the benefit was not obtained from him by the undue [605] exercise of the peculiar influence possessed by a father over his son.

Feb. 8. THE MASTER OF THE ROLLS [Sir John Romilly]. I have gone through the papers in this case, and I am of opinion that the Plaintiffs are entitled to a decree.

The case is a singular one in various respects; but the rule, which I have stated before, on which the Court is bound to act in all cases of this description, is strongly exemplified on the present occasion. When a person executes a deed by which his father or any other person nearly related and connected with him, or who, from any other cause, has necessarily a considerable influence over him is benefited, then the person who claims the benefit of that deed is bound to establish two things:—he is bound to establish, in the first place, that the person who executed the deed knew what he was about when he executed it; and in the next place, he is bound to shew that it was made of his own free will, and unbiassed by and without being subject to that influence which he could not easily resist.

The state of the case, on the present occasion, happens to be this:—Mr. Walter Berdoe, the father, carried on business as a tailor, both in Cornhill and in Bond Street; and it appears that the Plaintiffs, his two sons, assisted him in that business; they were not partners, and they had no share in the profits of the business, but they were paid at the rate of twenty shillings per week.

[606] It appears also that Mr. Berdoe had been supplied by Mr. Dawson, a friend of his, and who was well acquainted with his family, with a quantity of cloth and other matters for the purposes of his trade, and when Mr. Dawson died, a very heavy debt of about £5350 was due from Mr. Walter Berdoe to the estate of Mr. Dawson. The executors of Mr. Dawson (very properly, and I cannot blame them in that respect) pressed Mr. Berdoe very strongly for payment of his debt. He stated he was very sorry he could not pay it, and that if they pressed for its payment he would simply be ruined; that he could give no security, but that he was willing to insure his life for £1000, and to pay the premiums, and also to pay instalments of £50 a month as long as the business lasted. They said that would not do, and after some further pressure, he said, I can get my sons to give security. The security was of

this description:—A testator named William Paine had left a sum of £16,666, in which the father took an interest for life, and his sons took an interest in remainder in the capital. Accordingly, Mr. Berdoe, when thus pressed by the representatives of Mr. Dawson for payment of his debt, undertook that his sons should join with him in giving them a security upon this fund. The security was accordingly given; it was executed on the 11th of January 1858, but it bears date ten days before. At this time Walter Berdoe was twenty-five years and a half old, and James Berdoe was twenty-three years old. They were, therefore, quite of an age to be able to understand perfectly what was done in the matter; though, in my opinion, there is some obscurity and doubt upon the evidence whether they really did know what it was they were doing. They positively declare they did not, but the solicitor of Mr. Dawson's executors declares positively that they did, and that he gave them full information upon the [607] subject and explained everything to them. They say that they were totally dependent upon their father, that he was "a man of determined and austere temper," and that his children never "dared to contradict him or interfere with his wishes; that his word with them was law, and the only conversation which ever passed between him and any of them was of the shortest and most ordinary description, and that no intercourse of a confidential character ever passed between them." In substance, that they never thought of resisting what he advised, recommended or required them to do. That they executed this deed as a matter of course, without knowing the contents or how they bound themselves at all.

The effect of the deed itself is peculiar, because it not only mortgages all their interest, but it makes them enter into a personal covenant for the payment of their father's debt, provided it should not be paid by him before a certain time. It is not suggested that they obtained the slightest benefit by this transaction beyond this:—it is said they were much interested in the continuance of the business, and that if payment of the debt had been enforced against their father at once, the business must have been destroyed, and they would have been seriously injured; on the other hand, they say that they disliked the business, that they had no interest in it, and only acted as assistants to their father. It appears also that, upon the death of the father, his assets were not sufficient to pay his debts and that the whole of the concern was then broken up.

Now one of the principal things which the Court always requires in matters of this description is (as Lord Eldon observes in various cases), proof that it was a "righteous transaction," and the strongest and best [608] evidence is this:—that the person giving up his property should have an independent solicitor and independent advice in the matter. There was nothing of the sort here, not even a copy of the deed was sent to the Plaintiffs, and the only person who spoke to them was the solicitor of the persons who sought to obtain from them this security, and all that he says is, that he did, upon one occasion, explain the deed to them, and that, upon another occasion, he said he was ready to answer any question they chose to put to him. They say they understood nothing about it, there was no species of contract on their part, and the transaction was wholly voluntary and a mere giving up so much of their own money to pay the father's debt.

The cases upon the subject are exceedingly strong in shewing that this sort of security cannot be relied upon. The one which is the strongest and the nearest to this case is *Baker v. Bradley* (7 De G. M. & G. 597), in which the Lord Justice pointed out the distinction which is always taken in cases where a settlement is made by a young man of his reversionary property at the instance of his father. If it be a settlement by which the father gets no personal benefit, and is simply one made for the benefit of the brothers and sisters, the Court does not look into the extent of the consideration with strictness, but it even thinks that it may be a very proper thing that the influence of the father should be exercised so as to induce an elder son to make a proper and permanent settlement, when he comes of age, for the benefit of the family; but if the father gains any personal benefit by the transaction, the thing is tainted with a spot which stains it throughout. So where there is pressure used by a third person, who by means of threats against the [609] father induces him to compel his sons to join in a security of which he derives the sole benefit, the Court holds that neither he nor the third person can retain the benefit of that security as against the sons.

The case of *Baker v. Bradley* is a distinct authority on that subject. The marginal note is this :—"A mortgage was made of property by a father and son, immediately after the latter had attained his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security for the purpose of subjecting to it her separate estate, which she was, however, by a clause not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. Held, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence."

Without referring to the observations of the Lord Justice, that case strictly applies to the present, for it was endeavoured to support this transaction as a family arrangement, by which the Plaintiffs sought to keep up a business which has failed entirely. It is in point of fact a security obtained by undue influence.

I am of opinion, therefore, that, the burden of proof lying upon the Defendants, they have failed on both points. They have not proved that the Plaintiffs knew the true nature of the transaction; and so far from proving there was no undue influence, I think that the evidence shews clearly there was both undue influence and pressure used by the father in order to induce them to join in the transaction.

[610] It was then endeavoured to support this case on the ground of acquiescence, or a *quasi* acquiescence, and that fails entirely. Walter Berdoe died in July 1860; the Plaintiffs knew of the deed, but it does not appear that they knew the precise contents and nature of it, and an inspection of the deed was withheld from them till a very late period. As soon as they knew what the deed was, and had been advised by their solicitor that it was not binding upon them, they immediately filed this bill on the 16th of December 1863, which was about three years and a few months after the death of their father. In my opinion there is nothing proved to bind them by acquiescence in this transaction, there was merely an act of co-operation, an endeavour to make their father's estate as productive as possible for the purpose of paying his creditors.

The Attorney-General pressed very much the circumstance that these young men were, comparatively speaking, of mature age, and that they could not be called persons just escaped from infancy, because one was twenty-five and a half years old, and the other twenty-three years old; but I do not think this affects the case. If these two persons were entirely under the control of their father, and could do nothing but what he allowed them to do, and he required them to sign a deed of this description under the pressure of his displeasure and the fear of ruin in case of refusal, I think they are entitled to the protection of the Court and to be relieved from it.

A decree must be made, with costs, declaring that the mortgage is void so far as it affects to bind the Plaintiffs and their interest under Mr. Paine's will.

[611] THE EARL OF DURHAM v. SIR FRANCIS LEGARD. July 5, 14, 1865.

[S. C. 34 L. J. Ch. 589; 11 Jur. (N. S.) 706; 13 W. R. 959. See *Connor v. Potts* [1897], 1 Ir. R. 534; *Rudd v. Lascelles* [1900], 1 Ch. 820.]

The Plaintiff agreed to purchase an estate which, on the written contract, was, by mistake, stated to contain 21,750 acres; it turned out that it contained only 11,814 acres. Held, that the purchaser was not entitled to specific performance with a proportionate abatement for the deficiency of acreage, but that he could only enforce the contract on payment of the full price, or rescind the contract.

In 1862 the Plaintiff agreed to purchase an estate of the Defendant for £66,000. It was described in the written contract as the "*Kidland Estate containing 21,750 acres.*"

In the course of the investigation of the title, it turned out that the Kidland estate contained no more than 11,814 acres.

In May 1863 the purchaser instituted this suit for the specific performance of the

contract, on payment "of the purchase-money, less a proper compensation for the deficiency in quantity." The Defendant was willing either to perform the contract on receiving the full price stipulated or to cancel the contract.

The Plaintiff stated, in his affidavit, that he purchased the estate under the impression that its contents was 22,000 acres or thereabouts, that he would not have purchased if the real area had been stated, and that he had been guided in the price given by the extent of the estate and not by the rental, especially as he regarded it as affording him shooting and fishing over a large area.

On the other hand, on the part of the Defendant, it was shewn that the representation of the quantity was a *bona fide* mistake of his agent, and the Defendant said that "throughout his negociation, he was, in deter-[612]-mining the value of and fixing the price he should ask for the estate, actuated solely by the consideration of the rental thereof, and upon which alone he had made his calculations."

THE ATTORNEY-GENERAL (Sir R. Palmer), Mr. Wickens and Mr. Batten, for the Plaintiff, argued that the "general rule of specific performance was that the purchaser shall have what the vendor can give, with an abatement of the purchase-money for so much as the quantity falls short of the representation;" *Hill v. Buckley* (17 Ves. 394); *Crompton v. Lord Melbourne* (5 Sim. 353); Sugden's Vendors (p. 268 (13th ed.)).

Sir Hugh Cairns, Mr. Hobhouse and Mr. Williamson, for the Defendant, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this is not a case for compensation at all, it is quite distinct from that, it is a case of mistake, and not a case for compensation.

The Court, it is true, exercises a discretion in cases of specific performance; but it is laid down in *White v. Damon* (7 Ves. 30), and in many other cases, that the discretion in giving specific performance is "not an arbitrary capricious discretion, but must be regulated upon grounds that will make it judicial." I admit that the general rule is, that where there is a deficiency in quantity, such deficiency is properly the subject of compensation; but [613] that rule must be confined within certain limits. Where a person sells 21,000 acres, and finds that he has only 11,000 to sell, or, in point of fact, little more than half of what he has disposed of, that, in my opinion, is not a case for compensation, nor do I know how the Court could deal with it as a case of compensation. In all these cases, where the Court has found that it is utterly impossible to deal with the case as one for compensation, it has said "this is not a case for compensation, but one for avoiding the contract." For instance, if a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation; so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else, I apprehend it is not a case in which the Court can ascertain what should be the amount of compensation to be given. In all those cases the Court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation.

In *Price v. North* (2 Young & C. (Ex.) 620) what was sold was "seven fields, 14 acres more or less." By one of the conditions of sale, any mistake or error in the description was to be the subject of compensation. It turned out that there were 27 acres, and the vendor said "This is not to annul the sale, but is to be made the subject of compensation, and I am entitled to an additional price." But the Court said "That such a misdescription as this would not be the ground for modifying the contract, but for avoiding the sale altogether." So, in this case, a [614] person buys one-half the quantity of land that he intended to buy and the vendor intended to sell. The result is that there has been a mistake between the parties, and I am of opinion that this is not a case in which the Court could, upon any principle, assess compensation so as to make everything fair between them.

In the case of *Hill v. Buckley* (17 Ves. 394), which is usually cited upon these occasions, Sir William Grant laid it down that when the land turns out to be less than it is represented to be, the ordinary mode of calculating the compensation is, to

ascertain the quantity and allow for the deficiency. But if that principle were followed here, the Plaintiff would get for less than £36,000 an estate the rental of which was accurately stated and which the Defendant intended to sell for £66,000. It is, therefore, clear I should be doing great injustice if I applied that rule upon the present occasion.

I am of opinion that this is simply a case of mistake, and that the purchaser is not entitled to any compensation. He may elect to perform the contract without compensation, but, considering the Defendant's offer before suit, the Plaintiff must pay the costs of suit down to the present time.

[615] GREETHAM v. COLTON. June 23, 26, 1865.

[S. C. 13 L. T. 34; 11 Jur. (N. S.) 848; 13 W. R. 1009.]

A testator, "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate. Held, that the executor had an implied power to sell and give valid receipts for the purchase-money, without shewing the insufficiency of the personal estate. Held, also, that the lapse of thirteen years between the death and the sale did not affect the executor's power.

The testator, the Reverend Christopher Milnes, by his will dated in 1849, expressed himself as follows:—

"Reverend Christopher Milnes, of Asthorpe, in the county of Lincoln, makes his will and testament in the following manner:—Bequeaths to his wife Catherine Milnes the sum of £200, to be paid out of his personal estate. Bequeaths to his wife Catherine Milnes the sum of £3000 for her own separate use and benefit, which he charges upon and is to be payable out of his estate at Besthorpe, Girton and South Scarle, in the county of Nottingham. Devises his estate at Besthorpe, Girton and Scarle, unto and to the use of Thomas Greetham, his heirs and assigns, upon trust, by mortgage or sale thereof, or of a competent part thereof, to raise the sum of £3000, and pay the same to his said wife Catherine Milnes, for her own use and benefit; the receipt of the said Thomas Greetham to be a sufficient discharge for the purchase-money, and upon trust, subject to the payment of the said sum of £3000, for the purposes hereafter mentioned." He then gave the residue of his personal estate to Thomas Greetham, upon trust for his wife for life, with remainder over, and continued thus:—"In case his personal estate shall be insufficient for the payment of his debts, he charges the same upon his estate at Besthorpe, Girton and South Scarle. Declaration that Thomas Greetham, his heirs and assigns shall pay the rents and profits of all his estates to his said wife, Catherine Milnes, during her life, and after her death shall hold all his estates upon the trusts, and for the ends, intents and purposes after [616] mentioned. As to his farm at Besthorpe, Girton and Scarle, upon trust to pay Mrs. Serney during her life an annuity of £50, and after her decease to pay Dr. Serney, during his life, an annuity of £50. Upon further trust to apply the rents and profits of the said farm for the support, maintenance and education of the children of his brother, John Lansdale Milnes, in such proportions as the said Thomas Greetham shall think proper, and shall, when the youngest of the children shall have attained the age of twenty-one years, convey the same farm to all or any of the said children of his said brother, and in such proportions as the said Thomas Greetham shall, by deed or will, appoint, and in default of such appointment," Thomas Greetham was to convey the same equally amongst all the children of John Lansdale Milnes in fee. He then directed the conveyance of other hereditaments at Aisthorpe (subject to an annuity) to other persons, and the testator concluded thus:—"Power to be given to the said Thomas Greetham, with the consent of his said wife Catherine, and after her decease of his own authority, to sell all or any part of his said estates so devised to him, and to put the produce out at interest, and to pay the interest to the parties who would have been entitled to the rents, if the estates had remained unsold, and the purchase-money to be divided amongst the same parties, and in the same events, as the estates would have been divisible between them. Indemnity to trustee, his power to give

receipts for the purchase-money, appointing his wife Catherine Milnes and Thomas Greetham, executrix and executor of his will."

The testator died in 1850, and in 1852 the Plaintiff, Thomas Greetham, mortgaged the estate at Besthorpe, Girtton and South Scarle to the widow for £3000, the amount of the legacy bequeathed to her.

[617] On the 17th of March 1864 Thomas Greetham appointed the property to the children then born of the testator's brother, all of whom had attained twenty-one.

The widow died on the 18th of March 1864, and in May following the Plaintiff sold the Besthorpe, Girtton and South Scarle property in lots. The Defendant purchased a part of it.

The testator's brother, John Lansdale Milnes, was still alive, and all his existing children had attained the age of twenty-one years.

The Defendant objected to the Plaintiff's title on the following grounds:—he insisted that the power of sale, given to the Plaintiff by the will, had determined by the death of the testator's widow, and by the younger child of the testator's brother having previously attained twenty-one; that the trust estate ought thereupon to have been conveyed to the children as tenants in common in fee; that, consequently, all persons beneficially interested must concur in the conveyance, and that the purchase-money must be paid to them.

To this it was answered by the vendor that the legacy to the widow had never been raised, and was, in fact, payable out of the purchase-money. Secondly, that the general charge of debts upon the estate authorized the sale by the executor; and thirdly, that the power to Mr. Greetham did not determine until his death, or until the death of the testator's brother.

Mr. Joshua Williams and Mr. Simmonds, for the Plaintiff, argued, first, that a charge of debts gave to [618] executors an implied power to sell, and to give valid receipts for the purchase-money. Secondly, that the lapse of time between the death of the testator and the sale of the estate did not affect the executor's power; and thirdly, they relied on the express power to sell and to give receipts; *Forbes v. Peacock* (12 Sim. 528; 1 Phillips, 717); *Wrigley v. Sykes* (21 Beav. 337); *Sabin v. Heape* (27 Beav. 553); *Johnson v. Kennett* (3 Myl. & K. 624); *Stroughill v. Anstey* (1 De G. M. & G. 635); *Sugden's Vendors* (p. 423); *Mainwaring v. Beevor* (8 Hare, 44); *Polley v. Seymour* (2 Y. & C. (Ex.) 708); *Omerod v. Hardman* (5 Ves. 722).

Mr. Baggallay and Mr. A. G. Marten, for the purchaser, argued that it was doubtful whether, upon the authorities, a charge of debt in favour of creditors gave to the executors a power to sell, but even if it did, still that the words here used, "if his personal estate shall be insufficient for the payment of his debts," made the power contingent upon the existence of a deficiency, which must be proved, as in *Dike v. Ricks* (Cro. Car. 335). Secondly, that the express power to sell or mortgage had been exhausted by the mortgage to raise the £3000 for the widow. Thirdly, that there was an express trust to convey to the children, the class of whom was to be ascertained at the death of the widow, and that this was inconsistent with a sale; and lastly, that the title was of so doubtful a character that the Court would not force it on a purchaser, unless the children would join in the conveyance. They cited [619] *Sugd. Powers* (p. 161, sect. 60 (8th ed.)); *Jarman on Wills* (vol. 2, p. 503 (2d ed.)); *Hobson v. Bell* (2 Beav. 17); *Robinson v. Lowater* (17 Beav. 592, and 5 De G. M. & G. 272); *Hodkinson v. Quinn* (1 Johns. & H. 303); *Ayton v. Ayton* (1 Cox, 327); *Mainwaring v. Beevor* (8 Hare, 44); *Pyrke v. Waddingham* (10 Hare, 8-9); *Green v. Jenkins* (1 De G. F. & J. 469); *Bull v. Hutchens* (32 Beav. 615); *Cook v. Dawson* (29 Beav. 122, and 3 De G. F. & J. 127); *Eidsforth v. Armstead* (2 Kay & J. 335); *Gosling v. Carter* (1 Coll. 644).

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think I need trouble the Plaintiff for a reply, for I have had time to consider the case, and I have no doubt that a perfectly good title can be made. I must first express my great respect for the opinion of Lord St. Leonards on any question of law, but if it were now held that a general charge of debts would not enable an executor to sell the property, I am satisfied that it would disturb a large number of titles and that to a very great extent. It has been held by the Vice-Chancellor of England, Sir Lancelot Shadwell, by Lord Cottenham, by Sir John Leach, and by Lord Justice Knight Bruce, that a general

charge of debts on land enables the executors to sell the land, and to make a good title. I should be very sorry to do anything to weaken that decision; I myself so held in *Robinson v. Lowater* (17 Beav. 592); after referring to the opposite case at law of *Doe d. Jones v. Hughes* (6 Exch. Rep. 223), and the Lord Justices affirmed my decision (5 De G. M. & G. 272). Therefore, in-[620]-dependently of my own decision, so confirmed, the uniform course in equity has been to compel purchasers to take a title from executors, where there has been a general charge of debts, which give them an implied power of sale. The advantage of that practice is obvious, the amount of difficulty and expense it prevents is very great, and its convenience to the community is indisputable.

The rule of equity, which requires the purchaser of an estate sold by trustees to see to the application of the purchase-money, was introduced for the security of the *cestuis que trust*, but it was found to operate to their disadvantage by impeding the sale; and accordingly, for their sake, the settlor's conveyancer now usually introduces powers of sale framed for the express purpose of avoiding this rule. In like manner, for the convenience of selling property unfettered by this rule of equity, which only deters purchasers, it has been constantly held, for many years, that a general charge of debts on land enables executors to make a good title, and to sell that property by means of an implied power to that effect. This, in my opinion, exists here, and enables this executor to sell and to give a receipt for the purchase-money. He can therefore make a good title.

It is not necessary to say anything more than this, in order to state the ground on which my decision can properly be rested; but as I read the will, not only is there a general charge of debts on the estate, but there is also, in addition, an express power to sell and to give receipts to the purchaser. If that be so, then, besides there being a general charge of debts, there is a power to the executor and trustee to sell and to give receipts to the purchaser, and, in that case, no person can doubt that a [621] perfectly good title can be made to a purchaser under this will.

The first objection raised is this:—that the charge for the payment of debts is prefaced by these words:—"In case his personal estate shall be insufficient for the payment of his debts, he charges the same on his estate," and this is likened to a case where a power is to arise on a condition, and *Dike v. Ricks* (Cro. Car. 335) referred to as an authority; but I think it has no application to this case. It was a case of this description: the testator said, "In case it should fully and sufficiently appear" that the executrix should not find sufficient personal estate to pay his debts, then he desired that she should sell Whiteacre. That was, therefore, an additional condition which made it necessary that the deficiency of the personal estate should appear in the manner there stated, and the trust for sale did not arise until that happened. But where a testator says, "If my personal estate is insufficient to pay my debts there shall be a charge on the real estate," it is no more than saying, "I charge my real estate with the payment of my debts," for the personal estate is always primarily liable, and the charge never can arise until the executors find the primary fund deficient. The words "in case my personal estate should be insufficient" are a mere statement of what is always the case; it is, as I stated, *expressio eorum que tacite insunt*.

Then there is this power:—"Power to be given to the said Thomas Greetham, with the consent of his said wife Catherine Milnes, and after her decease of own authority, to sell all or any part of the said estate so devised to him, and to put the produce out at interest, and to pay the interest to the parties who would have [622] been entitled to the rents, if the estate had remained unsold, and the purchase-money to be divided amongst the same parties and in the same events as the estates would have been divisible between them. Indemnity to trustee, his power to give receipts for purchase-money," and so on.

Now it is to be observed that there is a power to sell after certain persons have become entitled to the rents of the property; for the testator expressly says, when the estate is sold the trustee is "to pay the interest to the parties who would have been entitled to the rents if the estates had remained unsold." No persons are entitled to the rents of the estate, if it should remain unsold, until either the appointment is made, or until the property is divisible between them. But it is clear that this power exists after they have acquired an interest in possession in the property.

There is this also to be observed:—that this, in one sense, is an executory will and was intended as instructions for a more formal will; and in arriving at the testator's intention, it is material to consider what sort of will a conveyancer would have drawn on these instructions?

Even without that, I am of opinion that the charge for payment of the debts constitutes an implied power of sale, and gives to the executor full power to sell the property without any concurrence of any of the beneficiaries. I am also of opinion that the thirteen years which have elapsed does not affect that right.

I stopped Mr. Martin on the question whether it was reasonable to require these beneficiaries to join; because if the vendor has a right to say, "You must [623] accept the conveyance of this property from me alone, if, in other respects, the title be a good one," it is not necessary for the beneficiaries to join. It is only in the case where a good title cannot be made without it that their concurrence is necessary.

I am of opinion, therefore, that a decree must be made in favour of the Plaintiff, and that the costs must follow the event.

[623] GRANT v. GRANT. July 7, 8, 10, 1865.

[See *Baddeley v. Baddeley*, 1878, 9 Ch. D. 115; *In re Breton's Estate*, 1881, 17 Ch. D. 420. On point as to evidence, dissented from, *Broune v. Collins*, 1872, 21 W. R. 222.]

Gifts of chattels by a husband to his wife supported.

A husband may constitute himself a trustee for his wife; the declaration need not be in writing, but the words must be clear, unequivocal and irrevocable.

The Court will not act upon the unsupported testimony of a claimant upon the estate of a deceased person.

The testator Mr. Grant married Miss Bayley in 1857, and he died in 1863. He made his brother, the Defendant, his executor, and gave him the residue of his property.

The widow of the testator claimed, as gifts to her from her husband, several chattels which were at the testator's residence at Nuttall Hall at his decease. These consisted of two statuettes of "Highland Mary" and "Lavinia," and two pedestals belonging to them, a piano, a soufflé and hash dish, a Bohemian glass dessert service, a marble dessert service, a copy of "The Madonna Della Sedia," and four engravings, namely, "Midsummer Night's Dream," "Miss Nightingale at Scutari," "The Rescue" and "The Sanctuary."

By this suit, the widow sought to have a declaration of her right to these articles, and to have them delivered up to her by the Defendant.

Mr. Hobhouse and Mr. W. W. Karslake, for the [624] Plaintiff, cited *Lucas v. Lucas* (1 Atk. 270); *Northey v. Northey* (2 Atk. 77); *Graham v. Londonderry* (3 Atk. 393); *Mews v. Mews* (15 Beav. 529); *Tipping v. Tipping* (1 Peere, W. 729); *Jervoise v. Jervoise* (17 Beav. 566).

Mr. Selwyn and Mr. Kay, for the Defendant, cited *M'Lean v. Longlands* (5 Ves. 71); *Walter v. Hodge* (2 Swan. 92); and as to costs, *Governesses' Benevolent Institution v. Rusbridger* (18 Beav. 467).

July 10. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, after reading the evidence, I have come to the conclusion that the Plaintiff is entitled to a decree.

It has been very properly observed, on both sides, that, in cases of this description, the question in equity is merely one of evidence, and that it cannot now be disputed that a husband may be a trustee for his wife. That is perfectly settled, and the only question is, whether he has constituted himself such a trustee or not. I apprehend that the fact of the transaction taking place between the husband and the wife, instead of between strangers, makes no difference, in this respect, further than this:—that, in the case of a gift of chattels by one stranger to another, there must be a delivery of the chattels in order to make the gift complete, whereas, in the case of

husband and wife there cannot be a delivery, because, assuming they are given [625] to the wife, they still remain in the legal possession of the husband, and therefore it is impossible to give that completion to the gift that would be necessary to give effect to it between strangers. Therefore, this comes under that class of cases in which it has been held that, though there is not an absolute delivery a declaration of trust is sufficient.

The question here is whether the husband has used words which are equivalent to a declaration of trust. In the first place, these words need not be in writing, that is quite settled by the authorities. They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, "I hold the property in trust for you," nor is it necessary to say, "I hold the same for your separate use." Any words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think it is also sufficient for the purpose of shewing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created. For instance, if A., who has a £1000 consols standing in his name, in the presence of witnesses or in writing (it does not matter which), says to B., "I hereby give you £1000 consols now standing in my name in the books of the Governor and Company of the Bank of England," in my opinion, that would create A. a trustee for B., and the gift would be complete. I think that is what is established in *Ex parte Pye* (18 Ves. 140), on which I have had to comment very often [626] in many other cases. I am of opinion that it would be just the same if A. were asked by C., "Have you given the stock standing in your name to B.?" and A. said in reply, "Yes, I have given it to B., and it is his property." I am also of opinion that if, without being asked, he had voluntarily said, "I have given the £1000 consols standing in my name in the books of the Governor and Company of the Bank of England to B.," that would constitute a valid declaration of trust of the stock though it still remained in the name of A.

I have said it must be final, irrevocable and complete; it will not do to speak of the property as belonging to another person, because that is ambiguous. That may be evidence corroborative of something else and very often is, but the mere fact of calling stock or a chattel by the name of B., saying, "that is B.'s statue or B.'s carriage or B.'s stock," does not necessarily make it the property of that person. Neither does an express declaration that "I intend to give it," or that "I mean to give it," because the thing is not complete. But if the donor makes an express declaration that "I do now give it," I am of opinion that is sufficient. I am also of opinion that it is sufficient if he makes a declaration "I have already given it." Then the only matter that is necessary to be known is, does the donor mean, by those words, to divest himself of the whole of the property in question.

I asked the question, what does a husband mean when he says to his wife, "I give you this vase or this chandelier," does he mean to say that he keeps any property in it for himself? If so, he means that which the words do not import, when he says expressly "I give it you." There may be, in some cases, an implied condition between husband and wife, and he is to be at liberty to make use of the thing given when he [627] requires it during his life, but even that implied condition does not exist unless it is expressed or is understood by both parties at the time. That might be so, but it would depend upon the nature of the property.

In all these cases the difficulty is whether the evidence establishes the fact, that is the real question to be considered. In the first place, there is a rule constantly acted on in Chambers in Equity, that the unsupported testimony of any person, on his own behalf, cannot be safely acted on. If it were otherwise, any stranger might come and swear that any testator owed him a sum of money; but that is not sufficient proof; the question would be asked—Is there any writing, or other proof of the debt? without that, this Court does not listen to the declaration of the claimant and is obliged in all cases to disregard it, and though, in many cases, it may prevent a person from receiving what he is justly entitled to, still the Court cannot act on the mere unsupported testimony of a claimant.

In this case I could not act on the uncorroborated testimony of the wife, the

alleged donee; but, in my opinion, there is evidence to support her testimony, and even to prove the case without it. I admit that a mere intention to give would not be conclusive, and that it must be shewn that the property has really been given. I will refer to the various passages in the evidence which, in my opinion, establish that this property is the widow's; and I will then refer to the two cases of *Meus v. Meus* (15 Beav. 529), and *Walter v. Hodge* (2 Swanst. 92), to shew how easily they are distinguishable from the present case.

I will first refer to the statuettes, and I find that the [628] wife swears that they were given to her; this alone would not do, but Ellen Lafon says this:—"I paid a visit to Nuttall Hall in September 1862, when Mr. Grant took me through the reception rooms and shewed me everything in them, particularly pointing out to me his presents to Mrs. Grant on her marriage, namely, the beautiful statuettes of 'Highland Mary' and 'Lavinia,' which he distinctly told me he had given to her."

Why am I to doubt this lady who says that Mr. Grant told her that he had given them to his wife? If he did, then he had created himself a trustee for her. That is still more strongly confirmed by Mr. Spence, the sculptor, who says that they were ordered for her, and that Mr. Grant stated to him that he intended to give them to her as a wedding present. That of itself would not be conclusive; but when the donor himself, speaking of these two statuettes, tells a lady voluntarily and of his own accord, "I have given them to her," and the sculptor says they were ordered for her and intended as a marriage present for her, then the matter is, in my opinion, established. There is the further corroborative testimony of the Plaintiff's sister, but I prefer this independent testimony.

That puts an end entirely to an observation made by Mr. Selwyn, which I think can scarcely be supported in law, that, if a man makes a wedding present to the woman to whom he is engaged, the fact of marriage reverts the gift in him, and he becomes entitled to it himself. It is not necessary to refer to that, because it is clear the statuettes did not arrive until after the marriage, and, therefore, they could not actually have been given until after the marriage.

[629] There is not the same clearness with respect to the two marble pedestals; but it is quite clear that they must go with the statuettes. Mr. Grundy, the sculptor, says Mr. Grant requested me to make, and I accordingly made, a pair of antique pedestals for the statuettes. I remember Mr. Grant saying to me that he had seen the statuettes in Mr. Spence's studio at Rome; and that he had told Mr. Spence that if Mrs. Grant liked them he would buy them for her, and that he had accordingly done so. I am of opinion that this addition to the statuettes must be treated as an addition to the original gift and must pass with the original gift.

The next thing which I have to refer to is the piano. As to this, Ellen Lafon says, "The piano which he told me he had given to her, on condition that he would play in the presence of other persons beside himself, which condition she had complied with." That, again, is an express statement made by him that he had given it to his wife.

The hash dish and soufflé dish rest on still stronger evidence; for, in the first place, Helen Flora Bayley says, "I first saw the hash dish (or breakfast dish) in the autumn of 1862 on the breakfast table at Nuttall, and my brother-in-law told me that he had given it to his wife for her own, and that he was going to have it altered for her, as the spirit lamp, which burned below it, was too high. At the same time he said that he had given my sister a soufflé dish, but she had only used it once." In my opinion, that is also an express declaration of trust, for, as I before said, no technical words are necessary, and here he stated that he had divested himself of the whole of the property in them. But the evidence is still more strong, and goes a great deal further, when you come to the evidence of the butler, who, in my opinion, not only proves that these two pieces of plate, but that the Bohemian glass service and the marble dessert service also belong to the Plaintiff. He says, "I perfectly well remember the soufflé dish and hash dish; they were under my charge as butler. Mr. Grant told me, before they arrived at Nuttall, that he had bought them of Mr. Harry Emmanuel for his wife; and after he came to Nuttall, he told me to take charge of them, and that they were his wife's; and, although they were kept, for convenience sake, with the other plate, I always considered them as belonging to

Mrs. Grant. They were engraved with Mr. Grant's crest, but, to the best of my recollection, they were not engraved with his initials. I also remember the Bohemian glass dessert service and the marble dessert service: they were under my care. Mr. Grant himself told me that he had given them to his wife. I very well remember Mr. Grant saying to me, the day before he left Nuttall for the last time, speaking of the marble statuettes and the marble dessert service, "Take care of them, Pearson, for they are your mistress's."

With respect to the two pieces of plate, the Bohemian glass service and the marble dessert service, the donor, if it were necessary, has really created Thomas Pearson, the butler, a trustee for her of this property. There is an express declaration that they were hers, and it meets exactly the case which I stated in *Mews v. Mews*, where I observed that if the husband had stated to the banker that the money was his wife's that would probably have been sufficient. Here he does expressly state to another person that they are his wife's. In addition to that, he puts them in his charge, and tells [631] him to take care of them for his wife. It is scarcely necessary to go further.

With respect to the picture of the Madonna della Sedia the butler says, "Mr. Grant himself told me that it was his wife's, that he had given it to her." This is repeated by the witness Mr. John William Maclure.

With respect to the two pictures, "The Midsummer Night's Dream" and "Miss Nightingale at Scutari," Miss Louisa Plummer says, she saw Mr. Grant give to his wife the engraving of "Miss Nightingale at Scutari" as a present, and Margaret Elizabeth Poole says, "I recollect hearing Robert Dalgleish Grant say that the engravings of 'Midsummer Night's Dream' and 'Miss Nightingale at Scutari' were birthday presents from him to his wife. I was always under the impression that the engravings of 'The Rescue' and 'The Sanctuary' were birthday presents from Mr. Grant to his wife." I do not find the same confirmation as to these two pictures of "The Rescue" and "The Sanctuary;" but considering that the wife's testimony in all other respects is so entirely supported by such abundant evidence, and that she swears positively to that gift, and that the others state that they were treated as presents of his, though those two are not confirmed, I shall trust to the evidence of the wife in that respect, and treat the whole of these four pictures as gifts to her. If these two had stood alone, and that had been the whole question, it would have been perfectly different; but considering that with respect to the statuettes, the marble pedestals, the two pieces of plate, the piano, the Bohemian glass service, the marble dessert service, the picture of the "Madonna," and two of the [632] engravings, her testimony is so amply and so entirely confirmed, I shall trust her word with respect to the other two pictures, and give the whole of those to her. I will make a decree accordingly.

I wish to make an observation on the two cases cited. In *Mews v. Mews* (15 Beav. 533), it is clear that why I considered the matter was not proved was this:—All that happened there was, that the money was allowed to be in the name of his wife at his bankers, but she never stated that he had given it to her. He knew of it perfectly, he sanctioned it, and she was in the habit of drawing upon it; but upon his deathbed he treated it as his own, and thereby contradicted the evidence of his wife in respect of it. I then made this observation:—"The evidence which is required to constitute a valid gift, as I have before stated, is that there must be some clear and distinct act by which the husband has divested himself of the property, and engaged to hold it as a trustee for the separate use of his wife. I have looked in vain through the evidence to find any such clear and distinct act on his part. If he had himself deposited the money with bankers, or with those gentlemen as *quasi* bankers, stating that they were to hold it for his wife, that would probably have been sufficient for that purpose."

Here, I am of opinion that there are distinct and unequivocal expressions, and that, unless technical words are required, nothing more can be required than for a man to say, "I have given it to my wife, I have divested myself of all interest in it, it is hers and hers only," and any words that are equivalent to that are sufficient for the purpose.

[633] In *Walter v. Hodge* (2 Swanst. 92), the wife said that her husband had given

her a pocket-book containing, I think, £300 worth of bank notes. If it stood on that alone, as I have already stated, the Court could not proceed on the unsupported testimony of the wife, though that would be sufficient if confirmed. She brought a lady, a friend of hers, who was present, to confirm it, but the lady's confirmation was this, "I give it to you in case any accident should happen to me," which is a very different thing from a gift; and if a gift at all, it was a *donatio mortis causa*. So that, in point of fact, there was no evidence in that case to support the gift. If the evidence of the gift had been confirmed by the other witness, I am of opinion that the case would have been made out.

I am of opinion that it is made out here, and the necessary consequences must follow.

[634] CHADWICK v. TURNER. Feb. 17, 18, 21, 1865.

[Affirmed, L. R. 1 Ch. 310; 35 L. J. Ch. 349; 14 L. T. 86; 12 Jur. (N. S.) 239; 14 W. R. 491. See *Lee v. Clutton*, 1875, 45 L. J. Ch. 45.]

The East Riding Registration Act (6 Anne, c. 35) is imperative, and unless a will of lands in that riding be registered within six months after the testator's death, or a memorial of the impediment which disables the devisee from doing so, registered in the manner pointed out by the 15th section, the will is void as against subsequent purchasers and mortgagees.

A testatrix, having lands in the East Riding, died in 1854. Her will was discovered in 1861, which devised these lands, but before any registration of it or of any "impediment" had been made, the heir mortgaged the property. Held, that the mortgagee had priority over the devisee.

The question in this case was one of priority, and turned on the construction of the East Riding Registry Act (6 Anne, c. 35). It arose under the following circumstances:—

Sarah Gooddy, the wife of Richard Gooddy, had power to devise a house at Hull within the East Riding of Yorkshire, which was settled to her separate use in fee. She died in January 1854, leaving her husband surviving her and he died four months afterwards. After the death of Mrs. Gooddy, William Atkin, as her heir at law, entered into possession, she having been supposed to have died intestate.

In June 1862 William Atkin mortgaged the house to the Plaintiff to secure £1420, and the mortgage was duly registered in the same month.

In the meantime Mrs. M'Kee, into whose possession the papers of Mr. Gooddy had come on his death, discovered, in July 1861, a will of Mrs. Gooddy dated in 1841. By this she devised the house to her husband for life, with remainder to William Atkin in fee upon trust that Mary Ann Prance should receive £21 a year, and subject thereto, to sell and divide the produce amongst the children of Mary Ann Prance.

Mrs. M'Kee did not, however, communicate this discovery to anyone, nor did she register the will till long afterwards.

After the mortgage had been executed and registered, [635] and in the month of September 1863, a codicil was discovered by Mrs. M'Kee dated in 1853, by which a life interest in the house was given to Mrs. M'Kee after the decease of Mrs. Gooddy and Mary Ann Prance.

The will and codicil were not registered until February 1864.

Chadwick instituted this suit in 1863 to foreclose the mortgage, and the question was whether, under the Yorkshire Registry Act, the mortgagee from the heir had priority over the devisees under the will and codicil.

The question depended on the statute of the 6 Anne, c. 35. This statute, after reciting that the lands in the East Riding were "generally freehold, which might be so secretly transferred or conveyed from one person to another, that such as were ill-disposed, have it in their power to commit frauds, and frequently do so, by means whereof several persons," &c., &c., "had been undone in their purchases and mortgages by prior and secret conveyances and fraudulent incumbrances," enacts, that a memorial of all deeds and of all wills and devises in writing "may be registered in

such manner as is hereinafter directed;" and that every deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee unless registered, &c.; "and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered in such manner as is hereinafter directed."

The 10th section provides, that "in case of wills the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses."

[636] By the 11th section the memorial of a will is to contain the date, &c., and the will or probate is to be produced to the registrar.

The 14th section provides that memorials of wills registered within six months after the death of a testator dying in Great Britain, or within three years of those dying beyond seas, shall be as valid as if registered immediately after the death of such testators.

The 15th section is as follows:—"Provided always, that in case the devisee or person or persons interested in the honors, manors, lands, tenements or hereditaments, devised by any such will, as aforesaid, *by the reason of the contesting such will or other inevitable difficulty*, without his, her or their wilful neglect or default, shall be disabled to exhibit a memorial for the registry thereof within the respective times hereinbefore limited; and that a memorial shall be entered, in the office, of such contest or other impediment, within the space of six months after the decease of such deviser or testatrix" &c., "then and in such case the registry of the memorial of such will, within the space of six months next after his, her or their attainment of such will or a probate thereof, or removal of the impediment whereby he, she or they are disabled or hindered to exhibit such memorial, shall be a sufficient registry within the meaning of this Act, anything herein contained to the contrary thereof in anywise notwithstanding."

Mr. Hobhouse and Mr. Kay, for the Plaintiff, relied on the terms of the Act and on the non-compliance with its requirements as giving the mortgagee priority over the devisees.

[637] Mr. E. K. Karslake, for William Atkin.

Mr. Cole and Mr. Ince, for Mrs. M'Kee, argued that the registration had been prevented by an inevitable difficulty and impediment, namely, by the ignorance of the existence of the will.

THE MASTER OF THE ROLLS. The only question seems to be on the Act of Parliament, and principally on the words "attainment of such will."

Mr. Hobhouse, in reply, referred to 2 & 3 Ann. c. 4.

Feb. 21. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case I think the only substantial question is that which arises on the 6th Anne, c. 35, the statute for the registration of deeds and wills in the East Riding of Yorkshire.

[His Honor having disposed of other points in the case proceeded:—] The only question is, whether the clause of the statute renders the mortgage deed valid, though the will would have prevented any interest being mortgaged to the Plaintiff. I am of opinion that the statute is imperative, and that the mortgage has precedence over the will.

By the first clause the registration of the will is made essential, for it enacts that every devise shall be fraudulent and void, as against subsequent mortgagees, unless registered as thereafter directed. Therefore it is expressly declared that the mortgage shall be valid, and the will invalid against the mortgagee, unless the [638] will be registered in manner after directed, that is, within six months after the death of the testator.

If the Act had stopped here the will would have been simply inoperative against the mortgagee. But this is not so, and the only question now is, whether the will comes within the exception contained in the 15th section. It is to be observed that, assuming there to have been an "inevitable difficulty" or "impediment" which disabled the parties claiming under the will from exhibiting a memorial, the clause specifies that the exception is only to take effect, if a memorial of such impediment is entered in the office within six months after the testator's death. It is argued that they could not do this, because they did not know of it. All I can say is that, in

such an event, the Act has provided that the will shall not be operative against a mortgagee. The only case of exception out of the first clause is distinctly specified, and it is the case of a known impediment; where the impediment is unknown and, therefore, cannot be registered, the will is inoperative against a mortgagee from the heir.

But in this case there is distinct evidence that the will might have been registered, for the husband, who paid legacies under the will and must have had notice of it, might have exhibited a memorial of it. Mrs. M'Kee, who discovered the will in July 1861, might also have done so, and yet she did not register it until February 1864. If she had registered the will within six months after its discovery, or if she had communicated with the parties interested under it, they might have registered it, and thus have prevented the execution of this mortgage deed, which was not done until a year after the will had been discovered; for the will was discovered in July 1861, and the mortgage deed was not executed until June 1862.

[639] I am of opinion that the mortgage has priority over the will in respect of this property.

NOTE.—Mrs. M'Kee and Mr. Prance appealed from this decree, but, on the 8th of March 1866, their appeal was dismissed with costs by the Lords Justices.

[639] *Re THE LIFE ASSOCIATION OF ENGLAND (LIMITED). BLAKE'S CASE.*
Feb. 11, 1865.

[S. C. 34 L. J. Ch. 278; 12 L. T. 43; 11 Jur. (N. S.) 359; 13 W. R. 486. See *In re Overend, Gurney & Company*, 1867, L. R. 3 Eq. 623; *Hallows v. Fernie*, 1868, L. R. 3 Ch. 472; *Anderson's case*, 1881, 17 Ch. D. 376.]

A person who takes shares in a company on the faith of material representations made by the company, which turn out to be false, may repudiate them.

B. took shares in a company on the faith of the prospectus, in which certain persons were stated to be directors, and relying on the statement of the agent of the company that the London share list was closed. Both these statements were false. He repudiated the shares, and the directors acquiesced therein. Held, that he was not a contributory.

This company was incorporated in June 1863, and in the same month Messrs. Thomas & Smith were appointed the company's brokers at Bristol.

Early in August 1863 Messrs. Thomas & Smith wrote to Mr. Blake, sending a prospectus of this company, and stating that they had 150 shares in it which they could dispose of. They stated that the list had closed in London, and that the shares were quoted at two to two and a quarter premium in London. The prospectus and the statement as to the closing the share list had been furnished to Messrs. Thomas & Smith by the secretary of the company, and the quotations had appeared in some newspapers.

Upon the faith of these statements Mr. Blake, on the 13th of August 1863, applied by letter for 150 shares, and he thereby undertook to execute the articles of association when required. The 150 shares were allotted to him on the 19th of August, and the script certificates were sent to him on the 28th of August 1863, but he never executed the deed of association. His suspicions having been aroused, by observing the low numbers of the certificates, which were from 2605 [640] to 2755, he caused a friend in London to make inquiry; and who discovered, on inquiring at the office of the company, that, so far from the list being closed, he could have any number of shares. Mr. Blake himself then applied to the secretary by letter to ascertain the number of shares issued, who in reply stated (31 Aug. 1863):—"They are, as near as we can judge, up to this date, 7000; but we know there are many more."

On the 4th of September Mr. Blake repudiated the shares and demanded a return of the deposit of £75. The board, on the 14th of September, declined to comply

with his request. On the 17th of October Mr. Blake searched the register and he found that, instead of over 7000 shares having been taken on the 31st of August, no more than 1298 had been taken at the time of the search, and that no transactions whatever had taken place in the shares as none had ever been transferred. He further discovered that five of the eleven gentlemen, whose names had been published in the prospectus as the directors of the company, held no shares therein, and consequently had no qualification as directors.

Mr. Blake having, thereupon, threatened to take criminal proceedings against the directors, secretary, manager and brokers, the board of directors, on the 21st of October 1863, resolved to repay Mr. Blake his deposit and to take his name off the share register, which was done accordingly, and he had no further connexion with the company.

In May 1864 the company resolved to wind up, and the liquidator having inserted Mr. Blake's name in the list of contributories, he took out a summons to have his name removed therefrom, which now came on for argument.

[641] Mr. Hobhouse, for Mr. Blake, argued that, as the shares had been taken upon representations made by the company which proved to be false, he had a right to repudiate them. That the acquiescence by the board of directors in the repudiation was binding and could not now be contested. He cited *Bell's case* (22 Beav. 35).

Mr. Selwyn and Mr. W. R. Ellis, for the official liquidator, argued that the contract to become a shareholder was complete, *Cookney's case* (3 De G. & J. 170), and could not be cancelled by the directors. That the company was not bound by the misrepresentations of its officers and of strangers, made without its authority: *Holt's case* (22 Beav. 48); *Nicol's case* (3 De G. & J. 387); *Mixer's case* (4 De G. & J. 575); *Brockwell's case* (4 Drew. 205); *Woollaston's case* (4 De G. & J. 437); *Ayre's case* (25 Beav. 513).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that Mr. Blake ought to be omitted from the list of contributories.

If the Court were to adopt the arguments which are to be found in many of these cases, it would amount to this:—That a contract with a joint stock company is quite different from any other species of contract, and that whatever may be the misrepresentation by which a person is induced to become a shareholder in a company, the act of becoming a shareholder becomes indelible, and that, though he may have taken only one step, as by once applying for shares, he is fixed for ever, and that no subsequent proceeding can emancipate him [642] from that species of entanglement in which he has become involved by applying for shares.

I am of opinion, as I laid down in *Bell's case* (22 Beav. 35), which (with the exception of the case referred to by Mr. Ellis) does not seem to be shaken by any other case, that a company, *quid* company, may commit a fraud, that is to say, may, by wilful misrepresentation, induce a person to become a member of the company, and that, in such a case, none of the persons whom the company represents can obtain the benefit of that which is brought about by its fraud.

Now, one very important thing which it concerns the public to know undoubtedly is, who are the directors of a company, for one of the first things that a person usually looks at before taking shares in a company is, to see who are the persons who have pledged themselves to support and manage the company, and accordingly the list of directors is usually the first thing inquired after and observed upon. It was one of the matters which pressed very strongly upon me in *Lord Abercorn's case* and *The National, &c., Assurance Association* (31 L. J. (Ch.) 828), viz., that persons lending their names as directors become, in a great measure, responsible for the consequences which fall upon other persons who take shares acting upon the faith of seeing such names upon the list of directors of the concern, and believing that they are not used merely as decoys, but that they are pledged to support and manage the company.

Here, the prospectus, which I hold to be an act of the company itself, states that these three persons, upon whom much reliance might have been placed, namely, George Buchanan, Esq., of Buchanan in Buteshire; Edward Elliott, Esq., late Chief Magistrate at Madras, [643] living at Harrow-on-the-Hill, and Lewis Monroe, Esq., late of Her Majesty's Bengal Army, Cavendish Club, are all directors of the company, and that they pledged themselves to the support of it. It does not appear by the share

register that they ever held a single share. It is, therefore, a reasonable inference that not one of them was a member of or had anything to do with the company, and yet by the prospectus of the company they are held out to the world as being directors of the company. It is obvious that a more gross representation can hardly be made, than holding out to the world that responsible persons who have nothing at all to do with a company are the directors of it.

In addition to this, it appears that the company employed Messrs. Thomas & Smith, of Bristol, as their brokers, and that they stated that fact in print. Then it appears that the manager and actuary of the company writes and tells them that the London share list is closed, and the brokers, upon that information, tell Mr. Blake that the share list is closed, treating the word "closed" as filled up. They say, although that is the case in London, still we have some shares which we can dispose of, and we advise you to take some. Thereupon Mr. Blake takes 150 shares. It is not necessary for me to consider whether that alone would be a sufficient amount of fraud to avoid the contract entered into in the first instance, if Mr. Blake had taken no step in the matter. But immediately he finds this out, and that there are false representations made (I know not by whom) in the newspaper, with respect to the value of the shares, he applies to the directors and requires to be released from his contract. Suppose he had said, "I took them by mistake, and I wish to be released from the contract, for I did not intend to become a shareholder," would it [644] be absolutely out of the power of the directors to say, "Well, if you did not intend to take the shares, we will take them back?" But he says, "You have made a misrepresentation to me; if you had told me the truth, I should never have taken any shares, and I require to be released from the shares and to have my money returned to me." The board of directors ultimately accede to that, and make an entry in their book that he ceased to be a shareholder on the 21st day of October 1863, he having taken the shares in the month of August previously. During the two next months he was investigating this matter, and after that investigation, he says, "I will not be a shareholder, and you have no right to make me continue one." The directors acquiesced in that, and thereupon he ceased to be a shareholder. Since that time he has never paid, and has never been called upon to pay, any calls, and he has never executed the deed of association.

I am of opinion that after that he could not have claimed any benefit from the company if it had turned out a very profitable and successful concern, and conversely, that it is impossible for the company to force upon him the liabilities of a shareholder. He cannot be placed in this position, that if the undertaking fails he is to be liable for all the losses of the company; but if, on the other hand, it succeeds, he is to have no benefit or advantage whatever from it.

I am of opinion, on this state of facts, that Mr. Blake ought not to have been placed upon the list of contributories, and that his name must be removed from it accordingly.

[645] HAYDEN v. KIRKPATRICK. July 5, 6, 11, 1865.

[S. C. 13 L. T. 56; 11 Jur. (N. S.) 836; 13 W. R. 1010.]

A first mortgagee purchased the equity of redemption, which was conveyed to him. Held, under the circumstances, that the second mortgagee had not thereby obtained priority over the first.

A. and B. mortgaged their estate to C. Afterwards B. conveyed all his interest in the estate to A. in consideration of a second charge on the estate. A. afterwards sold and conveyed the equity of redemption to C. in consideration of the mortgage debt. Held, that C.'s first mortgage was not thereby extinguished as against B. so as to give B. priority over C.

Two brothers, John and George Hayden, were the joint owners of a renewable leasehold, called Oakfield. In March 1835 they mortgaged this property to Richard and George Kirkpatrick, for £1000, and entered into the usual covenants for its payment. They afterwards became further indebted to Richard Kirkpatrick in £400.

In 1836 John Hayden sold and conveyed his interest in the property to his brother George for £450. This consideration money was not, however, paid, but John and George Hayden entered into a written agreement, which had been prepared by Richard Kirkpatrick, dated the 19th of September 1836, whereby George Hayden agreed to execute a mortgage to Richard Kirkpatrick for £850, of which £400 was the amount due to the Kirkpatricks, and the remaining £450 was the unpaid purchase-money due from George to John Hayden. Richard Kirkpatrick was to hold the mortgage on behalf of himself and John Hayden, and whenever the £450 should be paid off, Richard Kirkpatrick was to pay over the £450 to John Hayden.

No mortgage had ever in fact been executed in pursuance of this agreement.

On the 10th of April 1839 George Hayden, in consideration of £1600 due to Richard Kirkpatrick and George Kirkpatrick on their mortgage, and the security for it being insufficient, conveyed the equity of redemption to the Kirkpatricks, who released him from the debt [646] of £1600. Richard Kirkpatrick soon after acquired the whole of his brother George's interest in the property, and in 1850 he sold part of it for £550, and he sold the remainder in 1860 for £1000.

The suit was instituted in 1863, by John Hayden against Richard Kirkpatrick, insisting that the mortgages for £1000 and £400 had become merged and extinguished by the purchase of and conveyance to the Kirkpatricks of the equity of redemption in the mortgage premises. The Plaintiff also insisted that, at the time of the sales, the Defendant was sole owner, subject to the charge of £450, which was the only charge on the estate, and that he was a trustee for the Plaintiff for that sum, who was entitled to have it paid out of the purchase-moneys received by the Defendant.

Mr. Baggallay and Mr. Sheffield, for the Plaintiff, argued that the mortgage debt of £1400 had been extinguished, and that the Defendant, as owner of the estate, was now liable to pay the mortgage on it, and could not set up, as against the Plaintiff's charge, a debt already paid off. That, under the arrangement of 1836, the Defendant was a trustee for the Plaintiff, and liable to discharge the Plaintiff's debt out of the purchase-money of the estate. They relied on *Toulmin v. Steere* (3 Mer. 210); *Parry v. Wright* (1 Sim. & Stu. 369, and 5 Russ. 142); *Brown v. Stead* (5 Sim. 535).

Mr. Selwyn and Mr. Eddis, for the Defendant, insisted that the Plaintiff's debt of £1600 was still subsisting, and had not been released; that the purchase of the equity of redemption had not discharged the debt due from the [647] Plaintiff to the Kirkpatricks, or affected its priority, that the Defendant, not being a party to the agreement of 1836, was not a trustee, and that the purchase-money could not be followed. They cited *Watts v. Symes* (1 De G. M. & G. 244); *Eyre v. Burmester* (10 Jur. 687).

Mr. Baggallay, in reply.

July 11. THE MASTER OF THE ROLLS [Sir John Romilly]. The Plaintiff in this case seeks to make the Defendant a trustee of a sum of £450, part of the purchase-money derived from the sale of a leasehold estate called Oakfield, in the Isle of Wight. The Defendant had a prior charge on the property, exceeding the total amount of the purchase-money, and the question is, whether, in the events which have happened, this charge has merged in the reversion, so as to bring forward the second charge, and give it priority, so as to make the Defendant a trustee for the Plaintiff. [His Honor stated the facts and proceeded:—]

In truth, this is a case where the Plaintiff and his brother, being jointly and severally liable to the Defendant in £1400, which was secured by a mortgage on the land of the Plaintiff and his brother, says to the Defendant, who has purchased through his brother the equity of redemption of the whole land, and has since sold it, "under the authority of *Toulmin v. Steere* (3 Mer. 210), your prior charge is wiped off, and mine is the first and only charge." He not merely says that, but he [648] says, that besides the first charge being wiped off, the effect of the transaction is to release him, the Plaintiff, from his debt altogether, to put an end to his covenant to pay, and to entitle him to say to his creditor, "You, by your acts, have discharged the debt due from me and my brother to you, you are a trustee for me, and you are not entitled to set off my charge on the estate against the debt due from me to you." I am of opinion either that the Plaintiff is bound to accede to the arrangement, by which his brother arranged with the Defendant that the whole property should be taken for the debt, or if the Plaintiff is not bound by the arrangement, so neither is the Defendant bound

to discharge the Plaintiff from the covenant. If the effect of *Toulmin v. Steere* be as the Plaintiff contends it is, it certainly is a stronger decision than it has commonly been considered, and goes a great deal further than I had imagined, or than I believe the profession supposed it to go. Lord St. Leonards says that he advised an appeal in that case, but that it was compromised.

If I hold that the Plaintiff is right in his contention, then it follows that if A., the first mortgagee of an estate which is subject to a second charge in favour of B., purchases the equity of redemption, he not only extinguishes his own charge and lets in B.'s, but if he sell the estate, he cannot set off a debt due to him by B. against the charge which B. has on the property. In other words, if an estate be subject to two mortgages, and the second mortgagee be indebted to the first, then if the first mortgagee buys the equity of redemption, he not only extinguishes his own charge, but has released the debt due from the second mortgagee to himself. *Toulmin v. Steere* certainly never was intended to go to that extent. But even if that were so, the Plaintiff must either adopt the arrangement or repudiate it, in [649] which latter case the first debt is existing. If the Plaintiff's charge is a subsisting charge on the estate, the Plaintiff may go against it; if not, he cannot pursue the money in the hands of the person who sold it and come against him as a trustee for the £450, when he owes him already £1400 on a different account.

I am of opinion that when the Defendant received the £550 he was entitled to set it off against the £450 due on the mortgage made under the agreement of 1836, if any had been executed. No mortgage was actually made; but even if it had been, still it ought to have been made subject to the other prior and existing mortgages.

I am of opinion that this is an attempt, on technical grounds, to deprive a first mortgagee of what he is justly entitled to, and that the bill must be dismissed, with costs.

Mr. Sheffield asked for a decree for an account.

THE MASTER OF THE ROLLS ultimately said that he would give the Plaintiff a redemption decree if he liked to take it.

NOTE.—See *Phillips v Gutteridge*, 4 De G. & J. 531.

[650] *Re SADD. May 8, 1865.*

[S. C. 34 L. J. Ch. 562; 12 L. T. 817; 11 Jur. (N. S.) 774; 13 W. R. 1009.
See *In re Mason and Taylor*, 1878, 10 Ch. D. 732.]

A solicitor, on the sole retainer of the debtor, prepared a creditors' deed, the first trust of which was to pay the costs of its preparation. The trustees acted and employed the same solicitor in the trust. Held, upon a taxation between the solicitor and the trustees, that the solicitor was entitled to charge the costs of preparing the deed, though he had not been retained by the trustees for that purpose.

In July 1862 Mr. Sadd, a solicitor, on the sole retainer of Mr. Randle, prepared a creditors' deed intended to operate under the 24 & 25 Vict. c. 134, s. 192, by which Mr. Randle assigned his property to trustees, on trust to pay the costs of preparing the deed, and then for the benefit of such of Mr. Randle's creditors as should execute the deed.

The trustees acted under the deed and employed Mr. Sadd in getting in the estate, and he had received some moneys on account of it.

More than a year after the deed had been executed, it was discovered that it was inoperative under the Bankruptcy Act, as it did not include all his creditors. Mr. Randle was afterwards adjudicated a bankrupt.

In 1864 the trustees of the deed obtained an order to tax Mr. Sadd's bill, which contained charges for preparing the deed, to which they objected. The question, upon appeal from the decision of the Taxing Master, was whether these costs ought to be allowed to the solicitor on the taxation. They were objected to by the trustees,

first, on the ground of absence of retainer on their part, and secondly, on the ground that the deed had been improperly prepared and was void.

Mr. Jessel, for Mr. Sadd. Although the deed might have been prepared on the retainer of the debtor alone, [651] still when the trustees acted under it, they adopted it and were bound to perform all the trusts thereby declared, the first of which was to pay the solicitor for preparing it; these charges therefore constituted a proper disbursement made by the solicitor, which he is entitled to charge in his account.

Secondly, the deed was not altogether void, for after twelve months its validity could not be contested. (12 & 13 Vict. c. 106, s. 88.)

Mr. Lindley, for the trustees. The order is to tax Mr. Sadd's charges against the trustees, and he cannot be allowed to introduce items for which another person alone is chargeable. The trustees are not legally liable for these costs, which were incurred without their sanction and instructions, and the solicitor's remedy, if any, is under the trusts of the deed, which cannot be administered except in a suit.

Secondly, the solicitor has been guilty of such negligence in preparing the deed as to disentitle him to the cost of preparing it. It was not binding under the 24 & 25 Vict. c. 134, s. 192; *Walker v. Adcock* (8 Jur. 518).

THE MASTER OF THE ROLLS [Sir John Romilly]. The Taxing Master has fallen into an error on this point.

These items have nothing to do with the question whether the relation of solicitor and client existed. It is true that the solicitor could not maintain an action [652] against the trustees for the expenses of preparing this deed, because it was not done at their request, and therefore they are not personally liable to him for them. But it is quite clear, on the assumption that the deed is valid (on which assumption I proceed at present), that no retainer on the part of the trustees was necessary, for the solicitor is entitled to have the costs of preparing the deed as part of the trusts declared by the deed itself.

An action could not have been sustained by the solicitor against the trustees, and he would have been compelled to file a bill to administer the trusts of the deed. But the solicitor of trustees is always allowed to set off payments which have been properly made by him in the performance of the trusts against his receipts in the same matter.

Here is an assignment by a debtor to trustees, who have accepted the trusts and acted under the deed, the first trust in which is, to pay the costs of preparing the deed. Nobody could say to the solicitor, "You shall not have these costs because they were not incurred under my retainer," for he is entitled to them under the deed. It is like every other payment made by a solicitor in accordance with the trusts of a deed; the Court, to prevent circuity, allows the solicitor to set them off against his receipts, and does not compel him to file a bill to administer the trusts of the deed. Thus, in the case of a mortgage, where a certain specific sum which is charged on the property is paid by the solicitor of the mortgagor, that amount would not be any part of the costs between him and his client; but, in a taxation, the amount, if properly paid, would be allowed to the solicitor in taking the cash account. It is of very little importance, therefore, whether it comes under trusts of [653] deed or as part of the costs incurred on the retainer of the trustees.

Assuming, therefore, the deed to be valid, then, when the trustees accepted the trust, their solicitor, though not retained by them to prepare the deed, was entitled to deduct the expenses of preparing it out of his receipts, without being put to file a bill to enforce the trust. A solicitor by reason of his being an officer of Court is bound, in a taxation, to give credit for all moneys received for his client, and, on the other hand, he is entitled to have credit for all moneys properly paid on the same account.

If indeed the deed had been a nullity, and the persons named as trustees therein had not acted upon it, the solicitor would not have been entitled to his costs of preparing it; but they have accepted the trusts of the deed, and have agreed to perform them, and after the expiration of twelve months it could no longer have been avoided under the Bankrupt Acts.

I think the Taxing Master ought to have allowed these charges.

[654] THE ATTORNEY-GENERAL, at the relation of JOSEPH GREENHILL v. SIDNEY SUSSEX COLLEGE, CAMBRIDGE; TRINITY COLLEGE, OXFORD, AND FREDERICK GREENHILL. May 4, 29, 1865.

[S. C. on appeal, L. R. 4 Ch. 722; 15 L. T. 518; 15 W. R. 162. See *Attorney-General v. Dean of Manchester*, 1881, 18 Ch. D. 596; *Glen v. Gregg*, 1882, 21 Ch. D. 514 (n.); *Rendall v. Blair*, 1890, 45 Ch. D. 148.]

Devise to two colleges equally, for the use and education of the descendants of my brothers, &c., "or in default of such, to their next poor kindred." Held, that this was a good charitable trust, but that, if no objects existed, the property was given beneficially to the two colleges.

An estate was devised in equal moieties to two colleges on charitable trusts, and upon an information relating only to one moiety, a decree had been made and enrolled. Held, that having regard to the pleadings and parties, it was no bar to a subsequent information which embraced the two moieties.

College statutes made under the 19 & 20 Vict. c. 88 held not to affect the rights of a founder's kin.

The testator, Francis Combe, of Hemel Hempstead, by his will, dated in 1641, devised as follows:—

"I revoke the former article of sale of Abbott's Langley and appurtes, and will and ordaine, that all my houses and lands and tythes and goods I have in Hempstead shall be in possession of my father Greenhill and my aforesaid trustie servant, Francis Hodges, and twoe other sincere and impartiall men, as aforesaid, to pay the said debt for Abbott's Langley and my legacies, and doe presently infeoffee the twoe colleges aforesaid, viz., Sidney College, Cambridge and Trinity College, Oxford, and their successors, for ever, with all I have in Abbott's Langley and the lordship there and the meadowe in Saint Stephens, with the appurtes, equally betweene the said colleges, for the only use, education in pietie and learninge of foure of the descendants of my brothers and sisters and three of the descendants of the brother and sister of my first wife and three of the descendants of the brothers and sisters of my seconde [655] wife, or, in default of such, to their next poore kindred, for the fust by the father's side, for the second by the mother's side, and the lease of the said Langley to be at one-third parte under the value to my said wive's kindred ever, viz., brothers and sisters there and at Harrowe."

The testator died in 1641.

Trinity College, Oxford, and Sidney Sussex College, Cambridge, had been accustomed to manage and receive the rents derived from the estate, which consisted of a manor and mansion-house and cottages and 142 acres of land. They treated and dealt with the rents in distinct moieties, and they demised such undivided moieties respectively, by separate instruments.

Trinity College had, from time to time, granted leases to members of the family of Greenhill, who claimed to be descendants of a brother or sister of a wife of the testator, at rents less than the real value. In 1863 the moiety of Trinity College was held by Frederick Greenhill under a lease for twenty-one years, dated in 1853.

In April 1863 an information was filed by the Attorney-General, at the relation of Trinity College, Oxford, against Frederick Greenhill (*Attorney-General v. Greenhill*, 33 Beav. 193) alone, which prayed as follows:—

"First—That the validity and construction of the direction contained in the will of the said Francis Combe as to leasing the manor and estate at Abbott's Langley, so far as related to the moiety thereof devised [656] to Trinity College, Oxford, might be determined, and that it might be declared, whether or not such direction, if purporting to create, in favour of all generations of persons connected in affinity with the testator, a perpetual right to a lease of the estate at one-third part under true value, was invalid and void in law, and if so, that it might be declared that the whole interest in the said moiety, discharged from the said direction as to leasing, belonged to Trinity College. Secondly—That the construction of the charitable bequest

contained in the will, and the rights of persons belonging to the several classes of descendants and poor kinsmen, therein specified, to the income arising from the said moiety vested in Trinity College, as aforesaid, might be declared and determined. Thirdly—That the rights of Trinity College and of the Defendant, respectively, in the moiety attributable to Trinity College of the said enfranchisement moneys might be declared. Fourthly—That directions might be given for the regulation and management, in all respects, of the charity, so far as related to the moiety vested in Trinity College, and for the application of the funds arising therefrom, including moneys received or to be received for enfranchisements, and that a proper scheme might be settled and approved by this Honorable Court for the purposes aforesaid."

That information came on to be heard, when a decree was made on the 7th of December 1863 to the following effect:—

"It was declared that, according to the true construction of the will of Francis Combe, the direction contained therein, as to leasing the manor and estate situate at Abbott's Langley at one-third part under true value, was void. And that the whole interest in the [657] said estate, discharged from the said direction as to leasing, was, by the said will, given to Trinity College, Oxford, and Sidney College, Cambridge, in equal moieties for the charitable purposes in the will mentioned. And it was ordered that a proper scheme for the future regulation and management of the moiety of the estate belonging to the Trinity College, Oxford, and of the application of the income thereof should be settled by the Judge. And after providing for the costs, the decree proceeded to order that further proceedings in the said cause as against the Defendant should be stayed, but the Attorney-General was to be at liberty to attend the proceedings in Chambers relating to such scheme separately from the relators. And the further consideration of the said cause was adjourned. And any of the parties were to be at liberty to apply to this Court as they might be advised."

The present information was filed in March 1864. The relator Joseph Greenhill and the Defendant Frederick Greenhill were stated to be descendants of a brother of the testator's second wife. It submitted that the gift contained in Article 22 of the testator's will, "for the only use, &c., education in piety and learning" of descendants of the testator's brothers and sisters was a good charitable gift, and ought to be established, but that the following questions of construction, amongst others, arose: first, as to what proportions of the rents the descendants of the three families intended to be benefited by such gift ought to be allowed to take; secondly, as to whether the said gift was restricted to persons of the male sex; thirdly, as to whether any and what restrictions ought to be placed on the age at which the benefits of the said gift could be claimed; fourthly, as to whether the benefits of such gift could only be claimed on the terms of the claimant's [658] matriculating a one or other of the said two colleges and pursuing a university course of study.

It also submitted that the gift to "poor kindred" was a good charitable gift and ought to be established, but that questions of construction arose under it; first, as to whether the poor descendants of brothers and sisters of the testator's two wives alone were included in such gift, or whether the poor descendants of the testator's own brothers and sisters were also included therein; and secondly, as to when, from time to time, such a default in objects of the previous educational gift was to be considered to have taken place, as to give the poor kindred a title to any and what part of the said rents.

It also submitted that a question arose as to whether the direction to lease at one-third under true value created a perpetuity, or whether the same was not in the nature of an absolute devise to those brothers and sisters of the testator's said wives, who were at Langley and Harrow at the date of the testator's decease, of a perpetual rent-charge issuing out of the premises, and equal in amount to one-third of the sum which, at the death of the testator, represented the annual value of the estate, and that, so far as regarded the interest of Sidney Sussex College in the trust property, such question still remained unsettled.

That the estate of the colleges in the property was that of trustees only, and that they had not any beneficial interest whatever therein, and that the colleges had no power to sever their joint-tenancy in the trust property or to divide the said trust or the property subject thereto into moieties, but that the whole was one indivisible

trust and could not be and never had been severed. It submitted that in the suit of *Attorney-General v. Greenhill* [659] Frederick Greenhill only represented the interests of the lessee, and that the interests of the parties claiming the benefit of the said educational gift and of the poor kindred gift were in no way represented; "and that, if necessary, and the decree pronounced on the hearing of this suit should be inconsistent with that pronounced on the hearing of the suit of *Attorney-General v. Greenhill*, then the said suit of *Attorney-General v. Greenhill* ought to be reheard, and the said decree of the 7th day of December 1863 pronounced therein ought to be reviewed by this honorable Court."

It prayed a declaration that the educational gift and the said gift to poor kindred were good charitable gifts and ought to be established. That the construction of the will relating thereto and to the direction to lease might be declared and settled by this honorable Court.

And it prayed "That this suit might be taken to be supplemental to the suit of *Attorney-General v. Greenhill*; that all further proceedings therein might be suspended until the hearing of this suit and that the like decree might be pronounced in that suit and this; and that (if necessary) the decree in the suit of *Attorney-General v. Greenhill* might be reviewed and the said suit reheard for that purpose."

As to Sidney Sussex College, it appeared that in October 1646 it passed a resolution, providing for the payment of the income of their share, in various proportions, in case any of the kindred of the testator should come to Sidney Sussex College, and subject thereto, they applied the residue of the income to their general funds. But after several admissions, and ultimately on the non-appearance of any person being descendants of the brother and sister of the testator or of his wives, the col-[660]-lege claimed and applied the whole fund for their benefit. It also appeared that, by virtue of the powers contained in the 19 & 20 Vict. c. 88, "Statutes, concerning Bye-foundations at Sidney Sussex College," had been made by the Commissioners in 1860, which were approved by Her Majesty on the 16th of April 1861. One of these was as follows:—

"Mr. Combe's Benefaction.

"Subject to the legal rights of any persons beneficially interested under the will of Francis Combe, Esq., all the emoluments derived by Sidney Sussex College from the estate at Abbott's Langley, in the county of Hertford, devised by the said Francis Combe in his will, shall be carried to the general funds of the college, to be applied in the manner directed by the statutes of the college."

Sidney Sussex College, by their answer, submitted that none of the descendants mentioned in the will could become entitled to the benefit of the charity without entering at the college; that by the above college statute, the rents had been made part of the general funds of the college, and ought to be applied as such, and they submitted as to the effect of the decree in *The Attorney-General v. Greenhill*.

Trinity College, by their answer, stated that the decree in *The Attorney-General v. Greenhill* had been, previously to the filing of the present information, namely, on the 4th day of February 1864, duly signed and enrolled, and proceeded thus:—

"We humbly submit that the said decree cannot be called in question in this suit, and we crave the same benefit as if we had demurred or pleaded the said decree and enrolment in bar to so much of this suit as [661] seeks to set aside the said decree or otherwise to deal with the moiety, devised to us by the will of Francis Combe, and which is the subject of the said decree, of the estate at Abbott's Langley in this information mentioned."

Mr. Hobhouse and Mr. Bedwell, in support of the information. The new statute of Sidney College does not affect the rights of the "poor kindred," for it is made expressly "subject to the legal rights of any person beneficially interested under the will." Secondly, the trust for the poor kindred is a good charitable trust, which will take effect upon the failure of the prior gifts; *Isaac v. Defriez* (Amb. 595; S. C. 17 Ves. 373, note); *Att.-Gen. v. Price* (17 Ves. 373); *White v. White* (7 Ves. 423). Thirdly, this information is not in the nature of a bill of review, for the prior information only determined the rights of the lessee; it did not raise the present point,

and the proper parties were not present to discuss it; *Bainbrigge v. Baddeley* (2 Phillips, 705); *Urguhart v. Urguhart* (13 Sim. 613); *The Att.-Gen. v. The Ironmongers' Company* (2 Beav. 329). There is no inconsistency between the two informations, the present one is merely supplemental and its object is simply to perfect the former decree. Time is no bar, for there is an express trust; 3 & 4 Will. 4, c. 27, s. 25.

Mr. Charles Hall, for Frederick Greenhill.

Mr. Cole and Mr. Rigby, for Sidney Sussex College, relied on the lapse of time and the uninterrupted mode of administering the funds. They insisted that this was [662] not a charitable trust, but an attempted perpetuity in favour of the testator's family, and that the new statutes, made by virtue of an Act of Parliament, regulated the present application of the rents of the estate. They relied on *Att.-Gen. v. Catherine Hall* (Jacob, 393); *Att.-Gen. v. Smythies* (2 Russ. & Myl. 749); *Att.-Gen. v. Trinity College* (24 Beav. 399). As to the jurisdiction of the Charity Commissioners, they referred to 25 & 26 Vict. c. 112.

Mr. Selwyn and Mr. F. Vaughan Hawkins, for Trinity College, argued that this was a bill of review filed without the leave of the Court, and which, therefore, could not be entertained. That the rights had been, as regarded Trinity College, settled by the decree in the previous information, and that decree, having been enrolled, could not be altered, in any respect, except by the House of Lords. That this was not a suit instituted by one of the next of kin or by a relation of a wife of the testator, but an information by the Attorney-General, and that he, at all events, was bound by the proceedings in his previous information. They cited *Attorney-General v. Caius College* (2 Keen, 150); *Green v. Jenkins* (1 De G. F. & J. 454).

Mr. Hobhouse, in reply.

THE MASTER OF THE ROLLS. I do not think this is a bill of review, and the only question is, as to the relief. If the decree now to be pronounced came in collision with the other decree, I [663] should not make any decree until the Court had given leave to file a bill of review.

MAY 29. THE MASTER OF THE ROLLS [Sir John Romilly]. The question raised by this information is as to the construction to be put upon the will of Francis Coombe, which bears date the 1st May 1641, and whether, in the event of a failure of descendants of the testator's brothers and sisters and of his first and second wives, there is a good charitable trust in favour of "their next poor kindred, for the first by the father's side, and for the second by the mother's side."

Sidney Sussex College, Cambridge, and Trinity College, Oxford, owing to the circumstances to which I am about to advert, raise very different defences. Sidney Sussex College relies greatly on the time that has elapsed, but still more on the Act of Parliament for the reform of the University of Cambridge, and the regulations made in pursuance of that Act. Trinity College, Oxford, contends, that by virtue of the decree made on the 7th December 1863, in *The Attorney-General v. Greenhill*, the question has either been already determined, or that the possibility of its arising has been precluded.

The history of the devise is distinct as regards each college. In October 1646 Sidney Sussex College passed a resolution providing for the payment of the income of their share, in various proportions, in case any of the kindred of the testator should come into Sidney Sussex College, and subject thereto, they applied the residue of the income to their general fund. But after several ad-[664]-missions, and, ultimately, on the non-appearance of any person being a descendant of the brothers or sisters of the testator or of his wife, the college claimed the whole fund for their own benefit.

In 1856 the Act of the 19 & 20 Vict. c. 88 passed for the purpose of making provision for the good government and extension of the University of Cambridge and the colleges therein. There is nothing in this Act which touches directly the question I have to decide, but incidentally it has a very material bearing upon it. By the first section, Commissioners were appointed for the purpose of the Act. By the 27th section, power is given to each college to frame regulations for nine distinct heads or purposes. The only heads which bear upon the present question are the third, the fourth and the fifth. The third is "for redistributing and apportioning the divisible revenues of the college." The fourth is, "for rendering portions of the college property or income available to purposes for the benefit of the university at large,"

and the fifth is "for the consolidation, division, or conversion of emoluments, including therein the conversion of fellowships or scholarships attached to schools into scholarships or exhibitions so attached, or either partly so attached and partly open, or altogether open, and of fellowships otherwise limited, into scholarships or exhibitions, either subject or not subject to any similar or modified limitation."

By the 29th section of the Act, if the powers granted by the 27th section are not exercised by the college, they may be by the Commissioners, and the statutes so to be made are to be laid before the Queen in Council, and when approved of by the Queen, are to be laid before Parliament, and, thereupon, they acquire the force of law. This course has been adopted with [665] respect to Sidney Sussex College. The college itself did not exercise the powers intrusted to it, but the Commissioners have done so; these statutes have been duly approved by the Queen in Council, and laid before Parliament, and are now law.

It remains to be considered how they affect this question. That which relates to the present devise is in these words, "Mr. Combe's Benefaction," &c. [See *ante*, p. 660.]

In my opinion, this college statute does not dispose of the question before me. The statute is "subject to the legal rights of any persons beneficially interested under the will of Francis Combe." The question before me is whether any such legal rights exist. I am of opinion that the Commissioners have not (as indeed I think they had not, under the terms of the 27th section of the Act, which I have read, the power to do) determined, that no such rights exist, but merely that if none such do exist, the income is to be carried to the general fund of the college.

This, therefore, does not supersede the necessity of determining the question whether this is a good charitable trust.

The defence of Trinity College, Oxford, arises out of the decree made in *The Att.-Gen. v. Greenhill*. In April 1863 that information was filed at the relation of Trinity College, Oxford, against the Defendant Frederick Greenhill, and the bill prayed as follows:—"First, that." [See *ante*, p. 659.]

The decree bore date the 7th December 1863, and [666] was to this effect. [His Honor stated it, see *ante*, p. 656.]

This decree has been duly enrolled, and Trinity College claims the benefit of the decree, and disclaims all interest in the moiety devised to Sidney Sussex College, Cambridge.

It is quite certain that if this decree disposes of the question now raised before me, I cannot touch that decree, or deal with it in this suit. But upon examining the proceedings in that suit and reading the decree, I do not find that the question before me was raised or decided in that suit. The real question, on the construction which was there determined, was as to the validity of the direction contained in the will respecting the leasing power; but the question as to the validity of the charitable trust for the "poor kindred, for the first by the father's side, and for the second by the mother's side," was not raised, and it does not appear to have been ever argued or decided. Though a general scheme is directed, the decree contains nothing to indicate to the Court that if the trust in question were good, there might not be various other persons in existence who might be interested in such trust; and, assuming such persons to exist and to be interested, I consider it clear that a decree, made in a suit in which they are not represented and in which the questions in which they are interested are not raised, cannot be pleaded or relied upon as a bar to their rights.

I am, therefore, compelled to express my opinion on the effect of the will, in this respect, exactly as I should have been bound to do in case the statutes for Sidney [667] Sussex College had never been made, or the decree in the information of *The Attorney-General v. Greenhill* had never been pronounced, or, in fact, exactly in the same manner as if the persons interested in establishing the charity here contended for had been parties to that suit and had raised it, as it is now discussed before me.

Unfortunately, Trinity College, relying on the objection I have stated, has not thought it expedient to argue the question of the construction of this clause, and if it had, I have not before me all the persons who may be interested in considering that

question. In the absence of such assistance and subject to the question as to the objects of the devise, I am of opinion that this is a good charitable trust, that is, that it is a trust in favour of certain poor persons, and that it is one which this Court is bound to execute.

I am of opinion that the time which has elapsed does not affect the question. It is a trust now existing which has never been barred, and if the Court can discover who the real objects of the charity are, and any such are still in existence, I am of opinion that they are entitled to the benefit of the trust, subject to such modification for their benefit as the Court, with the assistance of the Attorney-General, may think fit to impose; and further, that if no such objects exist, and subject to their interests, if any such exist, the property is given beneficially between the two colleges.

In the absence of any argument on behalf of the persons who may be claimants, my impression is, that [668] the trust would be in favour of the poor kindred of the first wife of the testator by the father's side, and in favour of the poor kindred of the second wife of the testator by the mother's side. But I think I cannot decide this point, indeed I doubt whether I ought to express any opinion upon it in the absence of persons who may be entitled, and that what I ought to do, and all I can do, on the present occasion, is, to direct an inquiry to ascertain whether any and what persons are now in existence who are poor kindred of the brother and of the sisters of the testator Francis Coombe, and who are poor kindred of the first wife of the testator, and of the second wife of the testator, distinguishing such as are by the father's side and such of them as are by the mother's side, and then I must reserve all further consideration and the costs of this suit.

NOTE.—An appeal is pending.

The Authorized Reports of CASES in CHANCERY
ARGUED and DETERMINED in the ROLLS
COURT during the time of the Right Honorable
LORD ROMILLY, Master of the Rolls. 1865,
1866. By CHARLES BEAVAN, Esqr., M.A.,
Barrister-at-Law and Examiner of the Court of
Chancery. Vol. XXXV. 1868.

[1] ARMITAGE *v.* COATES. Dec. 14, 15, 1865.

[See *In re Ridley*, 1879, 11 Ch. D. 652.]

Where a bequest is made to persons *in esse* for life, with remainder to their unborn children, with a general direction that the female children shall take for their "separate and inalienable use," such restriction against alienation is too remote and void. *Semble.*

Under several bequests to living persons for life, with remainder to their children born and unborn, with a general proviso that the shares of females shall be for their separate inalienable use: Held, that the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children and a proviso that their receipts should be good discharges.

This was a special case, the effect of which and of the will itself was as follows:—

The testator William Barton, by his will dated in 1842, bequeathed £800 and a leasehold to trustees, upon trust for his daughter Charlotte, the wife of George Holloway, for her life, and after her decease, upon trust for her children as tenants in common, as and when they should attain twenty-one, and to pay, assign and transfer the same to them accordingly. There were gifts over if there should be no issue of Charlotte.

After several other gifts, the will contained the following proviso, on which the question turned: "Provided also and I do hereby declare that the several devises and bequests, hereinbefore by me made and given to or in favor of any female or females, shall be *for their respective separate and inalienable use*, and free from the debts, control or engagements of any present or future husband or husbands with whom she or they shall have intermarried or may hereafter intermarry; and that the receipt or receipts in writing of any or every such female or females shall, notwithstanding coverture, be a good and sufficient discharge or good and sufficient discharges for all and every sums or sum of money payable to her or them, respectively, under or by virtue of this my will, to the person or persons to whom such receipt or receipts shall or may be given for the money therein expressed or acknowledged to be received."

There were other portions of the will, preceding the proviso, affecting the decision in this case, and which were substantially as follows: The testator gave a leasehold to his wife for life, and afterwards to be sold and the produce to fall into the residue. The legacy to Charlotte in default of issue was given to another daughter (by name)

for life, with remainder over. He gave a freehold to his daughter Mary for life, with remainder over. He gave £600 to George and Charlotte Beard on attaining twenty-one, with gifts over; and he made other gifts to males which it is unnecessary to mention, and gave the residue to his wife for life, with remainder to a daughter for life, and afterwards to her children.

The testator died in 1842.

Charlotte Holloway died in 1854.

[3] In 1861 Charlotte Barton Holloway, one of the three children of Charlotte Holloway, married Mr. Coates, but no settlement was made on her marriage. She attained twenty-one in 1863, and shortly afterwards she requested the trustee to transfer to her one-third part of the £800 legacy, and to assign to her one-third part of the leasehold premises.

The trustee was ready and willing to comply with her request if he lawfully could, but he was advised that, by reason of the above proviso, he was unable to do so with safety.

The trustee submitted that Charlotte B. Coates was a female within the meaning of the proviso, and that a valid fetter had been imposed by the proviso on her vested interest.

Charlotte B. Coates, on the other hand, contended that the proviso was applicable only to females named in the will, and not to females unborn at the death of the testator and taking merely as members of a class; secondly, that as to the latter, the proviso was void, as infringing the rule against perpetuities.

The questions submitted for the opinion of the Court were, first, whether the proviso in the will was valid as regarded the vested share of Charlotte B. Coates in the £800 legacy and in the leasehold; and, secondly, whether the proviso, upon its true construction, created a restriction against anticipation.

Mr. C. Hall, for Charlotte B. Coates. The restriction against alienation is altogether invalid, being too remote. The rule of law is this, that you cannot tie up property so as to make it inalienable beyond a life or lives *in* [4] *esse* and twenty-one years afterwards; but if, after an estate to A. for life you give the *corpus* to A.'s daughters, and make their interest inalienable, even during coverture, it may restrict the alienation beyond two generations. This the law will not allow; it withdraws the property from the market beyond the permitted period, and such a limitation is void.

The point arose in *Fry v. Capper* (1 Kay, 163), where a fund was settled on a husband and wife successively for life, with remainder to the children as they should appoint. An appointment was made to their daughters for life, but not by way of anticipation. It was contended that the restraint upon anticipation of the daughter's life interests would infringe the rule against perpetuities. Vice-Chancellor Wood says, "The argument on this point in *Thornton v. Bright* (2 Myl. & Cr. 236) suggests the decision to which the Court would probably come—that, if necessary, the Court would reject the limitation and treat the appointment as being a settlement for the benefit of the daughter without the restraint upon anticipation. The point is ingenious, and would deserve, perhaps, more consideration if it were open to me. However, if *Thornton v. Bright* had not decided the question, I think that I should have come to the same conclusion, independently of that authority."

In *Thornton v. Bright* (3 Myl. & Cr. 230) and *Carver v. Bowles* (2 Russ. & Myl. 304) the objection as to a perpetuity was never raised, and in *Baggett v. Meux* (1 Phill. 627, and 1 Col. 138) the point did not arise, as the gift was to a person *in esse*. Here the case arises, not as to a life-estate, but as to the *corpus*, which makes the case stronger. This inalienable gift to a class not *in* [5] *esse* is contrary to the policy of the law and void, to support such a gift in favour of a married woman is beyond the power that a Court of Equity ought to assume, and the fetter ought to be rejected altogether.

Mr. Wickens, for Mr. Coates. According to the true construction of the will the clause against alienation is applicable only to the tenants for life, and not to persons taking as an unascertained class after the life-estates. The will provides that the receipts of females for the monies payable to them shall be good discharges to the trustees, and that the trustees shall "pay, assign and transfer the same to him or her accordingly." It is inconsistent with an alienable gift that payment should be made

at once of the fund, and that a transfer or assignment should be executed to them of their shares of the leaseholds.

Mr. Robson, for the other Defendants. The proviso only applies to the persons specifically designated by name and not to a class. He cited *Dickenson v. Mori* (8 Hare, 178).

Dec. 15. THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this proviso against alienation does not apply to the several classes of persons thereafter to be born.

The direction to pay the money to them, him or her shews that the proviso as to separate use and against anticipation is inapplicable to persons who have already received the money and who are enabled to give good and sufficient receipts and discharges to the trustees [6] for it. It would be inconsistent to hold otherwise. But this proviso has an intelligible meaning when applied to persons living at the death of the testator.

I do not express any opinion on the point, principally argued, as to remoteness; but my strong impression is, that it would be too remote, and that this Court could never, after a life or lives in being and twenty-one years, permit any estate to be inalienable. The point, however, was new to me, and I find no decision on the subject; but the more I consider it the more I feel convinced that it would be held too remote. It would be tying up property more than a life or lives in being and twenty-one years, the proviso against anticipation being clearly a fetter against alienation.

Mrs. Coates, therefore, is entitled to have the money paid over, and I will answer the special case, that this proviso in question does not apply to her share in the £800 or in the leaseholds.

The costs are payable out of the estate, for when the testator creates the difficulty, it is one of the charges on his estate.

[7] LORD v. JEFFKINS. Dec. 11, 12, 14, 1865.

In a suit to set aside a sale by private contract of a reversion: Held, that the highest price bid for it upon a previous attempt to sell it by auction was a fair test of its market value.

As to the difficulty in ascertaining the value of a reversion which is contingent on the death of a lady without issue. Whether such "issue risks" can now be insured against, *quere*.

In ascertaining the market value of a reversion, the fact of its being the subject of a Chancery suit, even though it does not affect the right to it, must be taken into consideration.

Long delay in filing a bill to set aside the sale of a reversion is not to be disregarded.

Dr. Cochrane died in 1831, and his property became the subject of a protracted litigation. (See 34 Beav. 220; 4 Drew. 366; 10 H. of L. Cas. 272.)

In 1841 Mrs. Barton, a widow, was entitled to half of a very considerable sum in Court, subject to the contingency of a Mrs. Moorhouse having a child. Mrs. Moorhouse was then of the age of about thirty-three years, she had married in 1826 and had no issue.

In August 1841 Mrs. Barton caused a sum of £50,000 consols, part of her share of the fund in Court, to be put up for sale by auction in lots, two of which lots were of £5000 consols each. The highest bidding for each of these lots was £300 each, and they were bought in.

Afterwards, in March 1842, Mr. Jeffkins (a stranger to Mrs. Barton) agreed to become the purchaser of a contingent reversionary sum of £5000 consols (part of the money in Court) and some interest for £750. Accordingly, by an indenture dated the 4th of March 1842, Mrs. Barton, in consideration of £750 paid to her by Mr. Jeffkins, assigned to him £5000 consols (part of the £167,808 in Court), together with the dividends which would accrue thereon after the expiration of twelve years from the sale or the death of Mrs. Moorhouse, whichever event should first happen.

[8] In June 1842 Mrs. Barton married the Plaintiff Mr. Lord, and she died in December 1844. The Plaintiff Mr. Lord was her legal personal representative.

On the 21st of June 1864 Mr. Lord instituted the present suit against Jeffkins, and against Waterson and Hill (who had purchased the £5000 from Jeffkins), to set aside the sale of March 1842, on the ground that it was a sale of a reversion for an inadequate consideration.

Mrs. Moorhouse died the 23d September 1864, without issue.

Evidence was entered into as to the value of the reversion, the effect of which is sufficiently stated *post*, p. 10.

Mr. Selwyn, Mr. Baggallay and Mr. W. Pearson, for the Plaintiff, cited *Boothby v. Boothby* (1 Mac. & G. 604, and 15 Beav. 212); *Baker v. Bent* (1 Russ. & Myl. 224); *Salter v. Bradshaw* (26 Beav. 161); *St. Albyn v. Harding* (27 Beav. 11); *Davies v. Cooper* (5 Myl. & Cr. 270); *Perfect v. Lane* (30 Beav. 197, and 3 De G. F. & J. 369).

Mr. Hobbhouse and Mr. L. Mackeson, for the Defendant Jeffkins, referred to *Waters v. Thorn* (22 Beav. 547); *Tynte v. Hodge* (2 Hem. & Miller, 287).

Mr. Jessel and Mr. William Morris, for Waterson.

Mr. Southgate, Mr. F. W. E. S. Everitt and Mr. Wakeford, for Hill.

[9] Dec. 14. THE MASTER OF THE ROLLS [Sir John Romilly]. I do not require a reply in this case, for, after reading over the evidence very carefully, I think the case of the Plaintiff fails.

In the first place, it is important to consider the nature of the suit. It was instituted on the 21st of June 1864, to set aside the sale of a reversion which took place on the 4th March 1842, that is to say, more than twenty-two years before. The first question to consider is, whether a fair marketable price, the utmost that could be obtained, was given for it—whether, in point of fact, the full value of the reversion was paid for it? The burthen of proof to establish that lies on the Defendant, and it is his business to prove that he has given the full market value for it; and, upon the evidence, I think that he has shewn that he has done so.

In the first place, it is very important to consider what the subject-matter of the sale was; it was the sale of £5000 consols, to be paid on the death of Susan Moorhouse, who was born in December 1807, and also the dividends which should accrue due after the year 1854 (twelve years after the date of the sale), subject always to the whole being put an end to by the fact of Susan Moorhouse having a child; for if Susan Moorhouse had a child, then, at once, the accumulations were stopped and the capital went over.

It is to be observed that, among several cases which were cited to me, there is only one (that is *Davis v. Cooper* (5 Myl. & Cr. 270)), in which a difficulty or contingency similar [10] to the present arose on the question of a sale of a reversionary interest. Lord Cottenham, however, got rid of it thus: he says, all the parties agreed to consider the contingency as nothing, and consequently it was simply the sale of a reversion. He then considered that the fair value had not been given for the reversion. That cannot, however, be said here; for unquestionably, in this case, the risk of the birth of a child was fully in the contemplation of the parties themselves. In looking at the evidence of the actuaries and auctioneers, and taking that alone, I have found it exceedingly difficult to come to any satisfactory conclusion on the subject. It is to be observed (and it is the constant observation both of counsel and of the Court) that the evidence given for the Plaintiff and for the Defendant in these cases is always, to some extent, biased; for, although the witnesses are perfectly respectable gentlemen, and speak exactly what they believe to be true, yet nevertheless it so happens that the persons who give evidence in favor of one side always differ much, in their estimates of the value, from those who give their evidence in favor of the other side. That probably, in a great many cases, arises from this: that the opinions of many persons may be taken, and only those used which are favorable. In this case, the difference between the actuaries is not very great; but the difficulty I have felt throughout respecting the matter has been this:—that it has been impossible to estimate what the real value of the risk was. With the exception of Mr. Morgan, there is very little difference between the persons who estimate what the value of the reversion was. Mr. Day makes it £1750, Mr. Sprague £1609, Mr. Hendrick £1680, Mr. Pattison £1589, and Mr. Williams £1708. In fact, there is very little difference

between them on this part of the subject; but there is very considerable difference in the mode in which they estimate what the risk was of the birth of a [11] child to Mrs. Moorhouse. I must say that it appears to me extremely difficult, and I should have thought *a priori* almost impossible, to ascertain what the possibility or probability was of a lady of the age of thirty-four years and seventy-seven days having a child, she having been married to a husband of about the same age for fifteen years, and either having had no child during that time, or having had a child who was either still-born or died immediately after birth. However, the evidence is that although such a contingency or a risk could not be insured against in 1842, yet that, in modern times, some offices have insured against risks of that description. Mr. Day (the actuary of the London and Provincial Society) says that in his office they would insure against a risk of that description, but that the premium, in a single money payment, which they would require would be £1300. If so, it reduces the value of the reversion to far below the £725 that was given, because in his case it would reduce it to about £300 and odd. Then Mr. Sprague seems to value this risk at £402, and Mr. Hendrick values it at £630. Mr. Williams seems to value the chance of the birth of a child at £1062, and Mr. Jellicoe at something like it, but the exact amount he does not state. (NOTE.—He considered the valuations of these “*issue risks*” to “be to a certain extent speculative and approximate.”)

I can well understand that, if you can go to an insurance office to insure, by payment of a fixed premium, for the receipt of a sum of money on the happening of either of two contingent events, one being the death of a person then alive during the life of another, and the other event being that person having a child born, you might estimate the sum which ought fairly to [12] be given for the property sold subject to that risk. But in 1842 the means of so doing did not exist, and it does not clearly appear to me that it exists at this present time.

When, therefore, I meet with cases of this description, I look about to see if I cannot find some evidence to guide me in coming to a more fair or accurate conclusion than that which is merely to be drawn from the evidence of the actuaries, or that of the auctioneers, whose evidence appears to me to be less satisfactory than the actuaries, for their opinions are given on less accurate data. Taking this course, I find this important event, which occurred on the 27th of August 1841: part of the property, consisting of the reversion in £50,000, was put up for sale by auction in eight lots, six of £5000 and two of £10,000. It is suggested that I cannot proceed upon what occurred on this occasion, because that which was put up by auction was not exactly the same as was included in the sale of 1842; but I am of opinion it forms a very useful guide, and gives great information to the Court upon the subject of the value. The only difference between the two was this: that the intermediate dividends, after the lapse of twelve years, were not put up for sale by auction, but the reversion simply was put up “to be transferred upon the death of a lady now in her thirty-seventh year, if she should not bear a child, or if she should bear a child or children, but it should be decided that the vendor is entitled notwithstanding: the purchaser not to have any claim whatever upon the funds or dividends in the *interim*.” Now that was not the real state of the case, but it was put much more favorably for the vendor than the real fact was, because, at the time when this was put up for sale, she was in her thirty-fourth year. Having been born in December [13] 1807, she was, in August 1841, in her thirty-fourth year, but she is stated to be in her thirty-seventh year. It is clear that the probability of a lady having a child rapidly decreases every year that she gets older, and that a lady of thirty-four is much more likely to bear a child than a lady of thirty-seven, assuming that they had both been married for fifteen years without ever having had a child.

In that state of circumstances, the result was that the highest bidding for either of the two lots which were put up was about £300. One of these was bought in for £490, and the other for £480. The exact sum that was bid is not given, but there was no *bond fide* bidding exceeding £300. I hold that to be a fair test of the market value of a property of this description. This also is certain, that if they had been knocked down to the *bond fide* bidder for £300, the sale could not afterwards have been set aside for inadequacy of consideration. The vendors thought that £300 was below the value, and I think it probable that it was so. But this is always to be

borne in mind in transactions of this kind, that a contingency of this description diminishes the number of purchasers, for very few persons are willing to undertake that species of risk. But does it therefore follow that this Court must lay down such a rule as this: that a person possessed of a property of this description shall not be at liberty to sell it to any person whatever? for that is really what it amounts to. If the market value of a contingent reversion, or that which it would fetch at an auction, does not exceed £300, and another person says, I am willing to give and gives £725 for it, is this Court to set the sale aside, after the lapse of twenty-two years, on a fanciful notion and on the evidence of certain actuaries and the like that it was worth more [14] than that sum at that time? I am of opinion that it would be impossible so to do, and that if this Court so held, the result would be, that it would be to inflict on the possessor of a property of this description the impossibility of obtaining any money whatever for it.

That this property could not well be sold by auction is established in this case, and they afterwards hunt about for a buyer amongst various sorts of persons, and find a stranger who is willing to give £725 for it. That is accepted, both parties knowing the state of the case, there being no suspicion of any undue influence and no peculiar relation existing between the parties to induce the vendor to sell the property to the purchaser, but the sale really being simply because the vendor wanted the money, as, in fact, is always the case in sales of all reversions.

I think the Court must look fairly at what, upon the evidence, was the real value of it; I think that, upon the evidence of the actuaries, that this property was not worth the £725, and the result of the attempted sale strongly confirms it. There being such a large amount of stock to be sold, it is probable that all persons who were willing to buy property of that description would be assembled on that occasion, and yet £300 is the greatest amount offered for the £5000 lot.

I think also that this contingency must be taken into consideration when you are estimating the value:—The fund was the subject of a Chancery suit, and though it is true that the questions to be determined in it could not affect the real right of the vendor to sell this property, or of the purchaser afterwards to obtain it, yet this was highly probable:—that a very considerable lapse of time might occur before the property [15] could be obtained out of the Court of Chancery. Nay, even at this moment the property has not been divided; a large portion of the *interim* dividends has been, but that was not until the year 1862. The final order for taking that out of Court was made in 1862, twenty years after this sale, and in the meantime the vendor has retained the £725, which she might have accumulated at compound interest if she thought fit, and she has not brought this matter forward until after the death of the tenant for life, when the reversion had actually fallen in.

Mr. Selwyn, in arguing this case, said the Court will not consider the lapse of time, and cited the case of *St. Albyn v. Harding* (27 Beav. 11), where I allowed the transaction to be set aside after sixteen years. But the circumstances were very peculiar in that case, for my disposition has not been to disregard the consequences that may follow from delay in instituting a suit. In the case of *St. Albyn v. Harding* the person who sold the reversion was exceedingly poor, the inadequacy of value was clearly proved; he had been reduced to such circumstances that, although a gentleman and educated at one of the universities, he had been compelled to drive an omnibus, and the question between the parties was so open, that about a year before the bill was filed it was proposed that, in consideration of a certain sum of money, the claim of the Plaintiff should be abandoned and that he should confirm the sale. That went off and the bill was filed. That is very different from a case of this description, where the Plaintiff, Mr. Lord, knew everything that had taken place, was an active party in the whole proceeding, married the lady who sold the property three months afterwards, had [16] been engaged in the Chancery proceedings during the whole subsequent time, and does not file the bill till the month of June 1864, that is twenty-two years and three months after the transaction had taken place.

I am of opinion that this Court must lay down, as a rule, that a reversion can never be sold, and that no time will operate as a bar, if this transaction will not hold good, and although there is no magic in words, yet it would be holding that there is a species of magic about a reversion, which makes the sale of it impossible except

by auction, and that even if sold afterwards for even double the price that had been bid for it at the auction, yet, unless it is sold in the auction room, this Court will not allow the sale to stand.

I have not come to that conclusion. In *Perfect v. Lane* (30 Beav. 197, and 3 De G. F. & J. 369), and some other cases, the Court has thought fit to confirm the sale though not sold by auction, and I think that this case is one of that description.

The case of the Plaintiff fails, and this bill must be dismissed with costs.

[17] FREEMAN v. BOWEN. Dec. 7, 1865.

[See *Montefiore v. Enthoven*, 1867, L. R. 5 Eq. 41.]

The income of a fund was payable to a trader for life or until he should become insolvent. He executed a deed of inspectorship, reciting that he was unable to pay his debts in full. Held, that his interest in the fund had thereby determined.

Under Mr. Bowen's marriage settlement, the income of his wife's settled fortune was payable to Mr. Bowen "until he should become bankrupt or insolvent or should die, which should first happen."

By an indenture dated in October 1864, and made between Mr. Bowen and two inspectors and his creditors, it was recited that Mr. Bowen had for some time past carried on the business of a shipowner, and being indebted to divers persons in divers sums of money, *which he was unable to pay in full*, had proposed to his creditors to provide for the gradual liquidation of his debts by the collection and realization of all his real and personal estate under the inspection of the parties thereto of the second part. His creditors thereto granted him liberty and licence to conduct, manage and wind up his business, and to collect, get in, realize and dispose of all his real and personal estate and effects, under the inspection and subject to the direction of two inspectors, until he should have wilfully broken or failed to comply with any of the stipulations or provisions therein contained and on his part to be performed. And he entered into certain covenants with the inspectors and also with the creditors to do certain matters and things relating to the winding up of his business and the realization of his real and personal estate and effects; and that, if the inspectors should think it desirable and require him so to do, he would convey and assign his real and personal estate to them, upon trust to realize and apply the proceeds in payment [18] of his debts. And it was declared that the deed should operate as a deed of inspectorship for the benefit of all his creditors within the provisions of the Bankruptcy Act, 1861.

Mr. Robinson, for the trustees.

Mr. Hobhouse and Mr. Streeten, for the children, argued that "becoming insolvent" meant until he was incapable of paying his debts; *Re Muggeridge's Settlement* (29 L. J. (Ch.) 288).

Mr. Baggallay, for Mr. Bowen.

Mr. Selwyn, for the inspectors. There has been no forfeiture; the recital is not that he is insolvent, but that he is unable to pay his debts in full until his assets have been realized, but payment of them is provided for by the deed.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this is an insolvency, for it is impossible to distinguish between a greater or less degree of insolvency. This gentleman calls his creditors together and executes a creditors' deed, which contains a recital that he is unable to pay his debts in full, and he agrees to carry on business under inspection. I must follow the case of *Re Muggeridge* (*Ibid.*) 288, and make a declaration accordingly.

[19] THE VISCOUNTESS D'ADHEMAR v. BERTRAND. Dec. 15, 1865.

A testator appointed A. B. (the tenant for life) and C. D. trustees. The will contained no power to appoint new trustees. C. D. having disclaimed, A. B. (under the powers of the 23 & 24 Vict. c. 145, s. 27), appointed a single trustee in his place. Held, that the other *cestuis que trust* were entitled to have a third trustee appointed, and that the statute did not take away the jurisdiction of the Court to increase the original number of trustees.

The testator, Joshua Evans, of Hampstead, by his will dated in 1861, devised and bequeathed his real and personal estate unto Charlotte Bertrand and James Campbell upon trust to realize and pay the income to Charlotte Bertrand for her life, and afterwards upon certain trusts, which it is unnecessary to state. The will contained no power to appoint new trustees.

The testator died in January 1864, and James Campbell having renounced and disclaimed, the will was proved by Charlotte Bertrand alone.

By an indenture, dated the 16th of July 1864, Charlotte Bertrand, by virtue of the provisions contained in the 23 & 24 Vict. c. 145, s. 27, appointed Major O'Reilly, a gentleman residing in Ireland, to be a new trustee of the will to act in conjunction with her.

This suit was instituted by the *cestuis que trust* for the administration of the estate, which was of very considerable amount.

Mr. Selwyn and Mr. Sheffield, for the Plaintiffs, asked that a third trustee might be appointed. They said that, without making the slightest imputation on the present trustees, a third trustee was necessary for the protection of the Plaintiffs' interests.

Mr. Bagallay and Mr. Eddis, for Mrs. Bertrand, [20] argued that as the testator had thought proper to commit the care of his property to trustees, it was not the course of the Court to increase the number. Secondly, that, by the Act of Parliament, the power was limited, that the new trustees could only be appointed in the place of those whose office was vacant, and that consequently there was no authority given to increase the original number.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Court never commits a trust to the care of a single trustee, even in cases where no more than one was originally appointed.

In this case, I think the Plaintiffs are entitled to have an additional trustee appointed. I also think that the Act of Parliament, which has been referred to, does not take away the jurisdiction of the Court to increase the number of trustees when necessary.

If I allowed this lady to appoint a single trustee, she might appoint any person she thought fit, and one who might be very unfavorably inclined towards the other *cestuis que trust*, and thus deprive them of the protection to which they are entitled.

The Plaintiffs are entitled to have a third trustee appointed.

[21] WALLACE v. ATTORNEY-GENERAL (No. 2). June 29, Nov. 3, 1865.

[For previous proceedings, see S. C. 33 Beav. 384 ; 55 E. R. 416 (with note).]

Held, in construing a legacy "aux hospices de Paris et de Londres," in the will of a person domiciled in France, and in regard to those in London, that the word "hospice" was to be construed strictly according to its meaning in France, and that the word "hospice" in French was not equivalent to "hospital" in English.

Under a French bequest "aux hospices de Londres:" Held, upon an examination of French authorities, that all those institutions in London were included in the bequest which gratuitously received within their walls and provided for persons unable to take care of themselves, either from old age combined with poverty, infancy combined with neglect, from mental incapacity, or by reason of any bodily

ailment not susceptible of cure. Held, consequently, that St. George's Hospital and the like, Christ's Hospital and other institutions for instruction, and the London dispensaries, were excluded from the benefit of the bequest.

This case came before the Court upon an adjourned summons.

Mr. Schomberg, for the English executor, referred to the statute 43 Elizabeth, c. 4, statute 31, Henry 8, c. 13, in regard to the meaning of the word "hospitals."

Mr. Selwyn, Mr. Wigram, Mr. Cole, Mr. C. Hall, Mr. A. Bailey, Mr. Bagshawe, Mr. Hobhouse, Mr. G. O. Morgan, Mr. Jessel, Mr. Rawlinson, Mr. E. F. Smith, Mr. Ware, for the classified claimants.

Nov. 3. THE MASTER OF THE ROLLS [Sir John Romilly]. The question to be determined on this summons, which is adjourned from Chambers, is, the meaning of the following bequest in the testator's will, which is written in the French language, viz :—

"Je donne et lègue tous les objets et valeurs dont je n'ai pas disposé ci-dessus aux hospices de Paris et de Londres, que j'institue à cet effet pour mes légataires universels."

In other words, the question I have to determine is, [22] what English institutions are included in the words "les hospices de Londres;" the same word is applied both to Paris and London, and must, in my opinion, receive the same interpretation, and, consequently, the words "hospices de Londres" must include such institutions as, if they were situated in Paris, would fall within the description of "les hospices de Paris."

With respect to that portion of the bequest which relates to "les hospices de Paris," the question before me cannot arise, because, by the law of that country, all bequests in favor of charity are brought into one common fund, and applied by a central board termed "L'Administration de l'Assistance publique." It is not, in that country, competent for a testator to select one particular hospital or almshouse at Paris and give a bequest exclusively to that charity. If given, it belongs to the general fund, and the persons who administer it apply the proceeds as they think fit. The question, therefore, is confined to London institutions, and, in my opinion, only those institutions in London which, if they were situated in Paris, would be termed "des hospices" are entitled to share in the bequest.

Having stated thus much it is also proper to state, by way of preliminary remark, that, in my opinion, the fact that any institution in London is called "hospice" does not, of itself, give it any claim to be admitted; it must, in order to share in the bequest, fulfil the conditions of what is meant by the word "hospice" in French. The consequence of this opinion of mine is, that it is wholly unnecessary to consider, for the purpose of deciding this question, what institutions would fall within the meaning of the words "hospitals of London," unless it could be first established that the word "hospice" was accurately and precisely rendered in English by the [23] word "hospital." My opinion is, that the word "hospice" in French is not accurately an equivalent to the word "hospital" in English, and this relieves me therefore from the necessity of considering the extent of the meaning of the word "hospital," or its variation from former periods of time, when the word included almshouses and places of instruction, such as Christ's Hospital.

On examining the meaning of the word "hospice," I find that, in all accurate writers, a distinction is made between "hospice" and "hospital." I do not, by this, mean to say that they are never used as equivalent expressions or nearly so, but that, in all the cases that I have been able to discover, especially where the discussion has been relating to charities, a marked distinction has been made between "les hospices" and "les hopitaux."

In the reports and statements of accounts rendered annually by the "Administration générale de l'Assistance publique" this distinction is constantly and rigidly preserved. I have consulted a large number of them, and I find no instance in which, as it appears to me, these terms are applied indiscriminately.

In the lists of bequests which accompany these accounts, I find that where donations are made to hospitals alone, the word "hospices" does not occur in the heading of the list; and where the bequests are to hospices and the hospitals are not

included, the word "hospitaux" is excluded from the title. In one of them, that of the year 1849, which contains "Notes et renseignements sur les hospitaux et hospices civils de la ville de Paris," rendered necessary apparently by the alteration produced by the revolution of 1848, occurs the [24] following passage, as an explanation of what is meant by the word "hospice":—

"On désigne, sous le nom d'hospices, les asiles ouverts à tous ceux que l'indigence et la vieillesse, l'enfance et l'abandon, l'aliénation ou des infirmités incurables mettent hors d'état de pourvoir eux-mêmes aux besoins de leur existence. On les subdivise en hospices, proprement dits, et en maisons de retraite. L'admission est gratuite dans les premières, et, dans les seconds, elle n'a lieu que moyennant une pension annuelle ou le versement d'un capital dont le montant est fixé par les règlements."

This I translate thus:—"Under the name of hospice are designated abodes which are open to all those who, by poverty and old age, by infancy and neglect, by mental alienation or by incurable disease, are unable of themselves to provide the means of existence. They are divided into hospice, properly so called, and into asylums. In the former, the admission is gratuitous; in the latter, it is conditional on payment of an annual or of a principal sum of money, the amount of which is fixed by the rules of the institution."

In the Nouveau Formulaire Magistral, relating to the charitable institutions of Paris, by Bouchardat, which is a standard work and has reached its thirteenth edition, occurs the following passage:—"Dans la description des Etablissements de l'Administration, je suivrai la division actuellement adoptée dans les comptes annuels: 1°. Hôpitaux; 2°. Hospices; 3°. Etablissements Spéciaux. Les établissements aux malades sont désignés plus particulièrement sur le nom d'hôpitaux, et nous appliquons le nom d'hospices aux maisons consacrées à l'enfance, à la vieillesse, ou à des infirmités qui ne sont pas susceptibles de guérison." The meaning of [25] which I understand as follows:—"In the descriptions of the institutions under the control of the public administration, I shall follow the division at present adopted in their annual reports: 1st. Hospitals; 2dly. Hospices; 3dly. Establishments of a Special Character. The establishments devoted to the sick are more particularly designated by the name of 'hôpital,' and we apply the name of 'hospices' to houses devoted to children, to old people, or to persons afflicted with incurable infirmities."

The third division of Establishments of a Special Character seems to include, principally, assistance given to the objects of the charity without receiving them into any house or building. These definitions of the meaning of the word "hospice," although not identical, are in substance the same.

I am of opinion that the word "hospices," as applied to institutions in London, must be taken in the sense here described. I find, by consulting many volumes of the *Moniteur*, in the places referred to in the index under the words "hospitaux" and "hospices," that they are always kept distinct, and that this division uniformly prevails. It is, however, but fair to add that, in the list of hospitals, I have discovered institutions which, according to the definition I have given, are properly des hospices, and also that the hospital for lying-in women is, in one list, called L'Hospice d'Accouchement, while it is obvious that, according to the previous definitions, if correct, that institution ought to be classed among the hospitals and not among les hospices. Still, in my opinion, this, although it may not always have been strictly followed, is the proper definition to guide me, and I shall, unless a contrary intention is to be discovered from the text of Lord Henry Seymour's will, hold that the word "hospices" [26] must be construed by the strict meaning of that word in the French language, according to the definition I have adopted as applied to the London institutions.

The rest of the will throws no further light on the subject than is to be gathered from the following passage, where he says—

"Je donne et lègue à M^{lle} Ellen Minchin, à condition qu'elle ne se mariera pas, usufruit sa vie durant de la somme nécessaire pour lui assurer un revenu de dix mille francs par an; la nue propriété de cette somme appartiendra à l'Hospice des Lunatics de Londres, auquel je fais don et legs."

But this, in truth, does not affect the former definition, and is, indeed, rather a confirmation of the conclusion to which I had previously come, as an institution for

persons of unsound mind falls within the strict definition of the word "hospice" to which I have referred.

I shall therefore hold that all those institutions are included in this bequest which gratuitously receive within their walls and provide for persons who are unable to take care of themselves, either from old age combined with poverty, or infancy combined with neglect, from mental incapacity, or by reason of any bodily ailment which is not susceptible of cure. That, in my opinion, is the best and most accurate meaning and construction I can give to the word "hospice" as employed in the will of Lord Henry Seymour.

The result of this will be at once to exclude from any interest in this bequest all those institutions in London which are usually called hospitals which are founded for the reception of sick persons, the inmates in which are discharged alike from the hospital when they are cured, [27] or when it is discovered that the disease is lingering or incurable. This includes the great London hospitals: such as Saint Bartholomew's, Saint George's and the like. It will also exclude all the institutions, whether called hospitals or not, the principal object of which is instruction: such as Christ's Hospital. It will also exclude all institutions which do not receive persons within their walls: such as dispensaries. It will also exclude all institutions which do not receive the inmates gratuitously.

THE MASTER OF THE ROLLS then discussed the merits of the several claimants mentioned in the Chief Clerk's special certificate; but the matter was remitted to Chambers.

[27] SUMMERS v. GRIFFITHS. Nov. 10, 1866.

Sale, by an old woman of eighty-eight, of an estate in possession for one-fourth its value set aside, she being in distress and without legal assistance, and being also under the impression that she could not make out a good title, while the purchaser, knowing that she could, concealed the fact from her.

The doctrine of *suppressio veri* applied to a purchaser.

By deed, dated the 18th of July 1853, Mary Lloyd (since deceased), in consideration of £40 conveyed a tithe rent-charge of £8 per annum, issuing out of a farm called Colston, to the Defendant William Griffiths, "his heirs and assigns."

Mary Lloyd, an old illiterate widow, was then in her eighty-ninth year, but in possession of all her faculties, and she kept a public-house in Fishguard. One witness represented her as being very correct in business, "and very much alive to her own interests in money matters. She was a very intelligent and clear-headed woman, and, having regard to her advanced age, sharp and active, both in mind and body." She had no professional advice on the occasion, and the deed was [28] prepared by the Defendant's solicitors. The value of the fee-simple of this tithe rent-charge (if a good title were shewn to it) was admitted to be twenty years' purchase or £160.

Mary Lloyd died in May 1862, having left her property to her son William for life, with remainder to his children. He became bankrupt in 1863, and the Plaintiff was his assignee.

The Plaintiff instituted this suit in March 1864 against William Griffiths and the son's children, to have the deed of 1853 set aside on the ground of fraud. The bill proceeded on the ground that Mary Lloyd intended to sell the rent-charge during her life only, while the conveyance was of the inheritance, but it also alleged that the consideration was inadequate.

The account of the transaction given by the Defendant Griffiths in his answer was as follows: "Prior to the month of June 1853 Mary Lloyd had repeatedly offered to sell to me, and as I believe to several other persons, the rent-charge; but I had invariably declined her offer, for I was under the impression that tithe rent-charges belonged to the church, and therefore that it was not in her power to dispose of the tithe rent-charge, although I afterwards came to understand that lay people

could hold such property. On or about the 23d day of June 1853 Mary Lloyd called at my house and strongly urged me to purchase the tithe rent-charge, saying, in the Welsh language, "I am pressed for money, take mercy on me, and let me pay my debts." I inquired of her why she did not go to some person who knew more about such property? To which she replied that she had done so, but that, not having the conveyance to her husband, she could not shew [29] any title to the rent-charge, and that therefore no one would purchase it of her. I remarked to her that if she had no title, perhaps her husband had none; but she stated that the farm on which the tithes were charged was her own, and that she had never paid tithe to anyone since the death of her husband; and that if I would give her £40 and put her to no expense about the title, she would sign any deed I liked making over to me all her interest, whatever it might be, in the tithes. On the assurance of Mary Lloyd that she had paid no tithe in respect of the said lands, I concluded that she must have some sort of right or title to the rent-charge, either as owner or lessee; and as I was willing to oblige Mary Lloyd, and the amount of the risk, in case the title should prove bad, was not great, I accepted the offer of Mary Lloyd, and agreed to purchase the rent-charge for £40, without further inquiry as to the title, and to pay all expenses attending the conveyance."

On his cross-examination, the Defendant Griffiths stated as follows:—"When she came to me in 1853 to ask me to buy the tithes, she begged and craved of me to take mercy upon her; this she said in Welsh. I said to her that I thought it was a spiritual thing and belonged to the church, and that she had no right to sell that. 'Yes,' she said, 'I have a right to sell it.' She said she had it after her husband's death. She shewed me her husband's will, I read the will, and I then said I would give her what she asked for it, £40. I said, why do not you offer it to someone else? She said, I have no deeds, and they are afraid of the title to it. She never asked more than £40 for it, and had, over and over again, offered it to me for that sum before I bought it."

[30] A copy of the will of Mary Lloyd's husband was given to Mr. Griffiths, and it was recited in the conveyance to him. This will was dated in 1819, and thereby he devised the tithes of Colston to Mary Lloyd, "her heirs and assigns for ever." Mary Lloyd's husband had died in 1823, and the will had been proved in 1824; this also was recited in the conveyance.

Mr. Selwyn and Mr. Speed, for the Plaintiff, relied on *Clark v. Malpas* (31 Beav. 80), *Baker v. Monk* (33 Beav. 419), *Longmate v. Ledger* (2 Giff. 157).

Mr. Robinson, for Defendant in the same interest.

Mr. Owen, for trustees.

Mr. Jessel and Mr. Bevir, for the Defendant Griffiths. The case made by the Plaintiff on the record is one of fraud; it proceeds on the fact that the vendor only intended to sell her life interest in the rent-charge, and that the deed improperly conveyed the inheritance. That case has been displaced, and the Plaintiff now relies on a distinct one. There was no fiduciary relation between the vendor and purchaser in this case, no surprise or misrepresentation; but there being a difficulty in the title, the vendor obtained the price which she herself had fixed. The absence of an attorney on the vendor's part is no ground for invalidating a sale; *Harrison v. Guest* (6 De G. M. & G. 424, and 8 H. of L. Cas. 481).

The case is then reduced to one to avoid a deed merely for the inadequacy of the consideration. That [31] has been repeatedly decided to be no sufficient ground for annulling a conveyance of property in possession.

THE MASTER OF THE ROLLS [Lord Romilly] (without calling for a reply) said: I am of opinion that the Plaintiff is entitled to a decree.

The state of the case, as put by the Defendant himself, is, that an old woman, of the age of eighty-nine, in distress for money, and having a doubt about the title to the property, comes to him and asks him to buy it at one-fourth or one-fifth of its value, and that she, having no species of legal assistance of any sort, makes that offer to him. He assents, and buys it at that amount, having at the time in his hands the title to her property, and knowing or having the means of knowing exactly what her title was, and having told her, at first, that she could make no title to it, or that if she was entitled to it her husband probably was not, he having the deed probably

shewing how long the husband had had the property, and that she had then had thirty years' uninterrupted possession of the rent-charge. Thereupon he buys the property for one-fourth its value. This is the most favorable mode of stating the case, and I am then asked to say that if the matter were fresh, this is a transaction which can be supported, and the only reason urged why it can be supported is that the bill charges fraud. No person, I think, has been more strict than I have in endeavouring to repress the improper uses of the word "fraud" in regard to transactions which are neither of an improper nor of an immoral character—I mean immoral in the sense of taking advantage of a person who does not know what the value of his property is. I do not understand the distinction on the subject taken in the case of *Harrison* [32] v. *Guest*. There appear to me to be distinct fraud in this case, and on that ground I am of opinion that the Plaintiff is entitled to recover.

It is true the Plaintiff has put forward another case on the bill, which is, that Mary Lloyd intended to sell her life interest only, and there is some ground for that suggestion on the evidence; but here is this man, who knows everything about the title, and who admits (in the state of circumstances I have mentioned) that he allowed this old woman to sell the property to him for one-fourth its value, she believing there was a defect of title. If that be not fraud I am at a loss to know what the meaning of the word "fraud" is, in the proper and legal sense of the word. If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title, while I know that he can, and I conceal that knowledge from him, is not that a *suppressio veri*, which is one of the elements which constitute a fraud?

I am of opinion that the Plaintiff in this case is entitled to a decree to set this deed aside, on payment to the Defendant of the principal sum and interest after deducting the tithes he has received. The Plaintiff must pay the costs of the other Defendants, because, in my opinion, they ought all to have joined as Co-plaintiffs.

There is this also to be observed with respect to the question of time that ten years have elapsed, and this old lady took no steps in her lifetime. She died in 1862, and neither the son nor his assignee took any steps until March 1864 when the bill was filed. But, [33] then, I observe that there are persons who are interested in remainder, some of whom are infants and cannot be bound by that lapse of time, though it is absolutely necessary that there should be some limit to these cases.

It is true, as Mr. Jessel says, that mere inadequacy of value is not a sufficient ground for setting aside a transaction. But how far is that to go, is there to be no such inadequacy of value as can amount to evidence of fraud? Lord Thurlow said that, to set aside a conveyance, there must be an inequality, so strong, gross and manifest that it must be impossible to state it to a man of commonsense without producing an exclamation at the inequality of it. (*Gwynne v. Heaton*, 1 Bro. C. C. 9.) Tried by this test, I am satisfied that most men of commonsense would exclaim at the inequality, when they found that an old woman of eighty-nine had sold property for one-fourth of its value because she was in distress, and that without any legal assistance and without any person letting her know that she could make out a good title and obtain four or five times that amount.

[34] *Re PRESS AND INSKIP*. Nov. 20, 1865.

Twelve months after payment of a bill of costs by trustees to their solicitor it cannot be taxed, under the 1 & 2 Vict. c. 73, upon the application of their *cestui que trust*.

William David Jones assigned his property to trustees for the benefit of his creditors. On the 16th of June 1864 the trustees paid their solicitor's bill, and an application being made, in Chambers, more than twelve months afterwards by the

cestui que trust, under the General Order of August 1864, for the taxation of the bill, it was referred into Court.

Mr. Speed, in support of the application, relied on the 6 & 7 Vict. c. 73, ss. 39, 41.

Mr. Hemming, *contra*, was not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. The principle is quite clear that a third party coming to tax a solicitor's bill can only stand in the shoes of the client, and, unless there are circumstances which would entitle the client to a taxation, the third party cannot tax the bill as against the solicitor. Assuming that, in this case, it was improper for the trustees to employ one firm at Bristol and another at London, still that is a question between the trustees and their *cestuis que trust*, and not one arising between the trustees and their solicitors. If the trustees thought fit to employ a firm at Bristol and another in London, they must pay them. It is a question between the trustees and their *cestui que trust*, and it can only be determined by the [35] *cestui que trust* filing a bill against the trustees to take the account between them. The Court will then see whether the payment by the trustees to their solicitors was a proper one, and if not, it will moderate the charges and deduct the amount, not from the solicitors but from the trustees. NOTE.—See *Re Massey*, 34 Beav. 463.

[35] *In re THE COMMERCIAL UNION WINE COMPANY.* Dec. 15, 1865.

The Court will not, under the 25 & 26 Vict. c. 89, s. 100, make an order *ex parte* for the delivery over of documents by the manager of a company to the official liquidator.

An order for winding up this company having been made on the 11th of December last,

Mr. W. Terrell now applied *ex parte*, under the 100th section of "The Companies Act, 1862" (25 & 26 Vict. c. 89), that the late manager of the company might deliver to the official liquidator some dock warrants.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot make such an order *ex parte*.

[36] *LUDLOW v. BUNBURY.* Dec. 8, 1865.

Devise of real and personal estate to A. absolutely, with a proviso that A.'s interest should cease if B. or his wife or their children should become entitled to any part of the estate by gift, sale, &c., from A. Held, that the clause of forfeiture was void.

By her will, dated in 1860, Mrs. Bunbury, by virtue of a power, appointed all her real and personal property unto her husband "Henry Mill Bunbury, his heirs, executors, administrators and assigns absolutely."

She then proceeded as follows:—

"Nevertheless, the appointment, gift, devise and bequest hereby made are made upon this express condition:—that in case Louis Robert James Vesturme and Anne Elizabeth his wife, or either of them, or any child or children or issue or descendant or descendants of them the said Louis Robert James Vesturme and Anne Elizabeth his wife, or either of them, shall, by gift, sale, contract, devise, bequest, settlement or other instrument, made or executed by or on the part or behalf of my said husband, become, or, but for this present provision, would become, entitled to or in any manner interested in all or any part of all or any of the real or personal estate hereby by me appointed, given, devised or bequeathed, then and in such case and immediately thereafter, the whole estate and interest of my said husband, in all the real and personal estate, hereby by me appointed, given, devised and bequeathed, or intended so to be, shall cease and absolutely determine."

The testatrix died in 1864. The trustees were advised that, having regard to the

condition contained in the will, they could not safely transfer the property unto the husband, and they instituted this suit to obtain the directions of the Court.

[37] Mr. Selwyn and Mr. Henry F. Shebbeare, for the Plaintiffs.

Mr. Hobhouse and Mr. Lindley, for the Defendant Henry Mill Bunbury.

THE MASTER OF THE ROLLS [Sir John Romilly] held that the clause of forfeiture was void, and that Henry Mill Bunbury was absolutely entitled to the estates, funds, and monies. He ordered a conveyance and transfer of them to Mr. Bunbury accordingly. (Reg. Lib. 1865, B. fol. 2523.)

[37] *Re THE LONDON WHARFING AND WAREHOUSING COMPANY (LIMITED).*
Nov. 25, 1865.

[See *In re London and Paris Banking Corporation*, 1874, L. R. 19 Eq. 448.]

The fact of a company having neglected to pay a debt three weeks after demand made, under the 25 & 26 Vict. c. 89, s. 79, 80, is not sufficient to entitle the creditor to a winding-up order, unless it be shewn that the company is also unable to pay its debts.

Where a debt is disputed by a company, a petition by the creditor to wind it up will not be allowed to stand over, unless it is believed that when the debt has been established by a judgment, such judgment could not be enforced against the company.

This company was incorporated in December 1863.

The Petitioner, Mr. Mooney, was one of the projectors, and in December 1863 he had been appointed the managing director and secretary. He also held original shares in the company.

In February 1864, at a meeting of shareholders, the £100 shares were converted into shares of £20 each. The Petitioner exchanged his twenty-five £100 shares for one hundred and twenty-five £20 shares.

[38] On the 3d of May 1865 the Petitioner's appointment was cancelled as from the 31st of May; but he continued to act until the 27th of July.

The Petitioner, on the 12th of October 1865, sent in a claim against the company for £593, 16s., which was composed of £343, 16s. for his preliminary expenses and £250 for six months' salary. The company declined to pay it, and after the expiration of three weeks, the Petitioner presented a petition to wind up the company.

There was no proof of any insolvency of the company, and the only fact alleged as to its financial difficulties was that the company had expended £125,559 on capital account, while the paid-up capital amounted to £120,500 only, and that a considerable sum was due for the purchase of the land. The Petitioner also submitted that this conversion of the shares was *ultra vires*, that the £20 shares had been illegally issued, and that, therefore, the company could not enforce the payment of any calls upon them.

Mr. Selwyn and Mr. Graham Hastings, in support of the petition. The old law, giving a direct remedy against the shareholders, has been abrogated, and at present the proper mode of obtaining payment of a debt due from a company is under the 25 & 26 Vict. c. 89, ss. 79, 80, which enacts that a company may be wound up whenever it "is unable to pay its debts," and one of the tests is, whenever a creditor of the company above £50 has demanded payment, "and the company has for the space of three weeks," &c., "neglected to pay such sum." This is precisely what has taken place. It is not necessary, as a preliminary, to go through the process of proving a debt at law, it is sufficient to establish it in equity. Here it is plain that there is a debt, to some extent, due to the Petitioner from the [39] company—for, in the first place, the Petitioner was entitled to twelve months' notice; *Beeston v. Collyer* (4 Bing. 309); and, secondly, he is entitled to be paid two months' salary for the two months he has performed the duties of his office since his discharge in May 1865. There is no *bond fide* dispute as to the existence of some debt, and that it remains unsatisfied

after the three weeks' notice. To the claim for two months' salary no answer has been given.

Secondly, where there is a *bonâ fide* dispute as to the existence of the debt, and the case turns upon the question whether there is a debt, the Court (says Lord Justice Turner) "would do well to exercise the power given to it by the 86th section of the Act, to adjourn the petition till the existence of the debt is established;" *Re The Catholic Publishing, &c., Co.* (2 De G. J. & S. 121).

Thirdly, the company had no power to make any alteration in the amount of their shares; 25 & 26 Vict. c. 89, ss. 12, 13, 176. In the case of the Contract Corporation Company (Limited) an application was made during this year (1865) to Parliament for liberty to reduce the value of their shares from £100 to £50, but the bill was thrown out in the House of Lords. The existing shares in this company are therefore illegal, and no calls can be made upon them. It is therefore "just and equitable" either that the company should be wound up or that the petition should stand over.

Mr. Hobhouse and Mr. Colt were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Petitioner has no case at all, and that when there is simply a disputed debt, it is [40] not a legitimate object to present a petition to wind up a company.

What was done in the Catholic Publishing Co. was this:—There was strong evidence of its being in a state of financial difficulty, the debt was disputed, and if it had been admitted to be due, the company was not then in a situation to pay it. I therefore ordered the petition to stand over to see if the company would, in the meantime, pay the debt. (33 L. J. Ch. 325.) But if a company is able to pay, the fact of its disputing a debt or of not paying it is no justification for a creditor to come by petition to wind it up.

I have heard no evidence to shew that the company is unable to pay its debts or that there is any debt which it is unable to pay. It refuses to pay the Petitioner, who claims a debt of £593, of which £343 are for "preliminary expenses in connection with the formation of the company" in 1863, and which he has never enforced from that time to the present; the remaining £250 is for six months' salary, and this claim is disputed, and I infer that there is a question whether the company had a right to dismiss him or not. The Petitioner must take proper proceeding to enforce his debt at law.

I will not order the petition to stand over in the meanwhile, for if he should succeed at law he will then be able, by means of the judgment, to enforce payment by the company. A petition is ordered to stand over only in those cases in which it is believed that if the debt be established by a judgment at law, such judgment cannot be enforced against the company.

The Petitioner, as shareholder, has shewn no ground [41] for winding up the company. As to the question as to the conversion of shares, it is one which must be tried elsewhere.

This is an attempt to extort the payment of a disputed debt, the validity of which ought to be tried before another tribunal, and the consequence is that I must dismiss the petition with costs.

[41] CARR v. LEVINGSTON. Dec. 14, 1865.

After some negotiations, a landlord, by his agent, stated, in a letter to the tenant, the terms on which he would renew his lease, but added, he would expect an answer within a month. The landlord died seven days afterwards, and on the following day the tenant and agent, both of whom were then ignorant of the death, met, and the tenant signed his acceptance of the terms. Held, that there was no binding contract.

The testator, Mr. Levingston, being possessed of a copyhold called "The Blue Coat Boy Tavern," which he had let to Mr. Roseblade for a term expiring in 1873, made his will in 1861. He thereby devised all his freehold and copyhold property

in trust for his wife for life, with remainders over. And he thereby authorized his trustees to renew existing leases in consideration of a fine, which fine was to be held on the same trusts as the freehold and copyhold property. As to his personal estate, he bequeathed it to his wife absolutely.

The testator died on the 24th of October 1864.

With respect to "The Blue Coat Boy Tavern," the following circumstances had occurred which gave rise to the question in this cause. The testator had entered into negotiations with Mr. Roseblade, his tenant, for the renewal of the lease, and on the 17th of October 1864 the testator's land agent (Mr. Roberts) wrote to Mr. Roseblade specifying the terms on which the testator would grant a new lease upon payment of a fine of £2000. He added, "I expect that you will send me an [42] answer within one month from the date, but Mr. Levington will not be considered as having entered into any agreement until the fine be actually paid."

On the 25th of October 1864 Mr. Roseblade called on Mr. Roberts and signed a formal agreement to accept the lease upon the terms proposed, and he paid him £200 on account of the premium.

At this time the testator was dead, but neither Mr. Roberts nor Mr. Roseblade was aware of the fact. The agency of Roberts was not disputed.

Mr. Roseblade was desirous of accepting the proposed lease and all parties were willing that it should be granted to him on the terms mentioned in Mr. Roberts' letter of the 17th of October 1864; but a question arose, whether the fine of £2000 would form part of the personal estate of the testator or ought to be held upon the trusts declared by the testator's will of the fines and premiums, and so be considered as real estate.

Mr. John Pearson, for the Plaintiff, a trustee.

Mr. Selwyn and Mr. Eddis, for the widow, argued, first, that the tenant had the option of taking a renewed lease on the terms specified in the agent's letter, but to be exercised within one month. Secondly, that upon the exercise of the option, the fine of £2000 formed part of the testator's personal estate, and belonged to the widow; *Townley v. Bedwell* (14 Ves. 590); *Weeding v. Weeding* (1 John. & H. 424).

They also referred to *Price v. Hathaway* (6 Madd. 304).

[43] Mr. Hobhouse and Mr. Whitehorne, for the other Defendants, were not heard.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think there is no concluded agreement between the parties. If there had been, the tenant and the representatives of the testator might both have taken advantage of it; but this is a mere treaty. The landlord, by his agent, says to the tenant, I am willing to grant you a lease on certain terms, but before its acceptance the landlord dies.

The £2000 must be held on the same trusts as the fines held under the will.

[43] GRIFFITHS v. BRACEWELL. BRACEWELL v. GRIFFITHS.
Dec. 19, 20, 1865.

By partnership articles, one of three partners might "determine the co-partnership by giving six calendar months' notice:" and in that case, immediately after the expiration of the six calendar months, the assets were to be valued, and after the valuation being made and the result communicated, the partnership "shall, in regard to all the said partners, cease and determine." Held, that the partnership was dissolved at the expiration of the six months, and not from the completion of the valuation, though it continued after the six months, for the purpose of winding it up.

The Plaintiffs, William Bracewell, William Metcalfe Bracewell, and the Defendant Price Griffiths, entered into partnership as ironfounders, upon the terms of articles dated in 1863.

The 28th article was as follows:—

"That it shall be lawful for William Bracewell, of his own free will and without assigning any reason for so doing, to determine the co-partnership by giving six

calendar months' notice in writing of his intention [44] so to do, and leaving such notice at the respective usual dwelling-houses of the said William Metcalfe Bracewell and Price Griffiths, or at the counting-house of the partnership, and then and in that case immediately after the expiration of the said six calendar months, it shall be referred to William Clarkson, of &c., &c., "to value the partnership assets, plant, property and liabilities, and, for that purpose, all account-books, papers and documents shall be produced and submitted to the valuer so appointed; and upon the valuation aforesaid being made, and the result thereof communicated to each of the partners or his personal representatives, the co-partnership hereby intended to be established shall, in regard to all the said partners, absolutely cease and determine, without prejudice, nevertheless, to the remedies of the respective partners for any breach or non-performance, breaches or non-performances, before such the determination of the partnership, of any of the covenants or agreements contained in these presents."

Differences having arisen, the Plaintiff William Bracewell gave his co-partners a written notice on the 30th of May 1864, that "it was his intention, at the expiration of the period of six calendar months from the day of the date thereof, to determine the partnership."

After this, Griffiths, in October 1864, filed his bill to reform the articles, by striking out the 28th article, and in other matters. It prayed for a dissolution, and for an injunction to restrain William Bracewell from acting on the notice of the 30th of May 1864. His suit, however, failed.

The other suit was instituted by the two Bracewells against Griffiths in July 1865, for a declaration that the [45] partnership had been dissolved by the notice of May 1864, and to have the affairs wound up on that footing.

No valuation had as yet taken place.

Mr. Hobhouse and Mr. Waller, for Griffiths.

Mr. Selwyn and Mr. Speed, for Bracewell, insisted that, upon the strict terms of the 28th article, the partnership did not "absolutely cease and determine" until "the valuation aforesaid" had been "made and the result thereof communicated to each of the partners."

Mr. Waller, in reply.

Dec. 20. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, on looking over the articles, my opinion is against Mr. Griffiths, and on two grounds. I think that the 28th clause of the partnership articles does not mean that there was to be no dissolution until the valuation had been made. I assent to the argument that, in winding up partnerships, there are two periods to be referred to, one when it is to be terminated by notice, and another period when, to use Lord Eldon's expression in *Crawshay v. Maule* (1 Swan. 507), if one partner has a right to consider the partnership at an end, it may continue for the purpose of winding up the affairs: that is, the partnership is going on for the limited purpose of winding it up.

The notice here was to determine the partnership at the end of six months; but it was still necessary that something more should take place. The business must [46] necessarily go on in order to determine the rights of the several partners, and to realize the partnership property. There was a *quasi* and qualified partnership which continued for that purpose, and it went on until the assets had been realized and the shares of the partners had been ascertained. The 28th clause means simply this:—It assumes that the partnership determined at the end of the six months, but that it still went on for the purpose of ascertaining the rights of the partners, and that when those rights had been ascertained, the partnership absolutely ceased and determined.

I think, therefore, that Mr. William Bracewell is entitled to all the advantage to be derived from the notice which he gave.

Secondly, I am of opinion that Griffiths, by his acts, has prevented the valuation being made, and that he cannot be allowed to take advantage of his own wrong.

I must therefore declare the partnership dissolved as from the 30th of November 1864, and direct that the valuation be made by Mr. Clarkson, if he will undertake it, and that the usual partnership accounts be taken.

[47] GRESHAM v. PRICE. Nov. 9, 1865.

Executors who had neglected to produce their accounts deprived of their costs of suit up to the hearing.

This case was argued by Mr. Hobhouse and Mr. C. Browne, on the one side, and by Mr. Selwyn and Mr. Pearson, on the other.

THE MASTER OF THE ROLLS [Sir John Romilly]. Upon reading the evidence in this case, I think that the Defendant James Gilbert Price the younger has compelled the Plaintiffs to file this bill, by not producing his accounts, which he was bound to have ready. It is true that he nowhere absolutely refuses, but he postpones, delays and avoids, and nowhere promises to do it. Accordingly, the Plaintiffs having waited in vain from the 14th of December to the 7th of July, that is nearly seven months, filed the bill. I think they were justified in so doing, and that the Defendants were not justified in not sending accounts. The other Defendants are innocent, but they cannot be allowed to receive their costs of a suit which has been wantonly occasioned. They have not compelled James Gilbert Price the younger to make out the accounts as they ought to have done, and as they allowed him to manage the whole business they must take the consequences. I consider the conduct of James Gilbert Price the younger as equivalent to a refusal to account, although an exact denial is never mentioned, and so considering it, he cannot receive costs. It is clear that the distinction is verbal between a constant avoiding to produce [48] accounts without denial and an open denial at once. The latter is more manly and straightforward and produces in the end less costs, as it avoids all the preliminary correspondence between solicitors.

My disposition is to deal leniently and lightly with trustees, and I am not disposed to make them pay costs, as that is a strong measure, and besides I think that the costs of this suit has been unnecessarily increased by some amendments.

The proper course is to direct the ordinary accounts to be taken, but the Defendants are to have no costs of this suit up to and including the hearing.

[48] COX v. BOCKETT. July 4, 5, 1865.

A case of forfeiture is *strictissimi juris*, and the party alleging it must prove it at the hearing, and no inquiry will, as in ordinary cases, be directed in regard to a forfeiture.

The Plaintiff's interest was subject to a condition of forfeiture by anticipating. He gave a power of attorney to receive the income and a charge to secure a debt. There being an arrear of income at the time, and it not being shewn that the debt exceeded the arrears: Held, that there was no forfeiture.

The testatrix died in 1858.

By her will, she gave one-fourth of the profits of a newspaper, called *The Builder*, to trustees for the Plaintiff John A. D. Cox, for life, with remainders over, subject to the following contingency or condition:—

That if he should “be outlawed or declared bankrupt, or become an insolvent debtor within the meaning of any Act of Parliament for the relief of insolvent debtors, or should assign, charge or incur, or attempt or affect to assign, charge or incur, his share or proportion of profits or any part thereof, or should do or [49] suffer anything whereby the same, or any part thereof, might, if belonging absolutely to him, become vested in or payable to some other person or persons, then and thenceforth the share or proportion of profits to which, but for this provision, he would be entitled, should during the remainder of his life or other interest therein, from time to time, sink into and be added to and form part of his general personal estate.”

The trustees and some of the Defendants alleged that the Plaintiff had forfeited his interest, first, by executing to a creditor a power of attorney to receive the income;

and secondly, by executing a charge to a Mr. Keene on the 20th of November 1860, but which had been paid off in 1861.

There were some arrears of income due to the Plaintiff at the time he executed these two documents, the amount of which was doubtful, and it was not proved by the Defendants that the debts exceeded the arrears of income due at the time.

The trustees had discontinued to pay the income to the Plaintiff, on the ground of the alleged forfeiture, and this suit was instituted, in May 1863, to obtain an account and for payment of the arrears.

Some of the Defendants still insisted on the forfeiture.

Mr. Selwyn, Mr. Osborne and Mr. Locock Webb, for the Plaintiff Cox.

Mr. Baggallay and Mr. Faber, for the trustees, and

[50] Mr. Hobhouse and Mr. C. F. Bockett, for other Defendants, contended that there had been a forfeiture.

Mr. Beavan, for another Defendant, took no part in this question.

Acton v. Woodgate (2 Myl. & K. 492); *Browne v. Cavendish* (1 Jones & Lat. 635); *Walklyn v. Coutts* (3 Merr. 707); *Wilding v. Richards* (1 Coll. 655) were cited.

July 5. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon reading the evidence, I am of opinion that the case of forfeiture is not made out, and I am also of opinion that a clause of forfeiture must be construed strictly.

There are two matters by which it is attempted to shew that a forfeiture has occurred. First, there is a power of attorney executed by the Plaintiff to receive his income. This may have been irrevocable, because it may have been given for value; but it is not proved that the amount due to the Plaintiff at the time, for his share of the business, was less than the debt, and I am of opinion that if it can be shewn that the money to be paid under the power of attorney was less than what was then due to the Plaintiff, it was not an anticipation of the fund so as to bring it within this clause of forfeiture. But whether it was or not would depend on the result of an account.

With respect to the other case, that of Mr. Keene, the [51] secondary evidence of the contract is very vague. The witness says that it was a charge of all the Plaintiff's interest, and that he considered it a charge of the future income, and that £170 was the amount to be secured in January 1861. I am disposed to think the Court would deal harshly if it held that a forfeiture was occasioned by a charge made under a *bonâ fide* belief that the amount due for arrears to the Plaintiff exceeded the charge. I think the burthen of proof lies on those who insist on a forfeiture, and that it is not a case in which the Court will direct an inquiry, because no matter is so serious as a forfeiture, and a person who claims under it is put to strict proof, and cannot call on the Court to assist him in making out his case.

Except the question of forfeiture there is nothing in the case, and in fact the keeping the Plaintiff out of his income was the very mode of making him incur a forfeiture.

I must declare that there has been no forfeiture.

[52] WALKER v. THE WARE, &C., RAILWAY COMPANY. Dec. 4, 1865.

[S. C. L. R. 1 Eq. 195; 35 L. J. Ch. 94; 13 L. T. 517; 12 Jur. (N. S.) 18; 14 W. R. 158. Followed, *Sedgwick v. Watford and Rickmansworth Railway Company*, 1867, 36 L. J. Ch. 379; *In re Cambrian Railways Companies' Scheme*, 1868, L. R. 3 Ch. 289 (n.); *Wing v. Tottenham and Hampstead Junction Railway Company*, 1868, L. R. 3 Ch. 744; *Pell v. Northampton and Banbury Railway Company*, 1868, 16 W. R. 1077; *Raper v. Crystal Palace Railway Company*, 1868, 18 L. T. 8; *Goodford v. Stonehouse and Nailsworth Railway Company*, 1869, 38 L. J. Ch. 308; *Sutton v. Hoylake Railway Company*, 1869, 20 L. T. 214.]

The owners of land taken by public companies under their compulsory powers have the ordinary vendor's lien for unpaid purchase-money, and they are entitled to enforce that right by a sale of the land.

This lien extends not only to the value of the land, but also to the amount of compensation for damages.

This right of lien is unaffected by the deposit under the 85th section of the Lands Clauses Consolidation Act, and by a deposit, by agreement, before the amount payable has been ascertained.

The rights of the public, and of debenture creditors and others claiming under the company, are subordinate to the vendor's lien for unpaid purchase-money.

In 1861 this railway company, under their compulsory powers, took some land belonging to the Plaintiff, and under the 8 Vict. c. 18, s. 85, they deposited the sum of £700 in this Court (being the *ex parte* valuation), and they gave the bond required by that statute.

The company required further lands belonging to the Plaintiff, and it was agreed that, in lieu of a payment into Court, the sum of £700 should be deposited in a private bank in names agreed on, which was done.

The company took possession and constructed their railway over the lands taken. In 1863 the compensation was, by agreement, referred to arbitration, and by the award, made in April 1864, £725 was awarded for the lands taken, and £1100 as compensation "for the damages already sustained and thereafter to be sustained by reason of the severing of the lands sold," and from the other lands "being hereafter injuriously affected."

The title had been approved of, and the conveyance had also been approved of and had been "duly signed and executed" by the Plaintiff, "with a view to its delivery, but it had not yet been delivered by the Plaintiff, and was still in the Plaintiff's" possession.

[53] The company having made default in completing the purchase, the Plaintiff brought an action at law, and in December 1864 recovered judgment for £2289 and £45 costs.

The Plaintiff issued an *elegit*, but was unable to obtain payment of his debt, and he, in January 1865, instituted this suit, praying the payment of the judgment debt and costs, the payment of the deposits, a declaration that he, as unpaid vendor, had a lien on the lands for the purchase-money, and for an injunction to restrain the company retaining possession until payment, and for a receiver of the profits of the railway.

It appeared from the answer and the evidence that this company had, in June 1863, under the powers of an Act of Parliament, entered into an agreement with the Great Eastern Railway Company for working the line for ten years. That company had been made Defendants by amendment. It also appeared that this company had borrowed on mortgage or debentures the sum of £29,400.

After the institution of the suit, the Plaintiff received the money deposited (£1400) in part payment of his debt.

Mr. Selwyn and Mr. Druce, for the Plaintiff. The vendor of these lands is entitled to the ordinary lien for his unpaid purchase-money, payment of which may be enforced by a sale or mortgage. The fact of the purchaser being a public company can make no difference in a vendor's rights.

Mr. F. H. Colt, for the persons in whose name the money had been deposited.

Mr. James Kaye, for the two Defendant companies. This is not the ordinary case of a vendor's lien for [54] unpaid purchase-money. The company took the land for public purposes under their Parliamentary powers, and the bond and deposit, given under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18, s. 85), were intended as a substitute for the lien, and formed the vendor's Parliamentary security. The existence of such a lien as that claimed would be inconsistent with the nature of the transaction and the objects of the Legislature. 2dly. If any such lien ever existed, it has been waived by taking a security, *Nairn v. Prowse* (6 Ves. 752), and has been discharged by the deposit and the payment made by the company, under an agreement between the vendor and the purchaser, and its subsequent receipt by the vendor. 3dly. The deposit of £1400, received by the Plaintiff, must be considered as appropriated to and taken in payment, in the first instance, of the purchase-money for the land, and not for the damages by reason of the severance. The land is

therefore paid for, and there remains only damages for severance and injury to the estate; this is a separate and distinct matter, and is so treated by the arbitrator, who values them separately, and for which there can be no lien on the land; *Webb v. The Direct London and Portsmouth Railway Company* (9 Hare, 139); *Doherty v. The Waterford, &c., Railway Company* (13 Ir. Eq. Rep. 538).

But in cases of this description, involving the stopping of a public highway, the Court will have regard to the rights and interest of the public, *Wood v. The Charing Cross Railway Company* (33 Beav. 290), and to the rights of the other unpaid vendors, and of the debenture-holders, who are not represented in this suit.

The Plaintiff is entitled to no relief under his judg-[55]-ment, the suit was instituted before the expiration of a year (1 & 2 Vict. c. 110, s. 13). Again, the Plaintiff must exhaust his legal and special remedies before he can come for relief into equity; *Adams v. The Blackwall Railway Company* (2 Mac. & G. 131); and under his judgment he has no right to a sale or foreclosure; *Furness v. The Caterham Railway Company* (25 Beav. 614, and 27 Beav. 358).

The legal estate has passed to the Defendants under the conveyance "duly signed and executed by the Plaintiff;" and the Great Eastern Company are purchasers for valuable consideration without notice of the Plaintiff's rights.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not assent to the view which has been presented to me very forcibly on behalf of the Defendants. I think the Plaintiff is entitled, in a great measure, to the decree which he asks.

In the first place, I am of opinion that a distinction cannot properly be made between the price of land and the compensation for the injury done by the severance. If you take an acre of a man's land and give him £200, treating £100 as the price of the land and the other £100 as damage done to the estate by reason of the railway going through it, they are not to be separated, but are to be treated as the price of the land, and are not distinguishable. I think that is so, even where the amount is ascertained by arbitration, and the arbitrator awards specially the precise sums and items which make up the full sum which is so paid. I assent to this: that where compensation for damage alone is awarded, [56] that is quite distinct from the price of the land. If it is compensation alone, and no land is taken, it can be no lien on the land, because there is no land upon which it can attach, and therefore payment of the amount can only be enforced, in the ordinary way, by action at law and judgment. I agree also that if two agreements are made, one in January to sell a piece of land, and afterwards a separate agreement is made as to the amount of compensation to be awarded for damage, which was not previously understood or appreciated, they must be treated as two separate and distinct agreements. But where the price to be paid for the land is made up of various ingredients, I am of opinion that the whole can only be treated as the price of the land, and that the vendor is entitled to the ordinary lien for the whole, as purchase-money not paid. If it were otherwise, it would be exceedingly difficult to ascertain the price, and it would lead to inextricable difficulties in ascertaining the various considerations which entered into the mind of the vendor or were discussed between them, and the various items which made up the price to be actually paid for the land. The price of the land may depend, not merely upon its productiveness, but also upon the use of it to the person who parts with it. You cannot separate that, and the whole sum paid must be treated as the price of the land. I am of opinion, therefore, that I cannot make a distinction between the portion awarded for compensation and the portion awarded as the price of the land.

In addition to this, I am of opinion that the Acts of Parliament have not deprived the vendor of his lien, and that according to the true construction of the Act, it was never meant to give the railway company power to take possession of land upon an affidavit of a surveyor that he had valued it, and upon the amount [57] being paid into a bank, to deprive the purchaser of his right to have the value of the land ascertained afterwards, and to have the ordinary lien of the vendor, in case the amount of purchase-money afterwards ascertained should not be paid. The amount of the lien here is made up of two ingredients, one is the actual value of the land itself, and the other the damage from the severance and inconvenience done to the estate; those two must be treated as combined and not as separated.

That being so, the next question is, whether the purchaser has deprived himself

of his lien by taking security. The sums deposited in Court and in the private bank were not the agreed value of the lands, or what the vendor was willing to take for them. It is quite clear that the deposit could not be security for the purchase-money, for it had not been ascertained, and was not ascertained until the award had been made. The deposit of these sums beforehand, in order that so much of the purchase-money, at all events, should be secured to the purchaser when the amount of the purchase-money had been ascertained, cannot be considered analogous to or identical with the case of a purchase of property for a certain amount, where the vendor consents to take a security for that ascertained amount on other land or property, in which case he substitutes the lien or security taken for the lien which he has upon the land sold. I hold that the lien of a vendor for unpaid purchase-money is a right inherent in equity, which can only be taken away either by Act of Parliament or by express agreement. I also hold that it has not been taken away in this case either by the Act of Parliament or by any agreement, because, in point of fact, the amount was not ascertained.

The next question I have to consider is, what are the [58] rights of the public. These rights no doubt are to be carefully considered, in all these cases, where the Court proposes, at the instance of somebody, to interfere with them. But the rights of the public with regard to property taken by a railway company can only be subject to the payment of the purchase-money. A railway company cannot take property from individuals without paying for it, and then say, that because it is for the benefit of the public that we should use this property, the vendor is therefore to be deprived of his land. In my opinion there is no authority to be found for any such doctrine, which is totally inconsistent with any notion of equity. The public can have no right to enable one person to deprive another of his property without paying for it.

With respect to the Great Eastern Railway Company, it appears to me that they were necessary parties, but there is nothing, in this case to shew me that they have got the legal estate, or that they will get it, until the deed is actually delivered to the company. It is the ordinary and almost invariable practice for the vendor to execute the conveyance and give it to his solicitor, who exchanges the deed for the purchase-money when paid by the purchaser. But it would be a monstrous thing for the purchaser to be allowed to say to the seller, "You have executed the deed, and therefore I need not pay the purchase-money; and I have got the legal estate, and you must enforce payment of the purchase-money as you can." On the contrary, I am of opinion the purchaser has no estate until he has the deed. This I take to be the ordinary case which occurs every day, where the deed of conveyance is executed as an escrow.

I am of opinion also that the interests of the debenture-holders must all be subordinate to the interests [59] of the vendor, and that the Great Eastern Railway Company can only take what the Ware Railway Company have to give, and they have nothing to give, except this land and property, subject to the lien of the vendor, which the vendor by this suit comes to enforce, and which he is entitled to do.

I express no opinion as to whether the Plaintiff has any lien for the costs of the action at law; but what I propose to do is this: declare the Plaintiff's right to a lien, and refer it to Chambers to ascertain what is due for principal, interest and costs in respect of the lien; then I propose to fix a day for payment six months after the amount has been ascertained, and, in default of payment, to direct the land to be sold for the purpose of realising the amount. Any items in the account may be contested in Chambers.

[59] WICKHAM v. THE MARQUESS OF BATH. June 24, Nov. 4, 1865.

[S. C. L. R. 1 Eq. 17; 35 L. J. Ch. 5; 13 L. T. 313; 11 Jur. (N. S.) 988; 14 W. R. 21.
See *Churcher v. Martin*, 1889, 42 Ch. D. 316.]

A man granted to his sister a lease of lands at a peppercorn rent for twenty years, determinable at their deaths. Three months afterwards he granted the hereditaments to charitable uses, subject to the lease. Held, that this gift to charity was an evasion of the Statute of Mortmain and void.

A testator directed his executors to apply £600 in getting an Act of Parliament to continue an invalid disposition made by him of real estate to a charity. Held that this imposed no duty or obligation on the executors.

A grant of land to charitable uses was attested by one witness only, but two other persons who executed the deed were present. Held that this was not a sufficient compliance with the requirements of the Statute of Mortmain.

In 1850 Thomas Bunn, a widower without issue, aged eighty-three years, resided at a freehold house belonging to him at Frome Selwood in Somersetshire. His sister Jane Bunn, who was also very advanced in years (eighty-one), also resided with him. His real estate in Somersetshire consisted of the house and the gardens, [60] &c., appertaining thereto, in which he resided; of another freehold house in Cook Street, Frome Selwood, of a farm, which was subject to a farming lease, and of some other property, of the annual value altogether of £429.

By a lease dated the 1st of May 1850, and made between Thomas Bunn of the first part, and Jane Bunn of the second part, it was witnessed that, in consideration of natural love and affection and for the normal consideration of 10s., Thomas Bunn demised to Jane Bunn the two messuages and premises already described, with certain other hereditaments therein particularly described, and all the freehold messuages, lands, tenements and hereditaments of Thomas Bunn in the parishes of Frome Selwood, Beckington, Berkley and Rodden in the county of Somerset, with the appurtenances, for the term of twenty years from the date thereof, if Thomas Bunn and Jane Bunn or either of them should so long live, at the rent of a pepper-corn if demanded. Such lease was executed by Thomas Bunn alone, and was never delivered to Jane Bunn, nor was any counterpart executed by her.

Afterwards, by an indenture dated the 26th of July 1850, and made between Thomas Bunn of the first part, and the Marquess of Bath and twelve other trustees (including the Plaintiffs Wickham and Cruttwell) of the second part, after reciting that Thomas Bunn was desirous to improve the architecture, to widen the narrow roads and streets, and to amend the health and afford further means for the education of the inhabitants of the town of Frome Selwood, in which he had been born and where he then resided, and to promote the welfare of some other persons and places as far as his limited means permitted, *it was witnessed*, that for effecting the purposes aforesaid, and such others as were thereafter [61] specified, and for the nominal consideration of 10s. therein mentioned to be paid to him by the parties of the second part, Thomas Bunn granted, conveyed and confirmed unto the parties thereto of the second part, and to their heirs and assigns, all the above two messuages in Frome Selwood, and all his other property in Somerset (subject to the farming lease and the lease to his sister of the 1st of May 1850), and fifty-two and a half acres (which in fact belonged exclusively to his sister, and over which he had no power whatever), upon certain charitable trusts, such as for supplying water, the erection of an ornamental fountain, the improvement of roads, providing playgrounds and books for schools, the formation of burial grounds, and other local improvements.

This indenture was duly signed, sealed and delivered by Thomas Bunn in the presence of two credible witnesses, and was enrolled in the Court of Chancery on the 1st of August 1850 (being within six calendar months after the execution thereof), the same having been first duly acknowledged by Thomas Bunn.

After the execution of this deed, Thomas Bunn and his sister continued to live at the same house and to enjoy the property until the death of Thomas Bunn, on the 15th of May 1853.

Thomas Bunn afterwards made his will, and referring to the deed of July 1850, and that doubts had arisen as to its validity, he declared, that if any relation or person should attempt to defeat it, then he disinherited him; and he gave all his hereditaments as should not be faithfully applied according to the trusts of the deed to Her Majesty Queen Victoria and Prince Albert and to their heirs for ever, without any restriction or trust whatsoever. And he proceeded: and if, after my death, [62] "Her Gracious Majesty and His Royal Highness the Prince or the survivor of them shall not choose to trouble themselves, herself or himself with this affair, I give to my executors a sufficient sum of money, not exceeding £600, to enable them with proper

advice and friendly aid, to pass an Act of Parliament to confirm "the conveyance of the 26th of July 1850, and the trusts therein contained if they require confirmation. And he gave any of his property that should remain to his sister Mrs. Bunn, her executors, administrators and assigns.

Jane Bunn was the heiress at law of the testator, and she and the Plaintiff Mrs. Wickham were his executors.

Jane Bunn afterwards executed a deed, dated the 16th of September 1853, which was made between Jane Bunn of the first part, Jane Bunn and the Plaintiffs Wickham and Cruttwell of the second part, a trustee to uses of the third part, and the Plaintiffs and the surviving trustees of the deed of 26th July 1850, of the fourth part. It recited the deed of July 1850, and the will of the testator, and that Jane Bunn had been advised that the trusts thereby declared were absolutely void, and that the clauses contained in the will of Thomas Bunn relating thereto were inoperative, and that she was entitled absolutely to the hereditaments contained in the deed of July 1850, as heiress-at-law of Thomas Bunn, or that she and the Plaintiffs were seised thereof in fee-simple in trust for herself. It further recited that she was desirous to give effect to her brother's wishes, as expressed in the deed of the 26th of July 1850. *The indenture then witnessed* that, in order to give effect to that intention and for the nominal consideration of 10s., she, Jane Bunn, and the Plaintiffs conveyed to James Collier, his heirs and assigns, all the messuages [63] and hereditaments comprised in the deed of the 26th of July 1850, to hold the same (subject and without prejudice to the indenture of lease of the 1st of May 1850) to James Collier and his heirs, to the use of the parties thereto of the fourth part, their heirs and assigns, upon trust to receive the rents, and apply them on the trusts contained in the deed of the 26th of July 1850, which were repeated.

The last-mentioned indenture purported, on the face of it, to have been signed, sealed and delivered by Jane Bunn, and by the Plaintiffs, Wickham and Cruttwell respectively, in the presence of one witness only; but it was, in fact, executed by Jane Bunn, not only in the presence of such witness, but also in the presence of the Plaintiff Wickham, before whom such deed was acknowledged by Jane Bunn, at the same time, for the purpose of enrolment, and in the presence of the Plaintiff Cruttwell, and such deed was, on the following day, namely, the 17th day of September 1853, enrolled in the Court of Chancery.

Jane Bunn died on the 10th of December 1862.

Prince Albert died in 1861, having devised his real estate to the Queen, who by a grant under her sign manual, dated the 21st of July 1863, conveyed to the Plaintiffs and their heirs all the hereditaments devised to her and Prince Albert, to hold "(without prejudice to the trusts and purposes declared and contained by and in the indenture of the 26th of July 1850, so far as, if at all, the same trusts and purposes were valid and subsisting, and without intending to ratify, confirm or set up such indenture, or the trusts and purposes thereof or any of them, so far as, if at all, the same were not valid or subsisting) unto Wickham and Cruttwell, [64] their heirs and assigns, for all her estate, right and interest in or to the same, to be held by them upon and subject to such or the like trusts and equities as the said messuages, lands and hereditaments would have now been subject to under or by virtue of the will of Thomas Bunn, or by operation of law or otherwise, if she and her said Consort had, immediately after the death of Thomas Bunn, disclaimed the said devise or gift to her and her said Consort in the said will of Thomas Bunn contained."

Under these circumstances, various difficulties and questions had arisen as to the construction and effect of these documents. The trustees of the deeds of the 26th of July 1850, and the 16th of September 1853, alleged that under one or other of such deeds the hereditaments had been effectually conveyed upon the trusts contained therein, and that if the first of such deeds was invalid, an application ought to be made for an Act of Parliament to obtain a confirmation of it. The other Defendants however alleged that both of such deeds were void under the provisions of the statute 9 Geo. 2, c. 36, and that the indenture of the 16th of September 1853, had not been signed, sealed and delivered in the presence of two credible witnesses within the meaning of such statute, and also that, notwithstanding the reference in the deed dated the 16th of September 1853, to the lease of the 1st of May 1850, as a then

subsisting lease, Jane Bunn was then the absolute owner, and that she was well aware that she was then the absolute owner, of the hereditaments comprised in that indenture for an estate of inheritance in fee-simple in possession. They also objected to any application to Parliament.

The Plaintiffs instituted this suit to have the rights of the parties ascertained and declared.

[65] The Statute of Mortmain (9 Geo. 2, c. 36) prohibits the gift of lands, &c., to charitable uses, unless such gift, &c., "be made by deed indented, sealed and delivered in the presence of two or more credible witnesses" twelve months before the death of the donor, and inrolled; "and unless the same be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or any person claiming under him."

Mr. Hobhouse and Mr. Rendall, for the Plaintiffs.

Mr. Selwyn and Mr. Phear, for the trustees of the deed. The deeds of the 1st of May 1850, and the 26th of July 1850, were not contemporaneous; they were separate transactions, with an interval of nearly three months between them. The demise of the property to the sister for twenty years at a peppercorn rent was perfectly valid. The second deed passed all the interest of the grantor, and it "took effect in possession" and reserved no benefit to the grantor; this is all that the statute requires. Suppose the property had been let at rack rent, its devotion to charity would have been perfectly valid; and equally so if it had happened to be let at half the rack rent or less, or even at a peppercorn rent. It is sufficient that the whole interest of a grantor passes, even if that interest be merely reversionary. The possession does not affect the question; *Fisher v. Brierley* (10 H. of L. Cas. 159, and 30 Beav. 265-268); *Alexander v. Brame* (8 H. of L. Cas. 594, and 30 Beav. 153).

Secondly, the deed of the 15th of September 1853, [66] which was executed by Jane Bunn, is valid and operative. All that is required by the Statute of Mortmain is, that the deed should be "sealed and delivered in the presence of two or more credible witnesses." That has been done; and an attestation is not required; Sugden on Powers (p. 327 (6th edit.)); *Saile v. Freeland* (2 Vent. 355).

Thirdly, as to the £600, there is nothing unlawful in the direction to apply to Parliament.

Mr. Baggallay and Mr. J. Pearson, for the heir at law. The two deeds of 1850 form one transaction, the object of which was, to give to charity that which the law does not permit, namely, a mere reversion after the death of the settlor. The whole was a shift and contrivance to evade the Statute of Mortmain, the intention of the first deed was to give validity to the second, which would otherwise have been inoperative, and by that means to retain possession of the property for life and settle the reversion only on the charity. The invalidity and the object are stated on the face of Mr. Bunn's will. The gift to the charity did not, in fact, "take effect in possession," but in reversion, which is the very thing the statute intended to prevent.

Secondly, there is no proper attestation to the deed of 1853; it is attested by one witness only. Though Wickham and Cruttwell were present, still they were present as parties to the deed and not as independent witnesses.

Thirdly, the £600 cannot be applied in the way proposed, for the object of such an application is simply to [67] take away an estate from one person and vest it in another, and that at the expense of the former.

Mr. T. Stevens, for the next of kin and residuary legatee.

Nov. 4. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit instituted by the residuary devisees and legatees of the will of Thomas Bunn deceased, two of whom also are the surviving executors of his will, praying a declaration of the rights of the persons interested in the property of Thomas Bunn and also of his sister Jane Bunn, since deceased.

The principal Defendants are the trustees created by a deed executed by Thomas Bunn in his lifetime, conveying to them certain property at Frome in Somersetshire. The real question in the cause is, the validity or invalidity of this deed and of a subsequent deed executed by his sister Jane Bunn in confirmation of it. Their

validity or invalidity depends upon whether they have been made in conformity with the provisions of the Statute of Mortmain ; if not, the residuary devisees and legatees under Jane Bunn's will are entitled to the property, and the suit is instituted to try these questions. The deed executed by Thomas Bunn bears date the 26th July 1850 ; he was the party to it of the first part, and the first nine Defendants on the record, the three Plaintiffs, and three other persons who have disclaimed the trusts or have since died, were the parties to it of the second part. [His Honor stated the deed ; see *ante*, p. 60.]

This deed was duly attested by two witnesses, it was [68] enrolled in Chancery within a month of its execution, and Thomas Bunn did not die till long after twelve months had elapsed from the date of its execution. The forms therefore of attestation, enrolment and survivorship of the grantor were fully complied with ; but the validity of the deed depends upon whether, upon the true construction of the Statute of Mortmain, the lands vested in possession on the execution of the deeds ; and, if not, whether it must not be considered to have been an evasion of the provisions of that Act.

The lands and hereditaments which the deed purported to convey comprised all the real estate in which Thomas Bunn had any interest whatever. It included the house in which he lived, and also about fifty-two and a half acres, which were the exclusive property of Jane Bunn his sister, and in which he had no interest, nor had he any power over them.

The lease of the 7th October 1846, subject to which the hereditaments were conveyed, was a lease for seven years of 135 acres, of which about eighty-two and a half acres were the sole property of Jane Bunn, and of which about fifty-two and a half were included in the deed, and the lease was made by Thomas Bunn and his sister to John and Daniel Joyce at a rack rent of £190 per annum on the usual terms of a farming lease.

The lease of the 1st May 1850 was made by Thomas Bunn ; by it he demised to his sister Jane the two messuages, two other hereditaments not comprised in the lease of 7th October 1846, but included in the deed of 26th July 1850, to hold to her for twenty years at a peppercorn rent, determinable on the death of the survivor of himself and his sister. At this time Jane, the younger of the two, was eighty years old.

[69] They lived together till the death of Thomas Bunn, which took place in May 1863.

Previous to that event, he had made his will, by which, after referring to this indenture of July 1850, and stating that doubts were entertained as to its validity, he directs, &c. [His Honor stated the will ; see *ante*, p. 61.]

Before proceeding to consider the rest of the case, it will be convenient to dispose of that portion of it which depends upon this will. Her Majesty the Queen, in whom the whole interest in the devise I have stated has vested, has, by a grant under her sign manual on the 21st July 1863, granted all the hereditaments to the Plaintiffs and their heirs, without thereby impeaching or affirming the trusts of the indenture of the 26th of July 1850, but simply for the purpose of disclaiming all interest in the demise. The effect of this is exactly the same as if this devise had not been made by the testator.

The next direction in the will, to obtain an Act of Parliament to render the trusts of the indenture of July 1850 valid, is also inoperative. Of course there is no question but that Parliament, if it pleases, might pass an Act making these trusts valid, as they might pass an Act to take away a field from one man and give it to another ; but this direction contained in the will imposes no duty or obligation on the executors or trustees to apply for any such Act, and as no such Act has been obtained or applied for, and if it were, in all probability Parliament would reject any bill introduced for this purpose, I must therefore proceed to consider the validity of the deed as it stands, unconfirmed by any extraordinary interposition of the Legislature.

I think that the real question is, whether the lease of 1st May 1850, being less than three months [70] before the execution of the deed of July 1850, is not a colourable evasion of the statute of 9 Geo. 3, c. 36. The forms prescribed by that statute have been complied with, but the question is, whether the provisions of the

statute, which enacts that the gift shall be void, unless it be made to take effect immediately, has been complied with in this case. I am of opinion that it has not, and that the deed, so far as it relates to the lands and hereditaments included in the lease of 1st May 1850, is void. I hold it to be quite clear that a conveyance of lands to be held in trust for the grantor during his life, and, upon his death, to be applied for the support of a particular charity would be void under the provisions of this Act.

It would, I think, amount to the same thing and be subject to the same consequences, if this was done by two deeds and through the instrumentality of two sets of trustees. For instance, if the grantor, by the first deed, granted land to trustees in trust for himself for life, and subject thereto as he should by deed or will appoint, and by the second deed he appointed the reversion in fee irrevocably to other trustees, to hold for certain charitable uses: this, I apprehend, would be bad. It is true that where a reversion in real estate is vested in the grantor who has no present interest in the property, the irrevocable and immediate conveyance of it to trustees, in trust for charitable purposes, would probably be held to be valid; but not, I apprehend, if the reversion had been created by the grantor, for the purpose of allowing him to retain the enjoyment of the property during his life. In many of these cases it would be a question of fact to be deduced from the evidence laid before the Court; but assuming it to be established by the evidence, to the satisfaction of the Court, that the grantor had, at any time, divided the fee-simple [71] into a life-estate, and a reversion, or had carved out of the fee-simple such an interest as would outlast the life of the grantor, and that he had done this with a view of securing to himself the beneficial interest in the property during his life, and of disposing of it after his death for charitable purposes—in such a case I am of opinion that the grant in favor of the charity would be an evasion of the provisions of the Statute of Mortmain, and, as such, would be held to be void by this Court. Were it not so, it is obvious that the real object of the statute would be easily evaded, and the words in it, to which I have referred, would be wholly inoperative.

If I am right in this, the question is, whether the lease of 1st May 1850 falls within the principle I have endeavoured to enunciate, and I am of opinion that it does. Three months before the grant to the charity, the grantor, an old man of the age of eighty-three, without children, living with his only near relation, a sister of the age of eighty, makes a lease of the hereditaments in question to his sister for twenty years at a peppercorn rent, after which they continued to live together and enjoy the property until his death. It was reasonably certain that the lease would exceed his life, it was equally certain that the sister would not attempt to evict her brother during his life, and it is highly probable that had she attempted to do so, she would have failed. In truth, the concord between them to accomplish the wishes of the brother is established by the evidence. Here there is a lease, which provides for the enjoyment of these messuages and hereditaments during the life of the survivor of the brother and sister, and subject to their interest therein, it is given to trustees for charitable purposes. This, in my opinion, is not a case where, in the meaning of the words of the statute, it can be said with truth that [the grant is made [72] “to take effect in possession,” “immediately” on the execution of the deed. That means, I apprehend, that the grantor shall give the whole interest he has in the thing granted. If the gift to the charity was intended to be an annuity or rent-charge, the grant must be of the whole interest in that annuity or rent-charge. If the thing granted be land, then the statute means that the whole interest the grantor has in the land should be conveyed, not the whole interest remaining in him at the exact date of the grant, after deducting his previous grants to secure benefits to himself, but the whole interest he had at the time when he first conceived and commenced the plan of benefitting the charity. If this be correct, then immediately another question arises, as to what is included in the words, the whole interest in the thing granted. I think that where lands are conveyed, this means the whole interest that a landlord usually possesses in his lands, which includes the rents receivable from the tenants. It is clear, that if A. agrees to sell to B. his estate at W., this does not mean the reversion subject to existing leases, the payment for which in future is to be retained by the vendor. In the absence of any stipulation on the subject, it means that the purchaser is to be

put into possession of the estate at the date of the completion of the purchase, and that this possession includes the receipt of the future rents. In like manner, if a man grants land to a charity the statute requires that the grant shall "take effect in possession" "immediately," not leaving the grantor to receive the rents till the expiration of existing leases or during his life, but putting the grantee in immediate and entire possession of the thing granted, as far as the grantor is able to do so.

The way in which I regard this will be made more plain by considering the bearing of this part of the [73] question on the lease of the 7th of October 1846, to the two Joyces of the remainder of the property included in the grant of July 1850. This lease was clearly not granted to them with a view of afterwards making the grant to the Defendants of the 26th July 1850. It was an ordinary farming lease, granted to tenants in the usual way, but this was excepted from the conveyance to the trustees, and the rent of £190 to be paid by the Joyces was to be received and was received by the grantor as long as he lived. To make the grant valid, in my opinion, Thomas Bunn ought to have conveyed to the trustees all his interest as lessor of the property included in the lease of 1846. If not, this would only be another mode of evading the statute. A landlord makes a long lease of a farm at a rack rent payable to himself, a man advanced in years. He then grants the property, subject to the lease, to a charity. This is, in fact, only another mode of reserving to himself the full annual value of the land during the continuance of the lease. In what way can the case be really said to be varied, if the grant be to trustees, in trust to pay an annuity to the grantor for his life, and, subject thereto, for charitable purposes, or if the grant be to trustees, subject to a lease of similar annual value, which will, or probably may, exceed the life of the grantor. It is true that this lease had but three and a quarter years to run, but the grantor was eighty-three years of age, and died in less than three years after the execution of the deed. How is the Court to speculate or act upon the probable duration of life of the grantor, or set this probability against the duration of a lease? The only safe rule seems to me to be, to hold that the grantor, in order to comply with the provisions of the statute, must grant all the interest he *bonâ fide* has in the property conveyed, whether from rents to be received or for actual possession at the time of the grant, and in addition to this, that he shall not, [74] in contemplation of such grant for charity purposes, have deprived himself previously of any portion of this interest in favour of another, under any expressed or implied agreement that he is to derive any benefit from the portion so previously conveyed.

This grant of July 1850 is defective in respect of the former of these propositions, by reason of it being made subject to the lease of October 1846, and it is defective, also, in respect of the latter of these propositions, by reason of it being made subject to the lease of 1st May 1850.

I am of opinion, therefore, that the deed of 26th July 1850 is void, as being contrary to the provisions of the Statute of Mortmain, 9 Geo. 2, c. 36.

I have next to consider what effect the acts of the sister Jane Bunn, which have been done since the death of the brother, have had towards confirming the grant intended by the brother, and effecting the destination of this property, in the manner directed by him. In other words, whether the acts of Jane Bunn, the sister, since the decease of her brother, have either rendered valid the trusts of the deed of July 1850, or have created new trusts to the same or similar effect.

Jane Bunn, besides being the sister of Thomas Bunn, was his heiress at law, his sole next of kin and the residuary devisee and legatee of all his property which could not be applied for the performance of the trusts of the charity pointed out by him.

Four months after her brother's death, Jane Bunn executed the indenture bearing date the 16th September 1853. [See *ante*, p. 62.] This indenture appears, on the [75] face of it, to have been attested by one witness only, but two of the Plaintiffs, who executed the deed at the same time with Jane Bunn, were present at the time when she executed it, although they did not sign any attestation clause. At the same time Jane Bunn acknowledged the deed before the same two Plaintiffs for the purpose of enrolment, which was accordingly done in Chancery on the following day, the 17th September 1853.

The first question is, was this deed attested by two witnesses as required by the statute of 9 Geo. 2, c. 36? In all other respects the forms required by the Act were

complied with, the deed was duly enrolled, and Jane Bunn survived the twelve months required by the statute.

I am of opinion that this deed was not properly attested by two witnesses as required by the statute. What is meant by attesting a will or deed? It means, as I understand it, that one or more persons are present at the time of the execution of the deed for that purpose, and that, in evidence thereof, they sign the attestation clause stating such execution. The fact that any number of persons were present when Jane Bunn executed the deed would not comply with the provisions of the statute, if they did not sign the deed as witnesses attesting such execution. Were it otherwise, all the cases on powers, which require the strict performance of the condition attached to the exercise of the power would have been incorrectly decided. Nay, in truth, no attestation at all on the deed would be necessary, if any sufficient number of persons were present at the time and saw the deed executed, although their presence was without any object relating to the subject of the deed. In this case, however, it is supposed that a difference is to be found in the fact that the Plaintiffs Whalley and [76] Wickham, who were present when Jane Bunn executed the deed, also executed it themselves; but, in my opinion, this makes no difference; they did not execute the deed *eo intuitu*, that is, they did not sign the deed for the purpose of attesting the execution of Jane Bunn, but for the purpose of conveying any interest they had or might be supposed to have had in the property. This cannot be converted into an attestation of Jane Bunn's execution.

In fact, were it otherwise, the cases decided as to the execution of powers would be all wrong, and the Statute of Mortmain might be easily evaded. Three tenants in fee-simple of an estate might convey it to a charitable institution without any attestation at all, in the ordinary sense of the word; because, according to the argument of the Defendants (the trustees) if valid, any two of the grantors might be witnesses of the execution of the deed by the third, provided they all executed the deed at the same time and in each other's presence. The execution of this deed, therefore, in my opinion, has only been attested by one witness. If this opinion be correct, the omission of the attestation by a second witness is a plain violation of the provisions of the statute, and this deed also is, in my opinion, void.

It is further to be observed that, notwithstanding this deed, Jane Bunn enjoyed the property as long as she lived, which was until the 10th December 1862, when she died at the age of ninety-three. She had previously made a will making certain specific devises, and making four persons her residuary legatees, three of whom and the legal personal representatives of the fourth are parties Defendants to this bill. But by this will she did not dispose of the property included in either of the deeds of the 26th of July 1850, or that of the 16th of September 1853. I am, therefore, of opinion that the here-[77]-ditaments comprised in these deeds pass to the heir at law of Jane Bunn, and as the certificate of the Chief Clerk establishes that Charles Kilson the Defendant is such heir at law, he is entitled to a declaration accordingly in his favour.

The costs of all parties must be paid out of the property in dispute.

[77] LORD LILFORD v. POWYS KECK (No. 3). Dec. 18, 1865.

[S. C. L. R. 1 Eq. 347; 35 L. J. Ch. 302; 14 W. R. 240.]

Pecuniary legatees are entitled, as against the devisee (under the doctrine of marshalling assets), to stand in the place of an unpaid vendor whose lien has exhausted the personal assets.

The testator, Lord Lilford, devised all his real estates to the Plaintiff for life, with remainder to his first and other sons in tail, with remainders over. (See 30 Beav. 300.)

He died in March 1861.

Between the date of his will and his death, viz., in November 1860, the testator

purchased lands intermixed with the Bank Hall estate (*Id.* 295) for the sum of £72,600. The purchase had not been completed at the death of the testator.

The testator's personal estate not specifically bequeathed was insufficient to pay both his debts and the purchase-money for the estate. The pecuniary legatees thereupon insisted that they had a right to have the testator's assets marshalled, so as to have the benefit of the vendor's lien on the estate for their unpaid purchase-money, in case such lien should be discharged out of the personal estate.

[78] Mr. Hobhouse, for the Plaintiff. Locke King's Act (17 & 18 Vict. c. 113) does not apply to anything but mortgages. There is no right to marshal in this case. The legatees rely on two points, first, that since the Wills Act, 1 Vict. c. 26, s. 24, a residuary devise is not specific. That, however, has not been definitely determined, the decisions on the point being conflicting; *Dady v. Hartridge* (1 Dru. & Sm. 236); *Rotheram v. Rotheram* (26 Beav. 465); *Eddels v. Johnson* (1 Giff. 22); *Pearman v. Twiss* (2 Giff. 130); *Ennes v. Smith* (2 De G. & Sm. 722, 735); *Mirehouse v. Scaife* (2 Myl. & Cr. 695); and see *Barnwell v. Ironmonger* (1 Drew. & Sm. 242); *Hood v. Hood* (26 L. J. Chanc. 616).

[THE MASTER OF THE ROLLS. I think that before I decide that point I must, out of respect to Vice-Chancellor Stuart, consider it carefully.]

Secondly, the legatees say that they are entitled to the benefit of the vendor's lien. But the contrary was expressly decided by Sir John Leach in *Wythe v. Henniker* (2 Myl. & K. 635). He held that a person having devised an estate which he had purchased, and the vendor having after his decease been paid a part of the purchase-money which remained unpaid at the testator's death, out of the deceased's personal estate, the pecuniary legatees had no right to stand in the place of the vendor in respect of his lien upon the purchased estate, to the extent of the sum so received. There is a distinction between a vendor's lien and a mortgage on the estate. In the case of a mortgage, the testator has converted his realty into personalty, but in the case of a purchase of real estate he has done the opposite. *Birds v. Askey* (24 Beav. 618) is inapplicable.

[79] He also referred to Jarman on Wills (vol. 2, ch. 46); *Tombs v. Roch* (2 Coll. 490).

Mr. Whitbread, in the same interest.

Mr. Selwyn and Mr. Cotton, for the legatees, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that there is no distinction between a mortgagee's and a vendor's lien. I considered it in *Bird v. Askey*, and my opinion remained unchanged. Declare that the legatees are entitled to the benefit of the vendor's lien to the extent to which he has exhausted the personal estate.

[79] ROBINSON AND THE ALLIANCE BANK v. THE CHARTERED BANK OF INDIA, &C.
Nov. 6, 9, 1865.

[S. C. L. R. 1 Eq. 32; 13 L. T. 454; 14 W. R. 71. Distinguished, *In re Gresham Life Assurance Society*, 1872, L. R. 8 Ch. 446. See *Moffat v. Farquhar*, 1878, 7 Ch. D. 610.]

By the deed of settlement of a company, shares might be transferred to any person approved by the court of directors; but it provided that no person should be entitled to become a transferee unless and until he should be approved of by the court. Held, that the power of rejection must be exercised reasonably, and that a refusal to make any transfer would not be a reasonable exercise of it.

A general demurrer to a bill filed by a shareholder against directors, who had a discretionary power of objecting to a transferee, to compel them to approve of a transfer to some proper person, overruled, the bill alleging, in substance, that they had refused to make any transfer at all.

The bill stated to the following effect:—

In 1864 Mr. Robinson deposited with the Plaintiff company seventy-five shares

in the Defendant company, by way of security for money then advanced by the [80] Plaintiff company. He at the same time executed a deed of transfer, but not in the form prescribed by the deed of settlement of the Defendant company.

The deed of settlement of the Defendant company provided the following formalities for the transfer of shares :—

“Transfer of Shares.

“Article 48. Subject to the provisions of these presents, any shareholder may sell and transfer all or any of his shares to any other person approved by the Court.”

“Article 49. No person, not being a lawful claimant of a share, shall be entitled to become a transferee of a share unless and until he be approved by the Court.”

In July 1865 the Plaintiff company instructed their stock brokers (Messrs. Whitehead) to sell these shares, “and, in order to facilitate transfers to the purchasers, to take a transfer from Mr. Robinson to one of themselves, and they left at the Defendant’s office an application for one of its forms of transfers of the shares to Mr. Jeffrey Whitehead. The company refused to authorize the transfer to be prepared.

The solicitors of the Plaintiff company wrote the following letter to the secretary of the Defendant company :—

“We are instructed by the Alliance Bank (Limited) to write to you on the subject of the refusal of your court of directors to permit a transfer of seventy-five shares in your company, which are at present standing in your books in the name of Mr. G. P. Robinson.” It then stated that the deposit with the bank, and proceeded : Lately “they applied at your bank for a form of transfer of the shares referred to, and their broker was informed [81] by you that the directors declined to allow any transfer of Mr. Robinson’s shares. We now beg to inquire the reason of such refusal.”

On the 8th of September 1865 the solicitors of the Defendant, in answer (after stating the 48th and 49th rules), proceeded as follows :—“We have advised the directors that the last clause entitles them to withhold approval of any transferee, and consequently to refuse the transfer mentioned in your letter, and that they are entitled so to do without assigning any reason. The directors have decided to act on our opinion.”

The bill then alleged as follows :—

“The Plaintiffs submit that the Court of Directors of the Defendant company is bound to act on equitable principles in approving or disapproving proposed transferees of shares, so that no unnecessary or inequitable obstacles may be placed in the way of the disposal, by shareholders, of their shares ; and they further submit that any disapproval by the said Court, under the said Article 49, ought to be of a particular proposed transferee, and to be accompanied by such reasons as may enable the applicant to dispute the same, if insufficient, or, if sufficient, to propose another transferee, and that the said Court cannot, under the said article, object to a transfer of any share by the actual holder thereof.”

“The Plaintiffs aver and submit, that no just ground of objection existed to the said Mr. Jeffrey Whitehead as transferee of the said shares, and that by the refusal of the Defendant company, through its said Court, to allow the said proposed transfer to the said Mr. Jeffrey Whitehead, or any other transfer of the said shares, they (that is, both the Plaintiff George Palmer Robinson and the Plaintiff company) have been and are wrongfully [82] damaged and hindered in the enjoyment of their respective legal and equitable rights and interests to and in the said shares.”

The bill prayed that the Defendant company might be decreed to approve of some proper person, to be nominated by the Plaintiff company, as entitled to become a transferee of the shares, and issue proper forms and register such transfers, and for an injunction to restrain the refusing to allow any transfer to the Plaintiffs, or some proper nominee of the Plaintiffs.

To this bill the Defendant company filed a general demurrer.

Mr. Selwyn, Mr. Baggallay and Mr. Bowering, in support of the demurrer. By the deed of settlement, which regulates the rights of the parties, the directors have an absolute discretion as to the persons to be admitted as shareholders. The law is,

that a partnership cannot be changed except with the consent of all the partners, and that no new partner can be forced on the old firm. If it were otherwise, a person might be introduced from a rival concern, who would obtain access to all the secrets of the partnership. It depends on the character, solvency, temper, knowledge and interest of a person, whether he may or may not be a desirable person to introduce into a company, and the directors are not bound to express their reasons why they may not consider it advisable, having regard to the interests of the company, to admit a particular person into the concern. By contract, the shareholders have reposed in the court of directors an absolute right, for the interests of the company, to admit or reject. To oblige them to give reasons would invite discussions, and deprive the company of the protection intended by the articles of [83] association. Their decision is final, and their judgment is not to be controlled by the Court, unless they exercise it fraudulently. The mere assertion by the Plaintiffs that there are no just grounds for refusing to transfer is insufficient, in the face of the decision of the board of directors to the contrary. The refusal to admit a number of persons successively might be evidence of unfairness; but here the refusal is of a particular transfer, "the transfer mentioned in your letter," that is, a transfer to Mr. Whitehead, the broker of a rival bank. That of itself is a sufficient reason.

This bill asks the Court to create a new partnership against the assent of the body of existing partners expressed by the directors.

The right of transfer is limited by the deed of association, it amounts to a right to transfer with the assent of all the other shareholders, which, for convenience, is to be given by the board of directors.

It is not a trust, but a matter of internal management, with which this Court never interferes, except in cases of fraud; *Foss v. Harbottle* (2 Hare, 461); *Mozley v. Alston* (1 Phillips, 790); *Inderwick v. Snell* (2 Mac. & G. 216).

Mr. Hobhouse and Mr. Westlake, in support of the bill. The court of directors have a discretion, it is true, but it must be reasonably exercised, and when a Plaintiff alleges that it is not so, this Court must be the judge and determine the point upon the evidence at the hearing. Here, according to the allegations of the bill, the Defendants not only refuse to transfer to Mr. White[84]-head, but they refuse to make any transfer at all, and thus prevent the owners of property from dealing with it. The Plaintiffs' object is only to realize their security, and, according to the admitted facts, there is no just ground of objection to the proposed transferee.

Mr. Selwyn, in reply. Assume that the judgment of the directors must be reasonably exercised, still this Court cannot be appealed to, unless some fact is distinctly stated on the bill to shew that the directors do not intend to exercise their judgment reasonably and fairly. There is no allegation of a refusal of every transfer, though it is sought to be made out, not from an allegation in the bill, but from the construction of a letter. The Defendants object to an agent of a rival company, who may attend their meetings, examine their books if he should think fit, and even file a bill on behalf of himself and all the other shareholders.

Dec. 9. THE MASTER OF THE ROLLS [Sir John Romilly]. This demurrer is, in fact, a contest between two banks, viz., the Alliance Bank and the Bank of India, London and China.

The Plaintiff Robinson is owner of seventy-five shares in the Defendant bank; he has pledged them to the Plaintiff bank as security for money advanced. The Plaintiff bank required this security to be realized, and, using the name of Robinson, sell the shares. The Defendant bank in substance says, "We will not approve of the nominee of the Plaintiff bank, whosoever he may be." That is, as I believe, the question which is intended to be raised in this suit; it cannot, however, be [85] properly determined on this demurrer as the allegations now stand.

The two clauses which relate to this subject are the 48th and 49th. The 48th is this:—"Subject to the provisions of these presents, any shareholder may sell and transfer all or any of his shares to any other person approved by the Court."

The next clause is, "No person, not being a lawful claimant of any share, shall be entitled to become a transferee of a share unless and until he be approved by the Court." I am not at all clear what is meant by "a lawful claimant" in this clause.

The question is, whether the Defendant bank can be compelled to approve of a

person as transferee, who is, in all other respects, a fit person, except that he is a nominee of a rival bank. I think that, though this is, as I believe, the question to be tried, it is not clearly raised on this bill and demurrer. The letter of 7th of September 1865 from the solicitors of the Plaintiff company says this:—"Lately, however, they applied at your bank for a form of transfer of the shares referred to, and their broker was informed by you that the directors declined to allow any transfer of Mr. Robinson's shares. We now beg to inquire the reason of such refusal." That is an allegation that they would not allow the transfer of any of the shares at all. The answer to that is, giving a copy of the two clauses of the deed and settlement, and saying, "We have advised the directors that the last clause entitles them to withhold the approval of any transferee, and, consequently, to refuse the transfer mentioned in your letter, and they are entitled to do so without assigning any reason. The directors have decided to act on our opinion."

[86] I think that is a statement by the Defendant company, that they will not allow any transfer at all, and not merely that they will not allow a transfer to a rival banking company.

The Plaintiffs also aver that there is no just ground of objection to the transferee Mr. Whitehead, and that, by the refusal of the company, through its court, to allow the proposed transfer to Whitehead, or any other transfer, they are prevented from the enjoyment of their property. I entertain no doubt that the board of directors of the company must exercise the power given them by this proviso reasonably, and that to refuse to allow any transfer to be made to anybody would not be a reasonable exercise of their power. Whether it would be so with respect to the transferee of a rival bank, which would enable them to investigate its concerns or the like, I express no opinion. But thinking that the demurrer was *bonâ fide* filed for raising that question, I propose to overrule it and reserve the costs until the hearing.

If the question I have adverted to is really the question between the parties, I shall, in point of fact, merely reserve it until the hearing. (NOTE.—See *Birmingham v. Sheridan*, 33 Beav. 660; *Pinkett v. Wright*, 2 Hare, 120.)

[87] YOUNG v. SMITH. Dec. 9, 1865.

[S. C. L. R. 1 Eq. 180; 11 Jur. (N. S.) 963. See *Lee v. Lee*, 1876, 4 Ch. D. 179; *In re De Ros' Trust*, 1885, 31 Ch. D. 86.]

A marriage settlement recited an agreement that the after-acquired property of the wife should be settled, but the covenant to settle was on the part of the husband only. Held, that the wife was not bound by it.

Where they are inconsistent, the operative part of a deed prevails over the recitals; but where the operative part is ambiguous, the recitals may be resorted to to explain the ambiguity.

In 1835, upon the marriage of Mr. and Mrs. St. John, certain property was settled on the usual trusts.

The settlement recited that it was also agreed, upon the treaty for the said intended marriage, that in case any property or effects, either real or personal, of the value of £500 at one time, should at any time thereafter during the said intended coverture descend or devolve to Helen St. John or to Oliver St. John in her right, such property and effects should be settled upon the same or the like trusts as were therein expressed and declared concerning the said trust funds and premises so agreed to be thereby settled, as aforesaid.

The operative part of the deed, after settling the specified property, *further witnessed* that in pursuance and further performance of the said agreement, Oliver St. John covenanted, that if, at any time or times during the said intended coverture, any real or personal property of the value of £500, at any one time, should descend or devolve to or vest in Helen St. John or to Oliver St. John in her right, then and in that case, and as often as the same should happen, he, Oliver St. John, his heirs, executors or administrators would make, do and execute, or cause and procure to be

done and executed, all such deeds, assignments, conveyances and assurances in the law, whatsoever, which would be necessary and proper for conveying, assigning, assuring and confirming the said real and personal estate, in such manner as that [88] (regard being had for the nature and quality of the premises respectively) the said real and personal estate should be vested in the trustees or trustee for the time being of the settlement, upon and for the trusts, intents and purposes as would best and nearest correspond with the trusts, intents and purposes thereinbefore declared and contained of and concerning the trust monies and premises thereby settled.

Oliver St. John died on the 16th day of November 1844.

In 1862, upon the death of her mother (the tenant for life), Mrs. St. John became entitled to a share in the residuary real and personal estate of her father (about £2447 stock), who had died in 1841.

The question was, whether this sum was bound by the covenant to settle contained in the deed of 1835.

Mr. Selwyn and Mr. Herbert Smith, for Mrs. St. John, and Mr. Jessel for an incumbrancer. The fund in question is not subject to the trusts of the settlement. It is not an executory instrument, and the covenant is that of the husband alone, which in no respect binds the wife. If the recital and the operative part do not agree, the latter must prevail. The contract is that of the husband, and was merely intended to control his marital interest.

The case is governed by the authorities : *Peachey on Settlements* (p. 523) ; *Ramsden v. Smith* (2 Drew. 298) ; *Reid v. Kenrick* (1 Jur. (N. S.) 897) ; *Grey v. Stuart* (2 Giff. 398).

[89] Mr. Baggallay and Mr. Archibald Smith, for the trustees of the settlement. The first question is, whether this property, which remained reversionary until 1862, comes within the terms, "descend or devolve to or vest in" the Petitioner during the coverture.

[THE MASTER OF THE ROLLS. I am disposed to think it does.]

Then comes the second question, whether, taking the recital and operative part together, they amount to a contract between the parties that this property should be settled, for if so the Petitioner is bound to settle it. The law is that whenever there is an apparent agreement between the parties that an act shall be done, though there be no express words of covenant, yet, if the parties set their seals thereto, it will amount to a covenant ; *Hollis v. Carr* (Freeman (C. C.), 3, and 3 Swanst. 638). In that case, the deed contained a recital of an intention to levy a fine ; there was no covenant to levy it, but only that the fine should be for the security of a portion. It was held that this constituted a covenant to levy the fine. Here the agreement recited is positive that such property and effects shall be settled."

This case is like *Butcher v. Butcher* (14 Beav. 222), where it was agreed between all parties, but the covenant was that of the husband alone, yet it was held binding on the wife. *Hammond v. Hammond* (19 Beav. 29) is distinguishable, for there the husband's covenant was limited to acts "so far as he was concerned," and, therefore, did not extend to the wife. The wife, who has executed the settlement, is [90] bound by it and estopped from setting up anything contrary to the agreement expressed in the deed.

The covenant on the part of the husband only is taken from the old forms used previous to *Purdew v. Jackson* (1 Russ. 1), when it was supposed that a husband had the power of disposing of the reversionary interest of his wife.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Petitioner is entitled to an order for the transfer to her of this fund.

It is important to keep the separate parts of a deed clear and distinct ; the recitals and operative parts ought to be carefully distinguished : where they are at variance, the operative part is that which is officious, and the recital is ineffectual and produces no effect. A recital may explain an ambiguity in the operative part, but it cannot have the effect of introducing a covenant into it. A very dangerous result would follow if I held otherwise, for I should, by means of this recital, introduce into the body of this deed a covenant on the part of the lady to settle her after-acquired property.

The recitals in deeds are occasionally very loosely framed, but I adhere to what

I said in *Hammond v. Hammond* (19 Beav. 29), to the effect that where the operative part of a deed is at variance with the recital, the proper mode of dealing with the case is, to act on the operative part, unless and until the deed has been reformed. The recital may still be used as evidence in a suit for reforming the settlement.

[91] The effect of this deed is simply this:—The recital states that it is agreed that the wife's future property shall be settled, and the husband alone covenants to settle it. I do not know on what principle I can control the operative part of a deed by the recital, and extend it if I cannot restrict it. Here, in order to bind the Petitioner, I must strike out the covenant of the husband, and introduce one of the husband and wife.

I am of opinion that this would be unwarranted by any authority.

In *Butcher v. Butcher* (14 Beav. 222), the agreement between the parties was contained in the operative part of the deed, and I was of opinion that it was part of the operative part of the deed, and constituted a covenant by all parties. Here I find nothing in the operative part but the husband's covenant that he will settle. The useful office of a recital is to explain any ambiguity in the operative part, as in the case of *Moore v. Magrath* (Cowper, 9) in regard to the parcels. But it would be a very different thing to introduce a covenant by another person.

The case of *Hollis v. Carr* (2 Freem. (C. C.) 3, and 3 Swan. 638) is very distinct. There was a recital of an intention to levy a fine, and the covenants declared the uses of the fine to be to secure a sum of money on the property. The deed would have been inoperative without the fine, and when you agree to do an act, it implies a covenant to do all which is necessary to perfect it.

I am of opinion the Petitioner is entitled to an order for the transfer to her of the fund.

[92] *In re INSOLE. Dec. 9. 1865.*

[S. C. L. R. 1 Eq. 470; 35 L. J. Ch. 177; 13 L. T. 455; 11 Jur. (N. S.) 1011; 14 W. R. 160. Followed, *In re Emery's Trusts*, 1884, 50 L. T. 197. See *Waite v. Morland*, 1888, 38 Ch. D. 137.]

Husband and wife mortgaged the wife's reversionary interest in a fund. Afterwards, and before the reversion fell into possession, the wife obtained a decree for judicial separation. Upon the reversion afterwards falling in, in the husband's lifetime: Held, that the mortgage did not affect it, and that the fund belonged absolutely to the wife.

Mr. Insole died in 1831, having bequeathed one-sixth of his personal estate to Thomas Insole for life, with remainder to his children.

In 1850 Eliza (one of the six children of Thomas Insole) married Alfred Puckle, and in 1854 Mr. and Mrs. Puckle executed a mortgage to the Consolidated Investment and Assurance Company for £125 and interest, and they afterwards executed a second mortgage to Mr. Barker.

In 1863 Mrs. Puckle obtained a decree for judicial separation from her husband.

In 1865 Thomas Insole, the tenant for life, died, and the trustees paid Mrs. Puckle's share (£427) into Court.

This was a petition by Mrs. Puckle and of the persons to whom, in 1864, she had mortgaged her interest, praying payment to them of the fund according to their interests.

Mr. Bagshawe, in support of the petition. The Petitioners are entitled to the fund discharged of the mortgages executed prior to the judicial separation and of all claim of Mr. Puckle. The mortgages which were executed by Mr. and Mrs. Puckle affected only the husband's interest, and in no respect bound Mrs. Puckle, and the interest of the husband determined by the decree of judicial separation. By the 20 & 21 Vict. [93] c. 85, s. 25 (1857), Mrs. Puckle, from the date of the sentence and while it continues, is to be considered as a *feme sole* with respect to property which she may acquire or which may come to or devolve upon her. And by the 21 & 22

Vict. c. 108, property of or to which the wife was possessed or entitled for an estate in remainder or reversion, at the date of the decree of judicial separation, is included in the protection given by that decree.

Mr. Schomberg and Mr. Speed, for the company and for Mr. Barker. The statutes of 1857 and 1858 cannot alter the antecedent rights under the mortgage of 1854. The mortgage by the husband and wife, no doubt, gave only a defeasible title, that is, the mortgagees took subject to the chance of the husband surviving the period of the reversion falling into possession. Subject to that condition and to the right to a settlement, the husband and his mortgagees took an absolute interest in the fund. Mrs. Puckle is entitled to a settlement of the fund, as in *Re Whittingham's Trust*, but that will give her a life interest only. The first Act merely applies to property which might devolve on the wife after the decree, and the second, though extending to reversions, means subject to the existing charges and mortgages prior to the Act. The mortgages of the wife alone cannot prevail against the prior ones of herself and husband.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Petitioners are entitled to the order which they ask. In fact, the only effect of a mortgage of the reversionary interest of a married woman by the husband, though the wife joins in it, is to mortgage the interest of the husband alone, and nothing [94] more. A person who makes advances on such a security runs the risk that, at or before the time of payment arrives, the husband will have been able to acquire the charged property. The clause of the 20 & 21 Vict. c. 108, disposes of the right of husband; for the moment the judicial separation takes place, the right of the husband is gone as if he were dead. The first Act applies to "property of every description, which she may acquire, or which may come to or devolve upon her." The second Act includes reversions to which the wife was entitled at the date of the decree, and this was a reversion which came to her after a separation. The husband mortgages a legacy which was payable to her after the death of her father; but if the husband had died previously to that period, the mortgage would have been worth nothing.

The first Act says, that "property of every description" may be disposed of by her, in all respects, as a *feme sole*; she may sell, mortgage or squander it; then why am I to cut down the words and say she can only dispose of a life interest in it? The clause goes on to say that on her decease it shall "go as if her husband had been then dead." Therefore, as soon as the judicial separation takes place, she may deal with her property in all respects as a *feme sole*; she may assign or leave it to whomsoever she pleases, and if she dies intestate, her husband is excluded, subject to what may happen in case she should return to live with her husband.

The Respondents are not entitled to costs out of the fund.

[95] MONTEFIORE v. BEHRENS. Dec. 7, 1865.

[S. C. L. R. 1 Eq. 171. Distinguished, *In re Holland* [1901], 2 Ch. 145.]

A married woman became entitled to a legacy. Her husband settled it on her and her children, reserving to himself a life-estate, determinable on his bankruptcy, &c. Held, that the limitation was valid.

Property was settled on A. B. until bankruptcy, &c., or until, by any act or default of A. B. or by any other ways, it should become vested in or the property of any other person. A creditor of A. B. obtained a judgment against him and a charge, under the 1 & 2 Vict. c. 110, s. 14, on the fund: Held, that A. B.'s interest had thereby determined.

On the marriage of Mr. and Mrs. Behrens in 1843, a sum of £10,000 consols, which belonged to Mrs. Behrens, was settled on her for life, and after her death to pay the dividends to Mr. Behrens "until Sampson Lucas Behrens should at any time assign, transfer or in any manner part with the same dividends and annual produce, or any part or parts thereof, or should execute any assignment or other assurance, contract, act, matter or thing whatsoever, by means whereof the same should be aliened or incumbered, either at law or in equity, or until Sampson Lucas Behrens should

assign, transfer, or in any manner part with the same, or any part or parts thereof, or should execute any assignment or other assurance, contract, act, matter or thing whatsoever, by means whereof the same should be aliened or incumbered, either at law or in equity, or until (if it should so happen) Sampson Lucas Behrens should be declared a bankrupt, or take the benefit of any Act or Acts of Parliament for the relief of insolvent debtors, or the said dividends and annual produce or the beneficial interest intended for Sampson Lucas Behrens under the trust thereafter contained of and in the said moiety of £10,600 £3 per cent. consolidated annuities, or any part thereof, respectively, should otherwise, by the act or default of Sampson Lucas Behrens, or by operation of law without his act or default, or by any other ways or means, become vested in or the property of any other person or persons whomsoever; and from and after the determination of the trust declared for the benefit of Samuel Lucas Behrens, on certain trusts for the children of the marriage.

[96] In 1846 Mrs. Behrens became entitled to a legacy of £500, which was transferred by the executors to the trustees of the settlement, to be held on the same trusts as those expressed in the settlement of 1843, and a memorandum to that effect was endorsed on the settlement.

Mrs. Behrens died in 1854.

In March 1858 Mr. Hughes obtained a charging-order on the £500 for £54, 6s.; and in April 1858 Messrs. Camps and Partridge obtained a charging-order on the £500 for £3, 15s. 11d. debt, and £9, 8s. costs.

In March 1864 Mr. Behrens was duly declared an outlaw in the county of Middlesex.

This suit was instituted by the trustees for the performance of the trusts, and a question arose as to the forfeiture by Mr. Behrens of his interest in the settled property.

Mr. Jessel, for the Plaintiffs.

Mr. Renshaw, for the children.

Mr. Freeman, for the Defendant Hughes. The £500 belonged to the husband in right of his wife, and the wife, who was then sufficiently provided for by the prior settlement of the £10,000, had no equity to any further settlement. Practically, therefore, the £500 belonged to Mr. Behrens himself, and the law does not allow a man to settle his own property in such a way as to go over on his bankruptcy, or in any other way so as to defeat the legal rights of his creditors. [97] The clause of forfeiture is therefore void; *Higinbotham v. Holme* (19 Ves. 88).

The charging-order created no forfeiture; it was no act of the debtor. The charge under 1 & 2 Vict. c. 110, s. 14, was not one created by the debtor himself, and it only gave to the creditor the same remedies as if the debtor had charged the £500. There was no forfeiture, at all events, until the outlawry.

Mr. Pemberton, for Camps and Partridge, cited *Whitfield v. Prickett* (13 Sim. 259).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am against you on both points. This was the wife's property, and I think that she was entitled to have it settled if she and her husband thought fit that it should be, and that he could give up his marital claims without waiting to be compelled to do so. It is the same thing as if the settlement had been made by the Court, or as if the trustees had resisted payment of the legacy until a settlement of it had been made. According to the authorities, the wife herself might have filed a bill for that purpose, and this is certain:—that if a suit had been instituted, and the husband and wife had agreed on these as the terms of a settlement, the Court would have settled the legacy at once, and then all the trusts of this settlement would have been valid and binding.

The words are these: the income is to be paid to him until by his act or default or by operation of law it becomes the property of another person. He has done that by which (except for the proviso) it would become the property of the creditor.

[98] It is impossible to say that a charging-order is not a charge. If I were to decide otherwise, I must then hold that a charge is not a charge. It is true that a judgment creates a charge on lands, but not on stock, and that you must obtain a charging-order upon the judgment for that purpose; but that has been obtained, and it has become a charge on the property charged.

The result is, that the fund must be handed over to the children.

[98] DE HOGHTON v. MONEY. Nov. 22, Dec. 6, 1865.

[S. C. L. R. 1 Eq. 154; 13 L. T. 447; 14 W. R. 159; affirmed on appeal, L. R. 2 Ch. 164; 15 L. T. 403; 15 W. R. 214.]

The principle of this Court, established by a great number of cases, is that it will not interfere between volunteers (in the legal sense of the term), but will leave them to their remedy at law, whatever that may be. The Court will neither, at the instance of the donor who repents his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift.

A purchaser for value of real estate cannot come into the Court of Chancery to have a prior voluntary deed, void under the 27th Eliz. c. 5, delivered up to be cancelled. The Court, in such a case, leaves both parties to their legal rights and remedies.

A. B. entered into a voluntary agreement as to a leasehold with C. D., and he afterwards contracted to sell it to E. F. for valuable consideration. Held, that a suit by E. F. against A. B. and C. D., to have the rights of the parties declared and the voluntary agreement cancelled, could not be maintained.

All the parties to the present suit were officers in a volunteer rifle regiment, whose headquarters were at Hoxton.

The Defendant Mr. Cotton kept a tavern at Hoxton, adjoining to which there was a piece of leasehold land used as a drilling-ground for the regiment. In 1861 Mr. Cotton, thinking it would be beneficial to him in increasing and improving his business, by establishing the rifle corps in that place, purchased this piece of land, which was held at a peppercorn rent for £500.

[99] Some negotiations afterwards took place between Mr. Cotton and Mr. Money (the lieutenant-colonel of the regiment) as to this land. On the 16th of February 1862 Mr. Money wrote to the Plaintiff (the colonel of the regiment) pressing him to buy the land, and to let it at as small a rental as he could to the corps. [See *post*, p. 103.]

To this the Plaintiff replied that he was prepared to purchase for £530 and sublet it to the regiment for seven years for £50 a year. [See *post*, p. 104.]

On the 3d of March 1862 the Plaintiff sent Mr. Money a cheque for the purchase-money; it was, however, never paid over, but was returned to the Plaintiff some time afterwards. The purchase from Cotton was not completed, and some misunderstanding respecting the matter having taken place between Cotton and Mr. Money, Cotton, on the 11th of March 1862, wrote to Money stating he was willing to give the regiment "the full and entire use" of the piece of ground for the remainder of the lease, if the regiment should so long exist, and that he would give £200 for building. The regiment was to level the ground and pay £1 per annum "as an acknowledgment that the ownership of the lease still remained with him."

Mr. Money, on receiving this letter, signed it and had it stamped as a lease, and paid the £1 rent. Disagreements subsequently took place in consequence of Mr. Money having claimed the land.

On the 24th of May 1864 Cotton agreed in writing to sell the land to the Plaintiff for £550 without any reservation whatever (except as to a disputed right claimed by Mr. Money in respect of the letter addressed to him by Mr. Cotton dated the 11th of March 1862).

[100] On the 10th of June 1864 Money purported to assign the leasehold to the Defendant Hook (a captain in the regiment) and to himself in trust for the corps.

This suit was instituted on the 20th of July 1864 by De Houghton against Money, and against Cotton and Hook, insisting that the letter of the 11th of March 1862 had been obtained from Cotton by "surprise, concealment and improper influence," and was void.

The bill prayed a declaration of the rights of the parties; that the letter of the 11th of March 1862 might be cancelled; that the conveyance to Hook might be declared void; for the specific performance of the agreement of the 24th of May

1864, and that Cotton might execute a conveyance, and that Money and Hook might join in it.

Mr. Baggallay, Mr. Jessel and Mr. W. D. Bruce, for the Plaintiff, cited *Cooke v. Lamotte* (15 Beav. 240).

Mr. Southgate and Mr. Stock, for Cotton, did not oppose, and referred to the 8 & 9 Vict. c. 106.

Mr. Selwyn, Mr. C. T. Simpson and Mr. T. Salter, for Money and Hook, referred to 26 & 27 Vict. c. 65, s. 25; *Tasker v. Small* (3 Myl. & Cr. 63).

Mr. Jessel, in reply. *Wright v. Vernon* (7 H. of L. Cas. 35).

[101] Dec. 6. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit for the specific performance of a contract entered into between the Plaintiff and Defendant Mr. Cotton on the 24th May 1864, for the assignment of a piece of land held by him on leasehold tenure, and also for the delivering up and cancellation of a letter of the 11th of March 1862, written by the Defendant Mr. Cotton and sent to the Defendant Mr. Money.

The specific performance is a matter of course, no one resists it. The question is, what is to be done with the letter? The prayer of the bill, for this purpose, is novel in form, but one which the pleader evidently was compelled to adopt from the circumstances of the case. It is as follows:—

That the rights of the parties may be declared, and that it may be declared that the letter of the 11th of March 1862 conveyed no estate or interest to Money, and was intended to operate as a revocable licence; that the indenture of the 10th of June 1864 may be declared void and cancelled; that the agreement of the 24th of May 1864 may be specifically performed, and that Money and Hook may join in the assignment, and for an injunction against Money and Hook to prevent them interfering with the ground.

The facts of the case are as follows:—The Plaintiff was the colonel of the 6th Tower Hamlets Rifle Volunteers, the Defendant Mr. Money is the lieutenant-colonel of that corps, and therefore commands it, and in whom all of the property of the corps vests. The other Defendant, Mr. Cotton, is also an officer in that corps, and was, at the time when the transaction occurred, the owner of the Royal Standard Tavern, where he seems to have carried on a thriving business [102] as a victualler, in the immediate neighbourhood of the place where the 6th Tower Hamlets Rifle Volunteers carried on their drills and parades and where their headquarters were established. Adjoining to the regimental drill hall was a triangular piece of ground of a little under half an acre in size, which might be made extremely commodious for the drilling of the corps and for the erection of a mess-room and a library. In 1861 Mr. Cotton bought the residue of the term in this plot of land for £500; the residue of the term was thirty-five years from 22d June 1862, and the rent was a peppercorn. The conveyance was made to him in 1862. I think that the fair result of the evidence is, that Mr. Cotton bought this piece of land thinking that it would be beneficial to him in increasing and improving the business he carried on, by drawing to or establishing the rifle corps in that place. On the 1st of August 1861 Mr. Cotton wrote a letter to Mr. Money, which was as follows:—

“Royal Standard, City Road, August 1st, 1861.—Sir,—I have much pleasure, in accordance with my promise, in forwarding you ten guineas, and, at the same time, allow me to express a wish that your company may continue to prosper as it has done since you took the command. The splendid manner in which you have taken possession of this building is most commendable, and places the corps in a position to carry out their military arrangements second to none in the metropolis, and only second to the South Middlesex in the suburbs. If I might be allowed the liberty, I should most respectfully suggest that a reading-room would be a valuable and highly appreciated addition to the conveniences you have already secured. I am not aware that your premises will admit of such a thing; if not, I am prepared to build you one with an entrance entirely [103] distinct from my premises. Hoping that this proposition may be received by you favorably, and that the inclosed donation will be sufficient to make me an honorary member of your corps.—I have the honor to be, Sir, yours most respectfully,
“GEORGE COTTON.”

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But there is nothing in it to shew that this was to be gratuitous.

After this, some negotiation took place between Mr. Cotton and Mr. Money, and on the 16th of February 1862 Mr. Money, writing to the Plaintiff, gives the following account of this, and makes a proposal which was accepted with a little qualification. Mr. Money's letter is as follows :—

"10th February 1862.—Last night Mr. Cotton's solicitor said 'let any man take the purchase off his hands.' The ground is well worth the money, and anyone may have it at the cost price to Mr. Cotton. I have no doubt you would find it a fair investment; it is a large piece of land in the centre of a thickly populated neighbourhood with all Mr. Sturt's property round, and it must increase in value, as that property has so immeasurably increased. It has thirty odd years to run, at a most trifling ground-rent, and the price is something under £550. Your money would be perfectly safe, and if you would build the room upon it, and (if you like it) lease the whole to us at as small a rental as you could, you would really be conferring a great boon on the corps and one most calculated to make us hold our heads above water. You know that I have it not in my power to do such a thing myself or I would not ask you.—Ever most truly yours,
"G. H. MONEY."

[104] The Plaintiff's answer to Mr. Money is as follows :—

"22d February 1862.—My dear Money,—Under the circumstances stated in your note of the 16th instant (assuming there are no objectionable covenants and the ground-rent to be nominal), I am prepared to purchase Mr. Cotton's lease of thirty-two years at the price paid by him, say £530. This effected, I am further prepared to sub-lease it to yourself and others, on behalf of the regiment, for seven years, at £50 per annum. As I should subscribe £50 annually, so long as I remain connected with the corps, the rent during such time would amount to *nil*. The conveyance to me must be free of cost, and the regiment will be at liberty to erect such buildings on the land as they consider requisite.—Yours very truly,
"HENRY HOGHTON."

This went on for some time, and an appointment was actually made to complete the transaction and pay the price (a cheque for which had been sent by the Plaintiff on the 3d of March 1862), when the whole was stopped by a letter written by Mr. Cotton to Mr. Money, which is as follows :—

"March 11th, 1862.—My dear Colonel,—I much regret the apparent little misunderstanding that has occurred between you and myself respecting the purchase of the ground adjoining the new drill hall. It is perhaps now hardly worth while to go into explanations, which I can better give verbally when we meet. However, I wish you and the officers of the 6th Tower Hamlets Rifles to clearly understand that it was always my intention and wish that the regiment should enjoy the use of that piece of ground at my ex-[105]-pense and for the period of my lease, if the regiment should exist so long, and that I would build, for the use of the regiment, a mess-room. Of course it was not my intention to part with the lease itself, and in case the regiment should cease to exist before the termination of my lease, or in case the regiment should not require the ground, then, and in either of these cases, it would return to me as the owner of the lease. Now, to terminate all misunderstandings upon the point, permit me to say that I am now willing to give our regiment (the 6th Tower Hamlets), for the whole term of my lease, the full and entire use of that piece or parcel of ground situate near the new drill hall, Hoxton, formerly a theatre, and of which I have purchased the remainder of the lease from Mr. Thorne, if the regiment should exist so long and if the regiment should require it for that period, upon this understanding :—that the regiment, from its own funds or otherwise, will level or cause to be filled up the said piece of ground, and will so prepare the same as to fit it for a proper drill ground, for which purposes only it is to be used. I will also give to the regimental funds the sum of £200, to be used for the purpose of building an armory and mess-room, with other accommodations for the use of the said regiment, and for regimental purposes only. The building may be placed upon the said piece

of ground in any position you, as colonel of the regiment, may select, with this further understanding:—that all the covenants of my lease are to be binding upon and fulfilled by the regiment, and that the ground and mess-room shall be kept in a proper state of repair, and that the regiment shall pay or cause to be paid to me, or to my executors or administrators, the sum of £1 sterling per annum, so long as they continue to hold and enjoy the use of the said piece of ground and mess-room, as an acknowledgment that the ownership of the lease remains still with me, or with my [106] executors or administrators for the time being. And, upon your paying to me £1 in advance, you may consider that this letter at once gives you the full right and legal title to use the aforesaid piece of ground as effectually, and to all intents and purposes, as though a regular lease had been executed between us.—I am, dear Colonel, yours very truly,
 “G. COTTON.”

It certainly does seem very singular that when the terms of the sale of the land had been settled, the deed prepared accordingly, the money sent for the payment of the price and a day fixed on for the completion of it, Mr. Cotton, who had hitherto insisted on receiving this price, should suddenly determine to give the whole piece of land gratuitously to the regiment. I call it gratuitously, because, in my opinion, the sum of £1 a year cannot be considered as a consideration for the sale of the property, nor indeed is it so treated in the letter itself; but it is referred to simply as a nominal acknowledgment of ownership in Mr. Cotton, in the event of the corps being disbanded. The circumstances under which the letter was written and signed are described by Mr. Grissell, a captain in the regiment, and by Mr. Cotton himself. [His Honor read it; but it shewed, in the opinion of the Court, that no fraud, pressure, misrepresentation or undue influence had been practised on Mr. Cotton.] As soon as Mr. Money received the letter, he made the most he could of it; he signed it himself as if it had been a mutual agreement, he caused his signature to be attested, he then caused the document to be stamped as a lease, and subsequently, when this bill was threatened, he caused to be prepared and executed an indenture of the 10th of June 1864, whereby he purported to convey the leasehold property to the Defendant Mr. [107] Hook, a captain in the regiment, and to himself in trust for the corps.

On the 24th of May 1864, and apparently with the object of getting rid of the effect of this letter of the 11th of March 1862, or any effect that it might be supposed to have, an agreement was entered into between the Plaintiff and the Defendant Mr. Cotton for selling the land to the Plaintiff, subject to the right claimed by Mr. Money, and this bill was filed on the 20th of July 1864.

The question, in this state of circumstances, is, what is the character and effect of this letter of the 11th of March 1862, and whether it is of such a description, that this Court can order it to be delivered up to be cancelled?

In the first place, I am of opinion that this document was not obtained by fraud, misrepresentation or undue influence. I am of opinion, on the evidence both of Mr. Cotton and Mr. Grissell, which I have read, that Mr. Cotton fully understood the value of the property, and what he was offering to give up, and though the letter was obtained somewhat hastily, no pressure or improper influence was exercised for that purpose. It was, in my opinion, purely voluntary, and my belief is, that Mr. Cotton expected to derive advantages from his act of generosity which have not been realized; but whether this surmise of mine be or be not correct, it cannot, in my opinion, affect the question I have to decide.

The question is, can I declare this document to be void or order it to be delivered up to be cancelled? I will first examine it, as if it had been a deed under seal, [108] and consider how I could have dealt with it, if an application had been made by Mr. Cotton to have it delivered up and cancelled before the contract of the 24th of May 1864 was entered into between Mr. Cotton and the Plaintiff. I will next consider how the matter is affected by the subsequent contract of the 24th of March 1864 between the Plaintiff and Mr. Cotton; and, finally, I will consider how the case is varied by the fact that the document in question is not a deed, but simply an instrument signed by Mr. Cotton.

The principle of this Court, established in a great number of cases, is, that it will not interfere between volunteers, in the legal sense of the term, but will leave them

to their remedy at law, whatever that may be. The Court will neither, at the instance of the donor, who repents his gift, cause the deed of gift to be delivered up, nor will it, at the instance of the donee, interfere to complete an imperfect deed of gift. This subject is very fully discussed by Sir James Wigram in the case of *Meek v. Kettlewell* (1 Hare, 464), and is laid down in so many cases that it is unnecessary to refer to them; I have had the case repeatedly before me, and the decisions on the subject are familiar to every practitioner in the Court. If, therefore, this had been a deed and Mr. Cotton had required it to be delivered up to be cancelled, the Court could not properly have interfered.

I have next to consider whether the contract entered into with the Plaintiff by Mr. Cotton in any respect alters the case, and in my opinion it does not. It is true that the statute of the 27th Eliz. c. 5 makes a voluntary conveyance of land void, as against a purchaser for value; but although this is the case, even where the purchaser had notice of the voluntary deed, [109] it has never been held that a purchaser for value could come into this Court to have the voluntary deed delivered up to be cancelled. It leaves both parties, in such a case, to their legal rights and remedies.

Lastly, can the circumstance that this document is not under seal alter the principles of equity as applicable to this case. I am of opinion that it cannot. Those principles do not depend on the nature of the instrument, but upon this: that as between donor and donee, where everything is straightforward on both sides, this Court will not assist either party, that it is not a matter of equity or good conscience, that a repenting donor should be allowed to recall his gift, or that he should be compelled to complete the gift he had promised to make.

The document, in this case, is a mere informal instrument, which has but little efficacy at law. If Colonel Money had instituted a suit to have a regular assignment of the lease, it is difficult to see how that suit could have been supported. It makes no difference, in this matter, that Colonel Money claims no *bonâ fide* personal interest in the land, and only claims it as a trustee for the regiment. If Mr. Cotton had filed a bill to have it delivered up and cancelled, it is equally difficult to understand on what equitable ground such a suit could have been supported. But this bill seems to have been framed on the supposition that the contract between Mr. Cotton and the Plaintiff gave the Plaintiff a right to a relief in equity, which Mr. Cotton himself could not have enforced. In my opinion this is erroneous, and although the sale for value in some cases may, by virtue of the statute of the 27th Eliz. c. 5, give the purchaser an advantage at law which the donor could not have obtained directly, it does not, in equity, [110] have any such effect, but the purchaser can only do what the vendor himself could have done.

In truth, I was somewhat at a loss to understand, during the argument, the reasons which have induced the Plaintiff to file this bill. The document in question of the 11th of March 1862 conveys no legal estate, and, if it did, then, upon the conveyance by Mr. Cotton to the Plaintiff, he might have brought his ejectment. If the document has any legal operation at all, it appears to me to be confined to giving Colonel Money a tenancy from year to year, which might have been determined by a proper notice to quit, and if Colonel Money had then come to this Court for assistance, he would have been met by that series of cases to which I have already referred, of which *Meek v. Kettlewell* (1 Hare, 464), before Vice-Chancellor Wigram, and which I have already mentioned, is an instance.

It is true that, throughout the observations I have hitherto made, I have treated the document of 11th March 1862 as a purely voluntary instrument, and, on considering the document itself, such it is in my opinion. It is, I think, obvious that the conveyance of a leasehold property, which has thirty-five years remaining of its term, and which is then worth £500, in consideration of a rent of 20s. per annum, cannot be supported as a purchase for valuable consideration. The inadequacy of the price would be a badge of fraud, if it were so treated. (See *Townend v. Toker*, 35 Law J. Chanc. 608.) Unquestionably, the conveyance may be supported as a voluntary gift by the donor to one he was disposed to favour. If, for instance, it had been conveyed to a charity on such terms, it would not be considered as a purchase by the institution; but it might well be treated as a gift to it, if the instrument had been [111] executed by a person who understood the full nature and effect of the

instrument he was executing. But if it be assumed that I am mistaken in this view of the case, and that the document of the 11th of March 1862 can really be treated as a legitimate sale of the leasehold for a valuable consideration, then it is obvious that this Court could not interfere to cancel a document which was given for value received by the person who signed it, and who did so with a full knowledge of what he was doing, and without any undue influence being used against him.

The bill also prays the delivery up and the cancellation of the deed of 10th June 1864; but it follows necessarily, from what I have said, that this Court cannot interfere to order the deed of the 10th June 1864 to be delivered up to be cancelled. If I am right that the document of 11th March 1862 gave Mr. Money nothing which he could convey to Mr. Hook himself, unless it be a tenancy from year to year, there is nothing more by the deed of June 1864, now vested in them or either of them. It is simply as if a stranger should take upon himself to convey the estate of another to a third person. For the same reason I cannot order Mr. Money and Mr. Hook to join in executing a proper legal assignment to the Plaintiff of the land in question as prayed by the bill; either there is nothing in them or either of them by reason of the document of the 11th of March 1862, or the deed of the 10th of June 1864, or, if there be, the parties must be left to their remedy at law, and this Court will not interfere.

The bill, in my opinion, fails, as regards the Defendant Colonel Money and Captain Hook, and must be dismissed against them with costs; the decree against Mr. Cotton is of course, but without costs, because it [112] was never opposed by him; in fact it is, in a great measure, for the benefit of Mr. Cotton that this suit has been instituted. (NOTE.—Affirmed by Lord Justice Turner, December 18, 1866.)

[112] TAIT v. LATHBURY. Dec. 15, 16, 1865.

[S. C. L. R. 1 Eq. 174; 11 Jur. (N. S.) 991; 14 W. R. 216.]

A marriage settlement of personalty empowered the trustees to sell it, and invest the produce in real estate. The estate was to be held on corresponding trusts and to be considered personal estate. There was an express power to sell the securities to be purchased, and to reinvest the produce, from time to time, but no express power to sell the purchased estate. The trustees invested the fund in a real estate. Held, that they had a power of sale over it, and could give good receipts for the purchase-money.

By the settlement, made in 1836, on the marriage of Mr. and Mrs. Bryan, a fund was settled on Mrs. Bryan for life without power of anticipation, with remainder for the children of the marriage.

The trustees were empowered, with the consent of Mrs. Bryan, to sell the trust stock, funds and securities, and invest the produce in the purchase of freehold or copyhold estates, to be conveyed to the trustees and their heirs, upon such trusts as would best and nearest correspond with the then subsisting trusts, thereinbefore declared, of the said trust stocks, funds and securities, it being thereby declared that such real estates, when so purchased in pursuance of the power, should be considered personal estate for the purposes of the said settlement and go accordingly. And it was thereby further provided that it should be lawful for the trustees with the like consent, to make sale of all or any part of the said trust stocks, funds and securities, to be so purchased under the trusts thereinbefore contained, and to place out and invest the monies arising by such sale or sales, from time to time, on good security of freehold, copyhold or leasehold estates by way of mortgage, or upon trust for sale either in England or Wales, or in [113] Government securities or Parliamentary funds in England, and, from time to time, to alter, vary and transpose such securities or funds so to be taken; and the monies placed thereupon should be vested in the trustees, respectively, upon the same trusts, and to and for the same intents and purposes, and with the same powers, as were therein declared concerning the trust

stocks, funds and securities, respectively, or such of them as should be then subsisting and capable of taking effect.

The trustees, in 1860, sold out the fund (£3886 stock), and invested it in the purchase of a copyhold property at Turnham Green.

In 1865 the trustees agreed to sell the copyhold property to the Defendant, Mr. Lathbury, for £4500, but, though a willing purchaser, he declined to complete, on the ground that the trustees were not empowered, by the settlement, to sell the copyhold and give good discharges for the purchase-money thereof.

Mr. Eddis, for the Plaintiffs. The trustees have a power to sell this property; it is expressly declared, by the settlement, that it shall be held on similar trusts, which includes the trust for sale, and be considered personal estate for the purposes of the settlement and go accordingly. There is also a power to sell and reinvest the produce, and in addition to this, the performance of the trusts will require a sale of the copyholds, for the purposes of a division. In such a case, a power to convert is necessarily given to the trustees; *Master v. De Croismar* (11 Beav. 184); *Elton v. Elton* (No. 2) (27 Beav. 634).

The trustees have a power to give sufficient dis-[114]-charges for the purchase-money; *Doran v. Wiltshire* (3 Swan. 699); 22 & 23 Vict. c. 35, s. 23.

Mr. Lewin, *contra*. The trustees, I admit, had power to give good receipts, the trusts being of a permanent character, and it being impossible to throw the responsibility of seeing to the performance of the trust on a purchaser; but here, the trustees have not at present any power to sell. There is no power to sell the real estate, but only the stock, funds and securities. The copyholds were to be held not upon the trusts before mentioned, but "upon such trusts as would best and nearest correspond with the then subsisting trusts," this shews an intention to retain it in specie upon corresponding trusts. The lands are to be considered personal estate for the purposes of the settlement and go accordingly, but there is no power to convert them.

Mr. Eddis, in reply. The question is, whether it was intended that the real estate should remain permanently in the same state of investment; if so, why was it to be considered personal estate? It was personal estate for all the purposes of the settlement, and therefore the investment in real estate was a temporary security for the trust property.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will read the settlement and carefully look into the case. What makes it the more important is this: that both parties seem to wish me to come to the same conclusion.

[115] Dec. 16. THE MASTER OF THE ROLLS. In this case I think the trustees have a sufficient power to sell. I think that the effect of it is this: that the real estate is converted into personalty and is to be treated as personal estate through the whole of the settlement. That being the true construction, it is not necessary to go further, as it gave the trustees a sufficient power of selling, and I will so declare.

[115] ROWE v. TONKIN. Nov. 2, 1865.

[S. C. L. R. 1 Eq. 9.]

A demurrer to part of the bill, unaccompanied by a plea or answer to the rest, which is put in before the expiration of the time for filing interrogatories, is irregular; but whether it would be regular if accompanied with a voluntary answer to the rest of the bill, *quere*.

This was a motion, on behalf of the Plaintiff, to take a demurrer off the file under the following circumstances:—

The bill was filed on the 13th of July, and the Defendants appeared thereto on the 21st of July. On the same day and before any interrogatories had been filed, the Defendants filed a demurrer to part of the bill, viz.:—to so much of the bill as sought an account of what was due from the testator in respect of a debt of £100 and interest; but they filed no plea or answer to the rest of the bill. The time for filing

interrogatories (XI. Cons. Ord. sect. 2) (which was within eight days after the time limited for the appearance of the Defendants, i.e., eight days after service of the bill (X. Cons. Ord. sect. 3)) had not expired when this demurrer was filed; but the Plaintiff afterwards, on the 28th of July, filed interrogatories.

Mr. Southgate and Mr. Bevir, in support of the motion. It is irregular to file a partial demurrer before the [116] time to file interrogatories has expired. It is wholly inconsistent, in point of pleadings, with the right of the Plaintiff to a discovery. Before the 15 & 16 Vict. c. 86, s. 12, which enacts that "no Defendant shall be called upon or required to put in any answer to a bill, unless interrogatories shall have been filed," it was irregular to file a demurrer to part of a bill without pleading to or answering the rest. That Act has not altered the practice. The case of *Burton v. Robertson* (1 Johns. & Hem. 38) is distinguishable, for there, the time for filing interrogatories had expired, and none had been filed when the Defendant put in his partial demurrer. The Defendants could not file a voluntary answer, and, therefore, they could not file a partial demurrer.

Mr. Selwyn and Mr. Freeling, for the Defendants. This proceeding was quite regular, and the difficulty, if any, arose from the course taken by the Plaintiff. He might have filed his interrogatories with the bill, and if he has chosen to delay filing them, the Defendants ought not to be prejudiced in their defence, and were entitled to meet the Plaintiff's record as it stood. The Defendants might have demurred to part of the bill and have filed a voluntary answer to the rest; *Anderson v. Stamp* (34 L. J. Ch. 230). That case shews that a voluntary answer might be filed under similar circumstances to the present. Under the old practice, the bill prayed a *subpoena* to appear and answer all and singular the premises; the Defendant was, therefore, bound to answer the whole bill, whether interrogated or not; but now he is not, and here the Defendant has answered all he was bound to answer. A Defendant might be deprived of his defence in the cases of *ne exeat* or injunction, if he were not permitted to file his demurrer *instantly*. There [117] is great convenience in such a practice, for if the demurrer to part of the bill be valid, interrogatories founded upon that part of the relief would be nugatory.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think this demurrer is irregular. The distinction between this case and *Burton v. Robertson* is this: here the Defendants have not waited for sixteen days allowed to the Plaintiff to file his interrogatories, as was done in that case.

I consider that, until sixteen days have expired, matters remain very much in the same position as under the old practice before the new Act and orders altered the rules of pleading. I consider it certain that, under the old practice, a Defendant, as soon as the bill had been filed, might demur to the whole, but not to a part only of the bill; he might file a demurrer to part and answer the other part, for there was nothing to prevent his putting in his answer as soon as he pleased. But a Defendant could not put in a demurrer alone to part of the bill; and, if he did, the Plaintiff would be entitled to come to the Court to have it taken off the file for irregularity.

That being so, and assuming that a Defendant is entitled to file a demurrer to part of the bill accompanied by a voluntarily answer to the other part of the bill (on which point I express no opinion), still I think that he cannot, before the sixteen days have expired, file a demurrer to part of the bill without an answer to the other part, and that this is irregular.

This demurrer is therefore irregular, and must be taken off the file.

[118] SIDNEY v. CLARKSON. Nov. 24, 25, 1865.

Building land was sold in a number of lots, subject to certain conditions as to fencing, repairing the roads, and to restrictions as to the class of houses to be built. The conditions also provided that statements to this effect should be inserted in the conveyances. By the 15th condition, the vendor reserved the right of selling the unsold lots under different arrangements, "and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or

the conditions." Held, first, that as to the unsold lots the vendor was subject to none of the restrictions: secondly, that the purchasers were bound to have not only the restrictive conditions stated on their conveyances, but also the 15th, in favor of the vendor: and thirdly, that a separate deed of covenant by a purchaser as to the restrictions was a sufficient compliance with the provision as to the statement on the conveyances.

The Walton Lodge estate, consisting of 247 acres, was put up for sale by the Plaintiff, subject to special conditions, in sixty lots.

The particulars of sale described the estate as "offering most eligible sites for the erection of first-class villas," and they provided that the purchasers of certain lots should fence against the neighbouring lots, as shewn on a plan.

The material conditions of sale were as follows:—

"The 9th related to contributing to keeping the roads in repair.

"The 10th condition provided that the purchasers of Lots 1 to 29 (inclusively), 48, 59 and 60, should not erect, on any of such lots, any building, except detached or semi-detached private dwelling-houses, of the value, at the least, of £800 and £600 respectively; and that they would not use such dwelling-houses, or permit them to be used, otherwise than as private residences."

The 11th condition was as follows:—

"Statements, to the effect of the two last preceding conditions, shall be inserted in the conveyances to the purchasers whom they may respectively affect, and such [119] statements shall have the force and effect of contracts binding in equity."

The 15th was in the following words:—

"The vendor reserves the right of selling the unsold lots, or any of them, at such time, and in such manner, and under such different arrangements, as to him may seem fit, and either subject to or not subject to the stipulations as to fencing and other stipulations contained in the particulars or these conditions."

The Defendants became the purchasers of Lots 48 and 59 for £2260; but all the other lots referred to in the 10th condition of sale were bought in by the Plaintiff, with the exception of Lots 3 and 4, which were sold.

The title to the property had been accepted, but disputes arose between the parties as to the form of the conveyance. The purchasers were willing to covenant to the effect of the 9th and 10th conditions; but they insisted that the vendor should enter into similar covenants in respect of the unsold lots. This he refused to do.

The purchasers were also willing to omit all covenants relating to these conditions, and to introduce, into the conveyance to them, a statement of the 9th, 10th and 11th conditions, but omitting the 15th.

During the progress of the suit, the Defendants discovered another objection, which was as follows:—

"In the conveyance of Lot 3 to the purchaser there was no restrictive covenant to the effect of the 9th and 10th conditions of sale, nor any allusion to them; but the purchaser executed a separate deed of covenant with the restrictions pointed out by those conditions. A memorandum of this deed of covenant was afterwards indorsed on the conveyance.

[120] Mr. Selwyn, Mr. Joshua Williams and Mr. Druce, for the Plaintiff.

Mr. Baggallay and Mr. Griffiths, for the Defendants. The object of the vendor was to build upon the land according to a general plan, and it was not intended to vary it in any essential particulars. The stipulations against building inferior houses on the lands laid out for building was not for the benefit of the vendor alone, but of all persons taking plots to build on, and the obligations were to be reciprocal as regards all purchasers. If the Plaintiff thinks proper to relax the obligation relating to the class of houses as to one purchaser, he, in equity, at least, dispenses with the obligation as to the rest; *Roper v. Williams* (Turn. & R. 22). There would be no mutuality if it were otherwise, for the Defendants would be kept bound by the restriction, while future purchasers of other lots would be free to build a series of inferior houses adjoining the Defendants' land.

A vendor is bound to state clearly and fairly on his condition of sale what he intends to stipulate for; if he expresses himself ambiguously, the construction must

be most favourable to the purchaser; *Symons v. James* (1 Y. & Coll. (C. C.) 490); *Seaton v. Mapp* (2 Coll. 562). A vendor selling land in lots for building purposes must be understood to hold out expectations that it will be laid out in the manner intended; *Peacock v. Penson* (11 Beav. 355). Here the purchasers have been entrapped by the condition, they swear they never would have purchased, if they were to be restricted in their rights, while purchasers of all the other lots were to be let free.

[121] The 15th condition applies to the roads, fencing, &c.; but it is inoperative as to the class of houses; the 10th condition is imperative: it says, no house "shall" be erected except of a particular description.

If the 9th, 10th and 11th conditions were introduced into the Defendants' conveyance, omitting the 15th, and a subsequent purchaser built small houses, the Defendants would have a right of action against the vendor. This is really what was contemplated.

Secondly. The separate deed of covenant is insufficient; it will not bind purchasers without notice, and the Defendants have a right to evidence that the purchaser consented to the indorsement on the conveyance, in order to shew that he is bound by it.

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the Defendants have mistaken their rights, and that the Plaintiff is entitled to a decree. The argument of the Defendant is, that the Plaintiff wants to get something he has not contracted for. What he contracted for was this:—The purchasers of certain lots under a sale by auction were not to erect any buildings thereon except private dwelling-houses of a certain value, and this stipulation was to be inserted in their conveyances, and was to have the force and effect of contracts binding in equity. If it stopped there, all the cases cited would apply; it would be a condition for the benefit of the vendor and purchasers, and would bind all purchasers, and Mr. Sidney could not afterwards sell any lots, except subject to this condition.

To provide against this, he introduces the 15th condi-[122]-tion, by which he reserves the right of selling the unsold lots, "in such manner and under such different arrangements, as to him may think fit, and either subject to or not subject to the stipulations" contained in the conditions of sale.

The Defendants insist that they are entitled to have such a conveyance as would make it appear, on the face of it, that every person who afterwards buys any of these unsold lots will be bound by the condition as to the houses to be built, although the Defendants have bought, subject to this 15th condition, which says, that they should not necessarily be bound by any of these stipulations. They then say that as the 9th and 10th conditions are inserted in their conveyance, they are not bound to have the 15th inserted in it also, because, they say, that the 11th condition provides only that the 9th and 10th conditions should be inserted in their conveyance, and does not specify anything else. This, however, I consider, is certain:—that the vendor is entitled to say, that in the conveyance to the Defendants the exact estate of the title shall appear, and that he shall not be prevented selling the other lots unfettered by the same covenants and conditions. The argument recoils on the Defendants, for if the 15th condition were omitted in their conveyance, and the Plaintiff afterwards sold the other lots unfettered by the 10th condition, and the purchaser built houses of less value than those prescribed by that condition, a right of action on the part of the Defendants would, on the face of the deed, arise, and the Plaintiff would be obliged to come to this Court to stay the action, the contract between him and the Defendants being, that he should not, as to unsold lots, be subject to these conditions. Whatever the agreement is, the truth and the whole truth should be stated in the conveyance to the Defendants, in order [123] that no persons may be misled in future. I am of opinion that the facts should appear on the conveyance to the Defendants, in order that future litigation may be prevented.

As to the other point, I am of opinion that the separate deed of covenant is proper; but that the covenantee ought to have possession of it, in case the covenant should hereafter be broken. If there had not been a separate deed of covenant, a counterpart of the deed of conveyance would be necessary. Then, the fact being that there is a separate deed of covenant, the question is, how to prevent a future purchaser being misled. The means are simply by an indorsement of notice of the deed of covenant on the conveyance. This is all that is required.

I am also of opinion that there is nothing in the condition of sale to decoy a man into purchasing. The 15th condition was introduced merely to prevent the seller from being fettered in future, in case any of the lots should remain unsold. The fact of there having been only two or three lots sold may be a great inconvenience to the Defendants, but I think that was a question on which they were bound to inquire, and having chosen to purchase subject to the 15th condition, I think that those lots only which were disposed of at the sale had the 9th and 10th conditions imposed on them.

There must be a decree for specific performance with costs, and a reference to settle the conveyance if the parties disagree.

[124] HENNIKER v. CHAFY. Nov. 18, 1865.

A petition presented by a tenant for life, for payment of the income of a fund paid into Court under the Lands Clauses Act, and which fund was the subject of an administration suit, was served on the trustees. Held, that the company must pay the trustees' costs.

In 1846 lands were taken by a railway company, which were the subject of an administration suit in this Court. The purchase-money had been paid into Court, and had accumulated according to the trusts. The accumulation having ended, a petition was presented by the tenant for life for payment to him of the dividends. This was served on the railway company and on the trustees of the fund.

Mr. Burdon, in support of the petition.

Mr. Holland, for the railway company, submitted that, under the "Lands Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 18, s. 80), the company was not liable to pay the costs of the appearance of the trustees. He cited *Hore v. Smith* (14 Jur. 55); *Wilson v. Foster* (26 Beav. 398); *Sidney v. Wilmer* (31 Beav. 338); *Henniker v. Chafy* (28 Beav. 621).

Mr. Goring, for the trustees, was stopped by

THE MASTER OF THE ROLLS [Sir John Romilly]. I must follow my own decision, the trustees must have their costs.

[125] LAKE v. PEISLEY. Dec. 16, 1865.

[S. C. L. R. 1 Eq. 173; 11 Jur. (N. S.) 1012. Overruled, *Allen v. Bonnett*, 1868, L. R. 6 Eq. 522.]

An order of course made, saving just exceptions, under the 19th Consolidated Order, rule 4, to read proceedings in bankruptcy at the hearing of the cause.

The secretary of the Master of the Rolls had declined to make an *ex parte* order, under the 199th Consolidated Order, rule 4, for liberty to use, in this suit, at the hearing, the proceedings in bankruptcy, including the depositions and schedules of accounts, and the Vice-Chancellor Stuart, to whom the cause was attached, had also declined to interfere.

Mr. J. N. Higgins now applied *ex parte* for the order. He referred to *Ernest v. Weiss* (1 N. R. 6); in which an order of course had been made to read in a suit evidence taken in a winding up, saving just exceptions.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think it is an order of course, and you may inform the secretary that I think so. The order may extend to all the proceedings, but it will be open to all parties to object to their admissibility at the hearing.

[126] DENT v. DENT. Dec. 12, 1865.

[S. C. L. R. 1 Eq. 186.]

By a consent order made in an administration suit, a purchaser was to be bound by any order, as if he were a party to the suit and his contract had been the subject of it. Upon a dispute arising between the purchaser and vendors: Held, that the purchaser was entitled to call on the vendors to make an affidavit of documents and to produce them.

Mr. Bird had entered into a contract with the trustees of a will for the purchase of an estate.

This was a suit for the administration of the estate of the testatrix, but to which Mr. Bird was not a party. However, on the 8th of December 1862, an order had been made in the suit, on the application of the trustees and upon the appearance and consent of Mr. Bird, that the contract should be carried into effect, Mr. Bird consenting to be bound by this or any other order, as if he had been a party to the cause and the contract had been specially the subject thereof.

Disputes having afterwards arisen as to boundaries of the property and in consequence of adverse claimants on part of it, Mr. Bird claimed, in Chambers, to be entitled to compensation, and he took out a summons that the trustees might make the usual affidavit of documents in their possession. This summons was adjourned into Court for argument.

Mr. Southgate and Mr. Druce, for Mr. Bird. The purchaser is, under the order of 1862, to be treated as a party to the suit. The dispute between him and the trustees is therefore to be determined in this suit, and he is consequently entitled to the usual production of documents.

Mr. Karlake, for the trustees. The applicant is not a party to the suit, and is not entitled to call on the vendors to make an affidavit of documents.

[127] THE MASTER OF THE ROLLS [Sir John Romilly] held that the applicant, being in the situation of a party to the suit, was entitled to the order asked, for otherwise he would be entitled to enforce the discovery he required by a separate suit. He accordingly ordered the trustees to file a full and sufficient affidavit, stating whether they had in their possession or power any documents "relating to the matters in question between them and the applicant," and he also made the usual order for their production. (Reg. Lib. 1865, A. fol. 2425.)

[127] CHUBB v. GRIFFITHS. Dec. 15, 1865.

[Followed, *Woolff v. Woolff* [1899], 1 Ch. 343.]

An infant who had sold spurious articles, representing them to have been manufactured by the Plaintiff, ordered to pay the costs of suit for an injunction.

The Defendant, an infant, had advertised second-hand iron safes for sale and sold which he represented and were marked as manufactured by the Plaintiff, Mr. Chubb. They were, however, spurious and inferior articles.

The Plaintiff instituted this suit for an injunction and an account.

Mr. Jessel and Mr. Bunting, for the Plaintiff.

Mr. Archibald Smith, for the infant, submitted to a perpetual injunction, but he argued that this was not a case for costs as against an infant; that the proceedings of the Plaintiff had been unnecessarily precipitate, the [128] Defendant having acted in ignorance and having at once submitted.

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think that the Plaintiff is to blame for coming speedily for an injunction; it was his duty to do so.

But I think that the Defendant, who sells articles and declares positively that it is

Chubb's manufacture, is not at liberty to say that he was ignorant of the fact. He was bound to make proper inquiry before he made so positive a representation.

In such a case, I am of opinion, upon the principle laid down in *Cory v. Gertchen* (2 Madd. 40), that infancy cannot protect him from paying the costs of this suit. (Reg. Lib. 1865, A. fol. 2417.)

[129] *BONVILLE v. BONVILLE.* Dec. 14, 1865.

Under the common decree in a partnership suit, interest is payable, on the balance found due from one partner to another, from the date of the certificate. The costs of a suit to take the partnership accounts are ordinarily paid out of the partnership assets.

The ordinary partnership decree was made on the 20th of April 1860, which directed an account to be taken of the partnership dealings and transactions, and that what, upon taking the said account, should be certified to be due, from either of the parties to the other of them, should be paid by the party from whom to the party to whom the same should be certified to be due.

The Chief Clerk, by his certificate dated the 23d of June 1865, found £380 to be due from the Plaintiff to the Defendant, and the cause came on for further consideration.

Mr. Hobhouse, for the Plaintiff.

Mr. Speed, for the Defendant, asked that the Plaintiff might pay interest from the date of the certificate, and also the costs of the suit.

Mr. Hobhouse, in reply.

THE MASTER OF THE ROLLS [Sir John Romilly]. I cannot give the Defendant costs. The practice, except there be something very unusual in the case, is to make the costs in partnership suits payable out of the assets.

But the Plaintiff must pay interest at the rate of £4 per cent., from the date of the certificate on the amount due, for the decree directs payment of the balance due as soon as it is ascertained. (Reg. Lib. 1860, A. fol. 1328; Seton, ch. 2, sect. 7.)

[130] *YEOMANS v. WILLIAMS.* Dec. 20, 1865.

[S. C. L. R. 1 Eq. 184; 35 L. J. Ch. 283.]

A. B., to whom his son-in-law had, by deed, mortgaged some property, declined to receive the interest, and afterwards, to induce his son-in-law not to sell and reside on the mortgaged property, he had promised to allow him to live there rent free. The son-in-law acted on the promise until A. B.'s death. Held, that in equity, no interest was payable until that time.

In 1843 the Plaintiff, Mr. Yeomans, married the daughter of the testator, Mr. Richards.

In 1855 Mr. Yeomans mortgaged a house and premises near Birmingham to the testator for £1000, which he covenanted to repay with interest at £4 per cent. per annum.

The Plaintiff in his affidavit stated that when, in August 1855, he offered to pay the testator the interest, the testator declined to receive it, and said he would make the Plaintiff and his wife a present of it, and added that he only expected the Plaintiff, in future, to keep up the fire insurance on the property.

The Plaintiff's wife also deposed to a conversation with the testator, shewing that he never intended to be paid any interest. In fact interest had never been paid to or asked for by the testator.

In 1862 an estrangement took place, and Mrs. Yeomans wrote to the testator that her husband intended to sell the property and pay off the mortgage. To

this the testator and his wife, in a letter to Mrs. Yeomans, replied in the following terms:—

“You wrote to tell me you should sell your house to pay me. Did I ever ask you to do it, or have you paid me a penny since you had the money from me, or ever took the least notice about it? You can remain where you are. You cannot sell the house, and I hold the deeds. You can live there, just as you do now, without paying us any rent; it is not wished that you [131] should give it up; if you give it up, you must get some place, and that you must pay for. We can only say we wish you every blessing if we never see you, but must tell you candidly you will never see us at Erdington. With our kind respects to Mr. Yeomans,—We remain, dear Mary Ann, yours sincerely,

“JAMES AND JANE RICHARDS.”

In consequence of this letter, Mr. Yeomans did not proceed to a sale of the premises comprised in the mortgage.

The testator died in September 1862.

Upon a bill for redemption, the Plaintiff, Mr. Yeomans, contended that the testator had released him from the payment of interest down to his death.

Mr. Baggallay and Mr. W. R. Fisher, for the Plaintiff, contended that no interest was payable prior to the death of the mortgagee; *West v. Fritche* (3 Exch. Rep. 216).

Mr. Haynes, for the Defendants. There is a covenant to pay, which cannot be released either by mere parol or by a declaration of making a voluntary gift. Unless there be a discharge from the debt at law, there is none in equity; *Cross v. Sprigg* (6 Hare, 552).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the Plaintiff is entitled to redeem on payment of interest from the last day when interest accrued before the death of the testator. I do not understand that the Vice-Chancellor, in *Cross v. Sprigg*, meant to lay down this proposition:—That a man may not let a farm to another, and say “you shall hold it rent free,” or that a man may not say “you may occupy it at a nominal rent, or you may live there, and I never intend to call on you to pay any rent.” Is there anything in this contrary to law, or which equity would not think fit to enforce? or is there any such equitable rule which applies to interest, because a verbal promise is no release at law?

I am disposed to think that this case would come under another head of equity:—I allude to those cases in which a person promises another to do something for him as an inducement to him to take a different course of life. This Court, in such cases, compels the promiser to make good his promise. If a son-in-law says, “I am not rich enough to live in my present residence, and I intend to sell it, and the father-in-law replies, “Don’t sell it, continue to reside there, I will not charge you with rent,” or “I will pay the rent for you,” it would be difficult, when the son-in-law has relied on that promise, to say that the Court would not give effect to it.

In such cases there is this distinction between principal and interest:—If he intended to give up the principal, why did he not give up the security; but to keep the security is consistent with releasing the interest.

I must hold that all interest is released up to the last day of payment of interest to the testator’s death, and I must make the usual redemption decree. (NOTE.—See *Flower v. Marten*, 2 Myl. & Cr. 459.)

[133] HARDWICK v. WRIGHT. July 14, 17, Nov. 17, 1865.

As between principal and surety, if the primary security prove worthless, whether it was so originally or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor.

In March, a trader assigned all his goods, &c., to A. B., to secure a composition to his creditors, and A. B. became liable for the payment. The wife of the trader became surety to A. B. in respect to her separate estate. In November, the trader was

made bankrupt, and A. B. entered into an arrangement by which he gave up the goods to the assignee. Held, that A. B.'s assignment was an act of bankruptcy, and that the wife's separate estate as surety was not released.

When a Plaintiff has delayed filing her bill for ten years, the time which has elapsed ought to preponderate in the Defendant's favor, where the evidence is conflicting, and the balance of it is even.

On the 24th of August 1852 the Plaintiff, Mrs. Hardwick, intermarried with the Defendant, Albert Hardwick, a draper, at Windsor.

She was, at that time, entitled for life to a reversionary interest in a sum of £5000 £3, 5s. per cents., expectant on the decease of her mother, which was settled on her for her separate use. There was no restraint against anticipation, and no settlement was made on her marriage.

Five months after the marriage Mr. Hardwick was compelled to come to an arrangement with his creditors, whose claims he was unable to discharge. By the deed, his creditors were to be paid by four instalments at three, six, nine and twelve months, to be secured by Mr. Hardwick's promissory notes, and the payment of those at nine and twelve months was to be secured by the covenant of Mr. Wright, as his surety. The liability thus incurred by Mr. Wright was to be secured by the assignment from Mr. Hardwick to Mr. Wright of all Mr. Hardwick's estate, goods and effects, whatsoever and wheresoever; and, in addition, by the assignment by Mrs. Hardwick of her reversionary life [134] interest in the sum of £5000 settled on her for her separate use.

Accordingly, by indenture dated the 23d of March 1853, Mr. Hardwick assigned to Mr. Wright his leasehold trade premises, and his stock-in-trade, credits and securities, for the purpose of enabling him, "at his discretion as he should think proper," to provide for the payment of the promissory notes, and to repay himself his advances, with power to sell, for that purpose, "sooner or later after the execution of" this indenture.

By an indenture of even date, Mrs. Hardwick assigned to Mr. Wright her interest in this sum of £5000 to provide for the payment of the instalments and to repay Mr. Wright his advances. Mr. Wright did not, at first, take possession of the business, but having received sufficient to pay the first two instalments, he paid them. The third instalment became due on the 24th of November 1853, but Mr. Hardwick was unable to provide the funds to pay it, and, after some negotiation, Mr. Wright on the same day took possession. Mr. Hardwick, on the following day (25th of November), signed a declaration of insolvency, upon which he was adjudicated bankrupt on the following day.

After some discussion between Mr. Wright and the assignees, an arrangement was come to between them; and by an agreement dated the 9th of January 1854, and made between the assignees of the one part and Mr. Wright of the other part, it was agreed (among other things) that Mr. Wright should not be entitled to prove under the bankruptcy in respect of any payments theretofore made by him to any creditors, parties to the creditors' deed, on account of the third instalment, and that he should pay the assignees £200 in satisfaction of [135] all the claim they might have against him on account of moneys received prior to the bankruptcy or otherwise, and that he should relinquish to the assignees the stock-in-trade, book debts, leasehold and other property of the bankrupt claimed by him (Mr. Wright) under the deed of the 23d of March 1853.

In February 1856 Mr. Wright, having paid £1038 on behalf of Mr. Hardwick, sold Mrs. Hardwick's interest in the fund for £800.

The tenant for life died in February 1863.

In October 1863 Mrs. Wright instituted the present suit, charging the Defendant with negligence in leaving the stock-in-trade in the bankrupt's order and disposition, and insisting that she was released thereby.

She also, by her bill, charged that the agreement of the 9th of January 1854 had not been executed with her privity or concurrence, or approved of by her solicitor, and that, by means thereof, the position of the Plaintiff, as surety, had been prejudiced, and that she was, by means thereof, released from being such surety.

The bill prayed a declaration that, by means of the agreement of the 9th of January 1854, and the other acts of Wright, the Plaintiff was released from her suretyship, and for a reconveyance of her property and an account.

Mr. Selwyn and Mr. A. Smith, for the Plaintiff, [136] cited *Pearl v. Deacon* (24 Beav. 186, and 1 De Gex & J. 461); *Pledge v. Buss* (Johns. 663); *Capel v. Butler* (2 Sim. & St. 457); *Ex parte Mure* (2 Cox, 63).

Mr. Jessel, Mr. Bayley and Mr. G. O. Morgan, for Mr. Wright.

Mr. Selwyn, in reply. *Wheatley v. Bastow* (7 De G. M. & G. 272).

Nov. 9. THE MASTER OF THE ROLLS [Sir John Romilly]. The real question to be determined is, whether the acts of Wright, subsequently to the execution of the indenture of 23d of March 1853, and the arrangement he entered into with the husband's assignees in bankruptcy, have discharged the Plaintiff from her suretyship.

I have no hesitation in declaring my opinion to be that, unless the Defendant Wright has forfeited the right he had under these deeds, the reversion of the Plaintiff was and is liable to make good any advances made by him.

The real question is whether the subsequent acts of the Defendant have deprived him of that right. The Plaintiff's counsel contend that the effect of the deed of the 23d of March 1853 is merely to make the Plaintiff a surety for so much as the husband's property would not produce for the liquidation of the sums paid by Wright, and that the arrangement made between the [137] Defendant Wright and the assignees in bankruptcy of the Plaintiff's husband, in January 1854, is a release of such suretyship, inasmuch as the effect of it was that the whole of the husband's property was not applied, in the first instance, in discharge of what was due to the Defendant. To determine this, we must examine the transaction itself. It was occasioned by the following circumstances:—On the 25th of November 1853 the Defendant Hardwick signed a declaration of insolvency, and, on the following day, he was adjudicated a bankrupt. The effect of this was that the deed of 23d of March 1853, which was in my opinion an act of bankruptcy, became invalid as against the creditors of the bankrupt, who were then entitled to avail themselves of the deed as an act of bankruptcy. If this be a correct view of the case, then the assignees of Mr. Hardwick might have taken possession of the whole property and left the Defendant Wright without any redress or repayment, except so much only as he might be able to obtain on proof of his debt under the bankruptcy.

In this state of things, the arrangement of the 9th of January 1854 was entered into. I am of opinion that, by this arrangement, the Defendant Wright gave up nothing that he could have retained; and if this be so, it cannot be said that he gave up or lost a security, the value of which could not be ascertained, and that, by reason thereof, the surety is discharged either *in toto* or *pro tanto*. If the primary security proves to be worthless, whether it was so originally, or whether it became so afterwards, this does not discharge the surety, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor.

In this case, I am of opinion that no act of the De-[138]-fendant, Wright, has made the assignment of the goods and lease of the Plaintiff's husband valueless. What, in truth, did make it so was, the declaration of insolvency by Mr. Hardwick on the 25th November following, which enabled his creditors to avail themselves of that deed as an act of bankruptcy.

It is true that Mr. Wright did not contest the matter with the assignees, but no man is required to litigate a question where the law is against him; and the real question on this deed is, whether it was or was not an act of bankruptcy which could be set aside by the creditors of the bankrupt. If he has mistaken the law, he must take the consequences; but, in my opinion, he was rightly advised as to the character of that deed, and the course he took was the best, not merely for himself but also for the Plaintiff, as by it he got (which, however, as events have turned out, must be admitted to have been valueless) the contingent reversionary interest in the testator's property given to the Plaintiff and not settled for her separate use, which, in the event of such reversionary interest falling into possession during the life of the Plaintiff's husband, would have belonged to the assignees.

I am of opinion, therefore, that the arrangement made by Mr. Wright with the assignees of Mr. Hardwick, did not occasion any loss or injury to the original security

given by Mr. Hardwick by the deed of March 1853; consequently, that the Plaintiff was not prejudiced by such arrangement, and that the property which she conveyed, as a further security to Mr. Wright for his advances, remained still applicable for that purpose.

There is still another circumstance which, although [139] it has not formed any part of the grounds on which I have found myself compelled to decide against the Plaintiff, ought not to be passed by without notice, and it is this:—The arrangement, made by the Defendant Wright with the assignees of Hardwick, took place early in January 1854; the sale of the Plaintiff's reversionary interest in the £5000 took place in February 1856; both these facts were well known to the Plaintiff and her advisers at the time when they occurred. All that is known to them now was known to them then, yet no step was taken, either to prevent the sale of the reversion or to insist on the release of the Plaintiff's property, by reason of the arrangement with the assignees in January 1854, until the reversion fell into possession, by the death of the tenant for life in February 1863, and then, nine years after the transaction complained of and when the evidence of assent or dissent becomes less trustworthy, and in October 1863, this bill is filed.

Absence from this country or insufficient means does not justify this delay, and this delay would entitle the Defendant Wright to insist that, in any conflict of evidence where the balance is even, the time which has elapsed is an element which ought to preponderate in his favour. However, I have treated the matter as if the arrangement of January 1854 had been recent and entered into against the will of the Plaintiff.

The decree will be (at the option of the Plaintiff) either to have the bill dismissed, or to direct an account of the receipts and payments of the Defendant Wright, in the ordinary form; but, in either case, the Defendant Wright must have the costs of the suit up to the present time.

[140] WHITWELL v. ARTHUR. Nov. 7, 10, 1865.

A. B. having been rendered incapable of performing his partnership duties, his partner filed a bill against him for a dissolution. Afterwards and before the hearing, A. B.'s health improved: Held, that there was not sufficient ground for dissolving the partnership, and all proceedings were stayed, with liberty to apply.

The Plaintiff and Defendant entered into partnership as chemists and druggists for a term, of which about two years remained unexpired.

In January 1864 the Defendant was seized with paralysis, which incapacitated him from attending to his duties as a partner.

In November 1864 the Plaintiff instituted this suit to dissolve the partnership in consequence of the incapacity of the Defendant.

Mr. Woodroffe, for the Plaintiff, insisted that the state of the Defendant's health rendered it impossible for the partnership business to be continued, and that the nature of the business rendered it perilous to the Plaintiff to have it attended to by an incompetent person. That the Plaintiff was therefore entitled to have the partnership dissolved and the accounts taken.

Mr. Selwyn and Mr. Eddis, for the Defendant, argued that the Defendant's inability had been temporary, that his health was now restored, and that consequently that there was no sufficient ground to justify a dissolution of the existing partnership.

Nov. 10. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a suit for the dissolution of a partnership on the ground of the permanent incapacity of the De-[141]-fendant. The Defendant was seized with a paralytic attack in January 1864, and in November following the bill was filed. I think, on reading the evidence, that during the whole of this interval the Defendant was incapable of performing the duties which he had covenanted to perform by the articles of partnership. But I think he has improved in health since that time, and that in June 1865, down to which time the medical evidence extends, he was competent to perform his duties, though I cannot say he was then perfectly competent or as competent as he had been

previous to his illness. I think, on the evidence, that there is not sufficient to justify the dissolution of the partnership, and the medical men look forward to an improvement in his health.

I cannot dissolve the partnership, but the Plaintiff was entitled to file this bill, for he might reasonably think that the Defendant would not be able to perform his duties. I at first thought of dismissing the bill without costs; but as a new suit might become necessary, I think that the proper course would be to stay all further proceedings and to reserve liberty to apply. If the Defendant should continue to improve, this would be the same as dismissing the bill without costs; but if his health should fail, the result of this order would render the expense of another suit unnecessary.

Therefore, stay all further proceedings in this suit, with liberty to apply. NOTE.—See *Sadler v. Lee*, 6 Beav. 327; *Leaf v. Coles*, 1 De G. M. & G. 171; *Besch v. Frolich*, 1 Phil. 172.

[142] CHEESMAN v. PRICE. PRICE v. CHEESMAN. Nov. 13, 14, Dec. 4, 1865.

By articles of partnership for a term between A. and B., all bills were to be signed by A. only. B. drew a bill on a customer for the amount of his bill. Held, that this was not a substantial violation of the articles.

The failure of one partner to enter in his accounts partnership moneys received by him is, of itself and independent of any provisions in the articles of partnership, a sufficient ground for the other partner dissolving.

By articles of a partnership for a term, each partner was to keep proper books of account and to enter all his receipts, and in default the other might dissolve the partnership. One partner had made small omissions in seventeen instances, which, in the aggregate, amounted to £9, 10s. Held, that this justified the other in dissolving the partnership.

In 1860 the Plaintiff, Mr. Price, a tailor, took the Defendant, Mr. Cheesman, into partnership. By the articles, the partnership was to continue ten years, determinable as aftermentioned. Price was to be entitled to three-fourths of the profits, and Cheesman to one-fourth.

The 9th article was as follows:—

“That all cheques, bills, notes or other negotiable securities, which may be given, signed, accepted or indorsed on behalf of the partnership, shall be signed, accepted and indorsed in the name of the firm by Price only, or by Cheesman, if previously authorized to do so by Price by some writing under his hand.”

By the 10th, Price was to be at liberty to draw £36 monthly, and Cheesman £12 monthly, out of the profits.

The 14th, “Each of the partners shall keep or cause to be kept good and proper books of account, in which shall be entered all the receipts and payments, dealings and transactions of the partners, respectively, in the course of the partnership business, in the manner usually adopted in a business of the like nature, and [143] Cheesman shall, from time to time, furnish Price with proper memorandums of all the receipts and payments, dealings and transactions of him, Cheesman, in the course of the business, in order that the same may be duly entered.”

The 18th provided (amongst other things) that if Cheesman “should wilfully neglect or refuse to keep just and proper accounts, as thereinbefore provided, or should do anything repugnant to clauses 6 or 9,” Price should be at liberty to dissolve the said partnership by giving a written notice, and thereupon the said partnership should, from the time of giving or leaving such notice, cease and determine.

The 20th article provided that in case of a dissolution by notice given by Price to Cheesman, under clause 18, Cheesman should be considered to have quitted the business for the benefit of Price. On breach of Article 18 Cheesman was to pay Price £1000 for liquidated damages.

The partnership commenced in July 1860, and the Defendant was principally employed in attending in the country.

On the 21st of July 1863 Price, alleging that Cheesman had violated the above articles, gave him a written notice declaring the partnership dissolved.

The particulars of these violations are stated in the judgment.

In April 1864 Cheesman instituted the first suit for a dissolution of the partnership, and to have the accounts taken.

[144] In June 1864 Price filed his bill for a declaration that the partnership had been dissolved on the 21st of July 1863, and for taking the accounts on that footing, and claiming £1000 for liquidated damages under a clause in the articles, but which was however abandoned at the hearing.

Mr. Selwyn, Mr. Southgate and Mr. Everett, for the Plaintiff. *Parsons v. Hayward* (31 Beav. 199, and 8 Jur. 924); *Kemble v. Farren* (6 Bing. 141); *Betts v. Burch* (4 Hurl. & N. 506).

Mr. Jessel and Mr. Hemming, for Price.

Mr. Selwyn, in reply. *Blisset v. Daniel* (10 Hare, 493).

Dec. 4. THE MASTER OF THE ROLLS [Sir John Romilly]. The real question in this case is whether, under the articles of partnership or otherwise, Mr. Price was justified in sending the notice, and thereby causing a dissolution of the firm. The principal charges made by Mr. Price against Mr. Cheesman relate to the accounts kept by him. The charges are, first, that he violated clause 9 of the articles, by endorsing bills on behalf of the partnership; secondly, that he has omitted to enter in his accounts sums received by him; and, thirdly, that he did not remit at once to the firm in London the sums received by him in the country, but deducted therefrom his expenses and the sums he was allowed to draw in respect of his share of the profits.

[145] In order to be able to judge of this matter satisfactorily, I have been compelled to go into the accounts, as well as I could, upon the affidavits, with the help of the ledgers of the firm. I think that the counsel for Mr. Price push the construction of the 9th clause of the partnership article too far, when they contend that it was a violation of it for Mr. Cheesman to draw a bill upon a customer, to be accepted by that customer for the amount of his account, when the customer was unable or refused to pay the amount due from him in cash, but consented to give a bill for it. It is to be remembered that Mr. Cheesman was acting as the collecting partner in the country, and the necessity of sending to London to have such a bill drawn, and of having it remitted to him by post, would have occasioned serious delay and some expense, and would, in the end, have resulted in the same conclusion; while the delay might have occasioned the loss of the opportunity of obtaining the bill, besides the expense of keeping Mr. Cheesman at the place where the customer resided for two days, during which time he might have had no more business to transact there. There is a marked difference between drawing a bill, to be accepted by a stranger, for the purpose of enabling the drawer to raise money on it, and drawing a bill, to be accepted by the customer of the firm, for the amount of his account. I think, therefore, the fact of Mr. Cheesman having drawn these bills was not a violation of the 9th clause; but it was essential that the bill should be transmitted at once to the bankers of the firm for the purpose, if not of being negotiated, at least of being presented for payment at maturity, and for taking the necessary proceedings upon it if it was not duly honoured. I do not think, therefore, that much stress ought to be laid upon this circumstance of the bills being drawn by Mr. Cheesman.

[146] The charge that Mr. Cheesman deducted his expenses and his monthly share of the profits out of the sums received by him, instead of remitting the sums entire to London, is, in my opinion, a charge with more substance in it, but not one of so serious a character as would, in my opinion, have justified the steps taken by Mr. Price, although it was very desirable, in order that the accounts should be kept clear and distinct, that the regular course should have been adopted.

But the charge that sums were received by Mr. Cheesman, which were never entered in the accounts, is one of much more serious character, and one which, in my opinion, affords ample foundation to justify Mr. Price in giving notice of dissolution of the 30th July 1863, even independently of the articles of partnership.

I have endeavoured to investigate this matter as well as I could. I have been unable entirely to make out the state of the case as to some of the items, but, as to the others, the evidence is strongly inculpatory of the course pursued by Mr. Cheesman. In many cases Mr. Cheesman charged himself with having received a less sum than he actually received. In Mr. Price's affidavit seventeen instances are given, amounting in the whole to £220, 19s. 6d., charged by Mr. Cheesman as received by him, while, in fact, he received £230, 9s. 6d. After a careful examination of the books and the evidence, this appears to me to be proved. It is suggested that the difference, which is but £9, 10s., is either trivial or to be explained by the discount allowed to customers; but the real objection does not lie in the amount, but in the system which it reveals and the want of confidence which one partner must necessarily feel towards another who is capable of thus conducting the accounts. When such irregularities are possible, it [147] must necessarily be productive of most injurious consequences to the business, particularly errors in sending in accounts to customers, than which nothing I believe is more likely to injure a tradesman. Many attempts are made by Mr. Cheesman to explain this, on the ground of discount and the like; but these attempts, in my opinion, wholly fail, and the irregularity in his accounts is, in my opinion, an established fact, even upon his own shewing. But were it otherwise, nothing can justify the omission to add some statement in the accounts, to explain why it was that the larger sum appearing to be due from the customers was discharged by the payment of the smaller one. This fact would alone, in my opinion, have justified Mr. Price in putting an end to the partnership.

The case, however, against him does not rest here; there are numerous cases of money received by him and wholly omitted from his accounts: and this is established in many cases by his own admission. In his answer, he admits having received £7 and £3, 1s., which he did not account for, and £12, 10s. which he did not account for till six months afterwards. He also admits having received £7 from Mr. Berridge, for which he did not account. He tries to explain this by making it appear that it was subsequently paid as part of a larger and another sum; but even if this were true, it was highly objectionable. He admits having received £14, 15s., which he did not account for until the customer, in answer to an account sent in to him by the firm, alleged that he had paid it. He admits a similar transaction as to £11, 2s. with a customer of the firm; and he admits having received £2, 12s. due, not to the partnership, but to Mr. Price before the partnership began, for which he did not account at all. In all these cases he offers ingenious excuses to explain why the circumstances of [148] the payment and the receipt escaped his recollection; but, in truth, no circumstance can excuse a partner for forgetting the receipt of money due to the partnership. If it only occurred once, it would be a very serious error on the part of a partner, but when this failure of memory is so frequent as to become almost systematic, it makes it impossible for any person to act with him in confidence as a partner, or to place any reliance in him or in his accounts. I regret to say that, from the examination I have made of the accounts, I believe that about £90, or something near that sum, can be proved to have been received by Mr. Cheesman, and either not accounted for at all by him, or not until the customers asserted they were prepared to establish the fact of payment to him. It is obvious that no firm can safely proceed upon such a footing; and I have no hesitation in saying, upon this ground alone, that Mr. Price was perfectly warranted in putting an end to the partnership as soon as he discovered what the state of affairs was. It is due to Mr. Price to say that he had previously, over and over again, remonstrated with Mr. Cheesman as to the irregular state of his accounts, and the impossibility of trusting to them. I am of opinion, therefore, that the notice of the 30th of July 1863 was a valid notice, and that the partnership between Mr. Price and Mr. Cheesman was then dissolved, and I will make a declaration to that effect.

The consequences are that Mr. Cheesman cannot, after the 30th July 1863, claim one-third of the profits, but he is entitled to an inquiry as to how much of the capital employed in the business since that time belong to him, and to a declaration that he is entitled to such a proportion in the net profits, after deducting all expenses, as his share of the capital bore to that of Mr. Price.

[149] LOVEJOY v. CRAFTY. Dec. 20, 21, 1865.

A testator, having made gifts to the three children of his first marriage, gave his residue to his wife for life, with remainder to the five children of his second marriage (by name) "and such other child or children as should be living at the time of his death." Held, on the context, that the children of the first marriage were not included in the residuary gift.

The testator had three children by his first wife, namely, William, Margaret and Eliza. By his second marriage he had five children, consisting of four sons and one daughter, namely, Warlters, Emma Maryann, Edward, Alfred and Francis.

By his will, dated in 1853, the testator bequeathed to his eldest son, William, "as a mark of respect, the sum of £20, I having some years since given him leasehold estate in the Kent Road as his share of my property."

He then devised a freehold estate to his daughters Margaret and Eliza.

And he devised all the residue of his real and personal estate to trustees, in trust for his wife for life, and after her death to sell and divide amongst Sarah Robson (the daughter of his wife by a former husband) and his children Warlters, Emma, Edward, Alfred and Francis "and such other child or children as shall be living at the time of my decease, or shall be born in due time after my decease, share and share alike," the share of Sarah Robson to be paid to her separate use. "The share or shares of my daughter or daughters to be considered as vested upon her or them attaining the age of twenty-one or marriage, which shall first happen," for their separate use, "and the shares of my said sons to be considered as vested in them upon their [150] attaining their respective ages of twenty-one years, with benefit of survivorship and accruer."

At the date of his will, the children by the first marriage were all adults; but those of the second marriage were all infants.

The testator died in 1854, and all the children survived him; his widow was still living.

The question was, which of the children participated in the residuary estate.

Mr. Baggallay and Mr. Roberts, for the three children of the first marriage, contended that the words "and such other child or children as shall be living at the time of my decease," included all the testator's children then living, and that the three children of the first marriage shared in the residuary estate. That it was plain that, if the second wife had died, the children of any subsequently taken wife would have taken, and, if so, those of the first marriage could not be excluded. That words of exclusion must be precise and certain, and that the circumstance that persons take under a distinct gift does not exclude them from coming in under a subsequent gift to a general class.

They cited *Peppin v. Beckford* (3 Ves. 570); *Barrington v. Tristram* (6 Ves. 348); *Ex parte The Earl of Ilchester* (7 Ves. 368); *Urquhart v. Urquhart* (13 Sim. 613); *Pearce v. Vincent* (1 Myl. & K. 800).

[151] Mr. Selwyn and Mr. Speed, for the purchaser of a share.

Mr. Hobhouse and Mr. Walford, for the children of the second marriage. The context shews that the testator did not intend to include the children of his first marriage as legatees of the residue; he had made a distinct provision for them. The words "other child or children" must to some extent be limited, for as they stand they would apply to the children of any other person. The word "my" must, at all events, be introduced into the gift. This shews that the gift was not unlimited. The other provisions relating to the residue do not apply to the Plaintiffs, who were adults at the date of the will.

Mr. Baggallay, in reply

Dec. 21. THE MASTER OF THE ROLLS [Sir John Romilly]. It was well observed that the words "such other child or children" must be restricted, and the question is, whether they are to be restricted to the children which are last mentioned or to all the testator's children. I am of opinion that they are restricted to the children of the second marriage, that they are, as it were, words *ejusdem generis*, and that the same sort of rule is to be applied to them as in those cases where the testator

enumerates particular species of personal property, and then adds some general words which the Court holds to be restricted to things similar to those previously enumerated. I am struck with this:—that he specifies by name all the existing persons who were to take, and there can be no reason why, if he had intended the three children by the first marriage to take in conjunction with [152] those of the second marriage, he should not have specified them by name, as well as the five whom he mentioned. He mentions the five, and then says, “and such other child or children as shall be living at the time of my decease, or shall be born after my decease.” I think that means the children of the class last mentioned, and that if he had intended the words “other children” to include the children of the first marriage, he would have specified them by name. The difficulty I have had has arisen from the manner in which he has dealt with the general expression in the subsequent words. He says “the share or shares of my daughter or daughters to be considered as vested upon her or their attaining the age of twenty-one years.” Now, that is in favour of the view I have already expressed, because by the second marriage he had but one daughter, and if he had intended to include the three daughters of the first marriage it is probable he would not have anticipated there being one daughter, in the singular number, to take. But he goes on to say, “and the shares of my said sons to be considered as vested in them upon their attaining their respective ages of twenty-one years,” and “in case any of my children shall not have attained the age of twenty-one years when their shares shall become divisible, I direct my trustees to invest such shares in the purchase of stock in the public funds, until they shall attain twenty-one years, and upon their attaining that age, or any of my daughters marrying, to pay or transfer their shares to them accordingly, and in the meantime to apply the dividends for their maintenance.” Now, undoubtedly, the sense seems to be very much extended here, for he not only uses the words “any of my daughters,” but “any of my children.” Still, having come to the conclusion, on the former part of the will, that he only meant the children of the second marriage, I think I can with propriety say that these expressions are to be [153] attributed to the children he had previously spoken of, and that he refers to the class with whom he was dealing. This explains why he anticipated the possibility of their dying before they attained twenty-one and during their infancy.

The same observations apply to the subsequent power to the trustees to raise £200 out of the portion of “any of my children” for “such child or children’s” advancement. That clause only applies to the children during their infancy, and the three children of the first marriage were not infants at the time, and therefore the clause is not applicable to them. I am of opinion that this also shews that the “other children” were the children of the second marriage.

[153] *In re STRAND MUSIC HALL COMPANY (LIMITED). Ex parte EUROPEAN AND AMERICAN FINANCE COMPANY (LIMITED). June 12, 27, 1865.*

[S. C. affirmed on appeal, 3 De G. J. & S. 147; 46 E. R. 594; 13 L. T. 177; 14 W. R. 6. See *Ross v. Army and Navy Hotel Company*, 1886, 34 Ch. D. 49. Distinguished, *In re Johnston Foreign Patents Company* [1904], 2 Ch. 239.]

Where directors of a public company have entered into an informal agreement, within the limits of their power, it is in equity binding on the company, and this Court will give effect to it.

Whether bonds issued by a public company, in which the names of the obligees are left in blank, are valid, *quære*.

The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed.

The 78th clause of articles of association limited the power of the directors of borrowing to £10,000, unless authorized by a “general meeting.” By the 35th clause, a “special meeting” might authorize the borrowing of such sums as it thought fit.

Held, that the directors might be authorized to borrow beyond £10,000, either by a general or a special meeting.

The Strand Music Hall Company (Limited) was incorporated in 1862, and, by the 78th article, the directors were empowered to borrow on mortgage or by [154] bonds any sum not exceeding £10,000, unless authorized by a *general meeting* to borrow a larger amount.

By the 35th article the company in *special meeting* might authorize the borrowing of such sums of money as it might think fit.

The directors having borrowed £9200, the company, at a *general meeting* held on the 1st of February 1864, empowered the directors to borrow a sum not exceeding £30,000.

On the 7th of April 1864 the Credit Mobilier Company lent the Strand Music Hall Company £5000 on the security of 200 bonds of the Strand Music Hall Company, £50 each (representing £10,000), and on the security of the directors. These bonds were issued with the names of the obligees in blank. Eleven of these bonds (£5500) were sold by the Credit Mobilier Company, and the names of the purchasers were then inserted as the obligees in the bonds.

Before the 10th of October 1864 all the interest of the Credit Mobilier Company had been transferred to the European and American Finance Company, and on the 10th of October 1864 an agreement was duly executed between the Strand Music Hall Company of the first part, the six directors of it of the second part, and the European and American Finance Company of the third part, whereby the remaining 189 bonds of £50 each, constituting a first charge on all the property of the Strand Music Hall Company, were made liable for the payment of £5000 to the latter company. The price of the other eleven bonds was paid over.

The Strand Music Hall Company was ordered to be [155] wound up, and the European and American Finance Company claimed to be specialty creditors by virtue of the bond.

Mr. Jessel and Mr. E. Romilly, for the European and American Finance Company. It will be contended that the resolution of the 1st of February 1864 to increase the borrowing powers of the directors is invalid, by reason of its having been made at a *general*, and not at a *special*, meeting of the shareholders. That is not so, they acted under the power given by the 78th article, and not under the 35th, and these powers are cumulative. Secondly, it is said that the bonds have no validity, because the names of the obligees were omitted; *Taylor v. The Great Indian Peninsular Railway Company* (4 De G. & Jones, 559). The answer is that an implied power was given, by the deed under seal, to insert the names of the obligees. At all events there is an agreement on the part of the Strand Music Hall Company to give valid bonds as a security; this agreement the claimants are entitled to have made good in equity.

The agreement of the 10th of October 1862 is a valid equitable contract, and this Court considers that done which has been agreed to be done, and it will give effect to imperfect instruments executed for a valuable consideration. This is laid down clearly by Lord Redesdale (p. 116). He says, "where parties, meaning to create a perfect title, have used an imperfect instrument, a feoffment without livery of seisin; a bargain and sale without enrolment; a surrender of copyhold not presented according to the custom of the manor, Courts of Equity have considered the imperfect instrument as evidence of a contract for making a perfect instrument, and have remedied the defect even against judgment creditors."

[156] Mr. Baggallay and Mr. Lawson, for the official liquidators of the Strand Music Hall Company. The acts of the directors were *ultra vires*, and the shareholders are not bound by this transaction. The power of the directors to borrow was limited to £10,000, and even then they could only exercise it by giving bonds to the extent of the money advanced; they were not justified in giving bonds to the extent of £10,000 to secure a debt of £5000. Secondly, the bonds, being in blank, were void, for there was no one to whom they were made payable, no obligation to anyone, and they could not be altered by the insertion of a name after they had been executed by the obligors. The object was to commit a fraud on the revenue and avoid the transfer stamp. If they be void, the agreement constitutes no charge for the money

advanced. Lastly, the 35th article of the association is positive that the borrowing powers can only be authorized at a *special* meeting of the shareholders, and therefore the excess beyond £10,000 is clearly void. They cited *Peto v. The Brighton, &c., Railway Company* (1 Hem. & Mil. 468); *Re The British Provident Company* (10 Jur. 713).

Mr. Elderton, for the bondholders.

Mr. Jessel, in reply.

June 27. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case, the European and American Finance Company claim to be specialty creditors of the Strand Music Hall Company (Limited) for two sums, one of £5000, together with interest thereon at £10 per cent. [157] per annum from the 16th of March 1865, and another of £2700, together with interest thereon at the same rate from the 17th of March 1865.

The first question to be decided is whether the directors had power to borrow this amount. The second question is, assuming the first question to be decided in favour of the claimants, whether the directors of the Strand Music Hall Company have, by the transaction in question, created a valid specialty debt to the amount claimed. There is no question but that the amount was duly advanced to or for the use of the Strand Music Hall Company, the question is whether the claimants are specialty or only simple contract creditors.

The first question is one of construction on the articles of association of the Strand Music Hall Company, and it is whether the directors had power to borrow beyond the sum of £10,000.

The company had, in fact, previously to the transaction in question on this summons, raised £9200, and, consequently, if they had no power to raise more than £10,000, the loan, in respect of which the present claimants seek to be specialty creditors, would have been invalid, except to the amount of £800.

The 78th clause of articles is to be found under the head of "Increase and decrease in capital," and is in these words, "The company *in special meeting*" (which is defined to mean "an extraordinary special general meeting") "may authorize the borrowing of such sum or sums of money, and on such terms and conditions, as they may think fit; and may also, by the resolution of a *special meeting*, increase the capital of the company by the issue of new shares."

[158] On the 21st January 1864 notice was given of a general meeting to be held on the 1st of February following. The general meeting was held accordingly, and a resolution was proposed, empowering the directors to borrow a sum not exceeding £30,000 according to clause 78. This was resisted, a poll was demanded and taken on the 8th of that month, when the resolution was carried by a majority of the shareholders of the company.

The resolution, if it required confirmation, has not since been confirmed by any subsequent meeting of the shareholders.

If the matter rested there, no question as to the validity of the power to raise money, to the extent of £30,000, could arise. But the 35th clause of the articles is in these words:—The directors "may borrow in the name, or otherwise on behalf of, the company, such sums of money as they may from time to time think expedient, either by way of mortgage of the whole or any part of the property of the company, or by bonds or debenture notes, or in such other manner as they may deem best; provided, nevertheless, that the aggregate of the principal money to be so borrowed shall not at any one time exceed £10,000, unless the borrowing of a larger amount shall have been previously authorized by a *general meeting*, in which case the directors may borrow to such an extent as is so authorized."

This claim, it is contended, is inconsistent with clause 78, which requires that a special meeting should be called to authorize the borrowing of any sum exceeding £10,000, and that no special meeting having been called for that purpose, the directors had no power to borrow more than £10,000.

[159] On referring to the interpretation clause, little assistance is derived therefrom; a "general meeting" is defined to mean an "ordinary general meeting;" an "extraordinary meeting" means an "extraordinary general meeting," and a "special meeting" to mean an "extraordinary special meeting." It is obvious that these definitions leave the matter exactly where it was.

The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed. I think that I must, if possible, give effect to both these clauses in the articles in question; and I also think that this may be done by declaring that by the 78th clause power is given to a general meeting to authorize the directors to borrow a sum exceeding £10,000, and that by the 35th clause power is also given to a special meeting of the company to authorize the borrowing of such sums of money as the meeting shall think proper. But for the 78th clause, such power could only be exercised by a special meeting; but for the 35th such authority could only be given by a general meeting; but by the combined effect of those two clauses power is given either to a special meeting or to a general meeting to raise money; and though this is not very skilfully expressed in the articles before me, there is, in my opinion, no other construction of which these, the clauses in question, are susceptible.

Various other clauses were read and commented upon, but, in truth, they none of them control or modify the effect of either of the clauses in question. There is no clause requiring a subsequent confirmation [160] of such a resolution, and no such confirmation was, in my opinion, essential to its validity.

The next question is, have the directors, by what has taken place, created a valid specialty debt of the company, and to what extent? The way in which they endeavoured to accomplish this was as follows:—On the 7th April 1864 a deed was executed by the Strand Music Hall Company of the first part, the chairman and five other directors (by name) of the second part, and the Credit Mobilier Company of the third part. By this deed the Credit Mobilier Company agreed to advance £5000 to the company for six months, with interest at £10 per cent. per annum, on the security of 200 mortgage bonds of the company for £50 each, and, secondly, on two joint and several promissory notes of the six directors for £2500. The validity of these bonds is disputed, first, because the name of the obligee is not stated in the bonds, and, secondly, because it is contended that it was *ultra vires* to issue bonds for £10,000 as a security for only £5000 advanced.

Eleven of the bonds, so deposited, were sold by the Credit Mobilier Company, and on the sale, the name of the purchaser was inserted as the obligee in the bond.

In October 1864 the Credit Mobilier Company required, if they continued their loan, certain conditions and a bonus of £400, which were accepted, with a modification, by the directors of the Strand Music Hall Company. This new plan was carried into execution by an agreement of 10th October 1864, duly made and executed by and between the Strand Music Hall Company of the first part, the same six directors of the second part, and the European and American Finance Company of the third part. It was agreed that the [161] agreement of 7th April 1864 with the Credit Mobilier Company should be renewed and confirmed between the parties to the said agreement.

1stly. That the loan was to be for six months from the date of the agreement, with interest at £10 per cent. per annum, together with a bonus of £400, and commission of £3, 10s. per cent. on sale of shares hereinafter mentioned.

2dly. The deposit by the Strand Music Hall Company of 189 mortgage bonds of £50 each, representing £9450, and forming part of £25,000 mortgage bonds, constituting a first charge on all the property of the Strand Music Hall Company with the Credit Mobilier Company by way of collateral security; and

3dly. Two joint and several promissory notes for £2500 each, by the said directors; and if the notes should not be paid at maturity, it should be lawful for the European and American Finance Corporation to sell the mortgage bonds, and out of the proceeds pay themselves the £5000, with interest and all the costs, together with a commission of £3, 10s. per cent. on the amount of such sale.

The first point to be considered is, whether this transaction creates a valid charge on the property of the company, for the sum of £5000. Although there be considerable informality in the instrument itself and in the bonds given, still I am of opinion that this creates a valid charge upon the property of the company. Assuming that I am right in the first point, and that the Strand Music Hall Company had the power to raise this money, and consequently to give a valid charge upon their

property, I am of opinion that they have endeavoured to do so, and that the deed executed [162] being for valuable consideration, they have effected that object. I think this rests upon the principle of the cases insisted upon by counsel, and referred to in the passages cited to me from Lord Redesdale's book. The Strand Music Hall Company has, in this instance, by contract for value, given a right to the Credit Mobilier Company, and through them by transfer and also directly to the European and American Finance Company, to obtain a valid charge on all their property. If this instrument be incomplete at law, this Court will interfere to carry the contract into execution, and complete and make effectual the object of both parties. If the Strand Music Hall Company had proved a flourishing concern, and had refused to complete this agreement, this Court would, on a bill filed for that purpose, have compelled them to do so. The rights in equity are, in my opinion, complete when the agreements were executed, and the fact that the company has failed, instead of becoming prosperous, cannot affect this right. I think, therefore, that a valid mortgage in equity on the whole of the property of the Strand Music Hall Company, for the sum of £5000, was effected.

On the question of the frame of the bonds, I give no opinion as to their validity; but I am disposed to think that the suggestion of an implied authority having been given to the holder of the bonds to insert, on behalf of the Strand Music Hall Company, the name of the obligee is not sufficient to render them valid.

The objection that the bonds to the nominal value of £10,000 were given to secure £5000 has not, in my opinion, any weight. It is frequently, and indeed usually, the case that the property pledged exceeds the value of the charge; but this does not render the trans-[163]-action invalid, independently of there being some limitation of authority in the power which they profess to exercise. On turning to this authority, I do not see anything in the articles of their association to limit this authority, or to make the case of this company, or of the directors of it, different in this respect from that of any ordinary individual. I am, therefore, of opinion that the European and American Finance Company have a valid charge on the property of the Strand Music Hall Company to the extent of the £5000 advanced by them.

NOTE.—Affirmed by the Lords Justices the 3d of August 1865. [3 De G. J. & S. 147.]

[163] *Re Fox's Will.* July 22, 24, 1865.

Under a bequest to two successively for life, with remainders to the survivors of a class: Held, that the survivorship had reference to the death of the last tenant for life.

The testator gave "all his goods and effects to his widow Esther Fox, *durante viduitate*, and afterwards to his sister Elizabeth Allen for life." He then proceeded thus:—"And it is my mind and will that after the death of my sister Elizabeth Allen, the residuary effects shall go to my surviving brothers and sister and their children, to be divided equally between them."

The testator died in 1795, he left his widow and three brothers and a sister surviving him.

His sister Elizabeth Allen died in 1810, and the widow in 1859.

The three brothers and the sister of the testator died in the interval between the death of the sister and that of [164] the widow; two of them had children, some of whom were still living.

The question was, who, under the above gift, were now entitled to the testator's residuary estate, which had been paid into Court under the Trustee Relief Act.

Mr. Edward F. Smith, for the Petitioners, argued that all the brothers and sisters who survived the testator (except Elizabeth) shared in the residue. He referred to *Shailer v. Groves* (6 Hare, 162, and see 11 Jur. 485, and 16 L. J. (Ch.) 367), where the gift in remainder is stated to be to the "surviving brothers and sisters or their issue;" *Jarman on Wills* (2d edit. p. 69); *Evans v. Evans* (25 Beav. 81); *Kidd v. North* (3 De G. M. & G. 951).

Mr. E. Romilly, Mr. C. E. Fox and Mr. Forbes, for the Respondents, argued *contra*, that the survivorship had reference to the death of the widow, the last tenant for life; *Atkinson v. Bartrum* (28 Beav. 219); and secondly, that the word "surviving" did not apply to the "children."

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that this case is very nearly met by *Atkinson v. Bartrum* (*Ibid.*), which authority has been supported by the House of Lords. I think that the word "surviving" applies to the whole class of parents and children, and that the period of division was the [165] death of the last tenant for life, when the class was to be ascertained. The class consists of the brothers and sisters of the testator, and their children; and these three divisions constituted the class. To entitle any of them to take, they must survive the period of distribution, and, I think, they take *per capita*, and not *per stirpes*. The result is this:—As the sister did not survive the widow, the death of the widow is the period at which the survivorship is to be ascertained.

This is consistent with *Shailer v. Groves*; for if the word used by the testator in that case was "*or*," as reported in the "Law Journal" and the "Jurist," and not "*and*," as reported in the 4th Volume of Hare, still, as the brothers and sisters all died in the lifetime of the widow, the result was the same, and it made the expression substantially "*and*."

Take a declaration that the residuary personal estate is divisible *per capita* equally among such of any of the brothers and sisters of the testator (other than Elizabeth Allen) as survived his widow, and such children as survived her of any brother and sister of the testator. (Reg. Lib. 1865, A. fol. 1932.)

NOTE.—See *Knight v. Poole*, 32 Beav. 548; *Drakeford v. Drakeford*, 33 Beav. 43.

[166] CRAGGS v. GRAY. Jan. 12, 13, 1866.

The Court sanctioned the raising of money by mortgage of an infant's estate, but after expenses had been incurred by the intended mortgagee in investigating the title, the matter went off without his default. He was allowed his costs out of the estate.

Infants being interested in this case, the Court sanctioned the raising of a sum of money by way of mortgage of the estate. The proposed mortgagee incurred expenses in examining the title; but, before the transaction had been completed, a reversion fell in and the matter went off, without his default.

The mortgagee presented a petition to obtain these costs, so incurred by him.

Mr. Southgate and Mr. Hawkins, in support of the petition.

Mr. Stiffe Everitt, for the infants, resisted the payment. He argued that such costs were usually the subject of a special agreement, but that there had been none in this case.

Mr. Southgate, in reply.

Jan. 13. THE MASTER OF THE ROLLS [Lord Romilly]. I think the Petitioner must have his costs; the arrangement was, in substance, with the Court, and therefore the expenses of the investigation of title must be allowed.

Though I regret that the matter went off, I think that the costs must be allowed.

[167] FORRER v. NASH. July 12, 13, 15, 1865.

[S. C. 6 N. R. 361; 11 Jur. (N. S.) 789; 14 W. R. 8. See *Brewer v. Broadwood*, 1882, 22 Ch. D. 109; *Wylson v. Dunn*, 1887, 34 Ch. D. 577; *Lee v. Soames*, 1888, 59 L. T. 367; *Bolton Partners v. Lambert*, 1889, 41 Ch. D. 300.]

Where a person sells property which he is neither able to convey or to enforce a conveyance from other proper parties, the purchaser may repudiate the contract, and is not bound to wait to see if the vendor can induce some third person to join

in making a good title. The Plaintiff agreed to grant to the Defendant a lease for twenty-one years, with a right to re-let; but he had only a term of twenty years, and could not under-let without the consent of his landlord. The Defendant repudiated the contract. The Plaintiff afterwards filed his bill for specific performance, and, pending the suit, the landlord agreed to concur. Held, that the contract could not be enforced, and the bill was dismissed with costs.

By an agreement, dated the 2d of September 1864, the Plaintiff agreed to let to the Defendant the ground-floor, &c., of No. 2 Hanover Street "from Michaelmas Day 1864, with the right to a lease of the above-named premises for seven, fourteen or *twenty-one years*;" also with the right to re-let the premises, if he desired it, for any business that would not interfere with Mr. Forrer's business.

It turned out afterwards that Mr. Forrer, the Plaintiff, was himself a mere lessee of the property for a term, of which twenty and a quarter years only remained unexpired. It also appeared that his lease contained covenants restraining the carrying on upon the premises any trade or business except that of jeweller, and from under-letting the premises without the consent of his landlord.

This being discovered, a correspondence ensued between the solicitors of the parties, and on the 22d of September, the Plaintiff's solicitors having written a letter calling on the Defendant to perform his agreement, the Defendant's solicitors replied on the same day, remarking that the Plaintiff had not the power to carry out the agreement, and adverting to the deficiency of the term and to the restriction against under-letting the premises. They added, "Unless some communication [168] from you, in the course of to-morrow should alter our views, *we shall consider the whole negotiation at an end.*"

The Plaintiff's solicitors rejoined, insisting on the contract, and on the 23d of September the Defendant's solicitors replied, adhering to the former letter of the 22d of September, and declining any further negotiation.

The Plaintiff, on the 7th of October 1864 (before he had obtained the concurrence of his landlord in granting the lease which the Plaintiff had agreed to grant), filed his bill for the specific performance of the contract of the 2d of September 1864.

It appeared that so late as January 1865 the landlord had refused to join in the lease to the Defendant; but in April 1865 the landlord made an affidavit, in which he stated that he had been and was ready to do all acts necessary for enabling the Plaintiff to perform in all respects on his part the agreement with the Defendant.

Mr. Southgate and Mr. E. K. Karslake, for the Plaintiff. The contract is complete and binding, and the Plaintiff, who has now the power of performing it, is entitled to a specific performance. It is no objection, to a suit for the specific performance of a contract, that the title has been made perfect since the institution of the suit; it is frequently made perfect even after decree.

Mr. Selwyn and Mr. Eddis, for the Defendant. First, there was no concluded agreement between the parties; secondly, the Plaintiff had no power to perform the contract at the time when the Defendant annulled the contract, which he was entitled to do, and nothing sub-[169]-sequent can reinstate it. Time was of the essence of the contract, for the Defendant intended to devote the premises to his business purposes, which admitted of no delay and required the immediate possession of the premises.

July 15. THE MASTER OF THE ROLLS [Sir John Romilly]. In this case I am of opinion that the contract was perfectly good, and that it is well proved; but, under the circumstances, I am of opinion that the Plaintiff is not entitled to a decree for specific performance. The contract was for a lease for twenty-one years, with the right to re-let the premises; but the Plaintiff had only the power to grant a lease for about twenty years, and the assent of Mr. Leslie, the freeholder, was required to enable the Plaintiff to grant a lease for twenty-one years. In addition to this, the covenant in the Plaintiff's lease made it impossible for him to grant to the Defendant a "right to re-let the premises for any business which would not interfere with" the Plaintiff's business; the assent of the freeholder was also necessary for that purpose. As soon as the Defendant found that the Plaintiff had no power to grant the lease for which he contracted, his solicitor wrote, requiring the assent of the

landlord, and pointing out that the Plaintiff had not the power to perform his agreement. [THE MASTER OF THE ROLLS commented on the subsequent correspondence, and continued]:—It is important to observe that during this time the Plaintiff had no power to grant the lease, and therefore the case was like that of a person undertaking to sell a property which does not belong to him. It appears, from the correspondence, that the Defendant set the Plaintiff at defiance in the month of September 1864. It is also to be observed [170] that the shop was wanted by the Defendant for the purpose of carrying on his trade, he being desirous of keeping up his connexion; and if he had taken possession of the premises, he might have been turned out by the lessor at any time if he thought fit to dissent from the lease granted, and besides the Defendant could not have had the lease for the full term with the power to re-let, which he had contracted for.

The Plaintiff, at the hearing, says, I have now the power to grant you the lease, and for that purpose he produces an affidavit from Mr. Leslie, filed the 21st of April 1865, in which he says he is ready to do all acts necessary to enable the Plaintiff to fulfil his contract. If he had made this statement in September 1864, and the Plaintiff had communicated it to the Defendant, there would have been an end of the question. But how long was the Defendant to go on and wait to know whether the Plaintiff could make out a good title? The Plaintiff, it appears, had several interviews with the Mr. Leslie, the freeholder, and it is not contradicted that in January of the present year the Plaintiff could not make a title, for at that time Mr. Leslie refused to join in the lease, and it was not until April of the present year that he consents to do so. How long was this to go on?

The Plaintiff filed his bill in October 1864, and it is proved that in January 1865 he was not able to grant the lease he had agreed to grant, and he does not shew that he was ever able to complete his contract until April 1865. Is a person entitled to keep another in suspense during that time? if so, it may go on any length of time.

Besides this, it is to be observed that there was no [171] mutuality, for the Defendant could not have had a decree against the Plaintiff to perform the contract, because the Court does not attempt to compel a person to do what is impossible. The Plaintiff had no power to grant the lease, and neither the Court nor the Defendant could have compelled him to do so.

I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, "I will have nothing to do with it." The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold.

The bill must be dismissed with costs.

[171] WARD v. CARTTAR. Nov. 21, 23, 1865.

[S. C. L. R. 1 Eq. 29.]

A solicitor paying off a mortgage on his client's estate is considered as acting as his agent.

A mortgagee out of possession called on the tenant for his rent, who said he had laid it out in repairs. The mortgagee acquiesced in this; but there was no evidence of the tenant's accepting the mortgagee as his landlord or of anything like an attornment. Held, that there was not an entering into possession or into the receipt of the rent by the mortgagee.

The question in this case arose upon the Statute of Limitations (3 & 4 Will. 4, c. 27, ss. 2, 28), under the following circumstances:—

In 1828 the testator mortgaged a freehold house in Greenwich to Matthews and Pearson for a term of 1000 years for securing the sum of £40.

The testator died in 1829, having devised this property to his wife for life, with remainder to his sons, daughters and granddaughters.

[172] The widow died in April 1836, and, in the same year, Mr. Carttar was employed as solicitor of the legatees. An attempt was made, through him, to sell the house for the purpose of division, but without success. In August 1836 Carttar paid off the mortgagees (Matthews and Pearson), but took no assignment of the mortgage. He continued to receive the rents down to 1841 when he became bankrupt. The bankruptcy was annulled, and in January 1843 Carttar assigned all his estate to trustees, of whom Pugh was the survivor, for distribution amongst his creditors. Subsequently, in September 1843, the trustees obtained an assignment of the mortgage from Matthews and Pearson. They thereupon insured the house against fire, and applied to the tenant in possession for the rent in arrear. The tenant accounted for it, by saying that he had laid it out in repairs, and the trustees acquiesced in this, and at that time received nothing from the tenant. The first time they received any rent was on the 24th of September 1844, and they had since continued in receipt of the rent. There was no proof of any attornment by the tenant to the trustees or any acknowledgment of their title as his landlord prior to the payment of the rent on the 24th of September 1844.

This bill was filed in January 1864 by the persons entitled in remainder, under the will of the testator, against Carttar and Pugh to redeem the mortgage.

Carttar disclaimed, and Pugh, though admitting he had received sufficient to discharge the mortgage, insisted on the Statute of Limitations (3 & 4 Will. 4, c. 27) in bar.

Mr. Southgate and Mr. W. W. Cooper, for the Plaintiffs. The statute does not apply in this case, for Carttar [173] was never in possession in his own right, he was in as the mere agent for the Plaintiffs, and he never changed his character. In regard to Pugh, he was never in personal possession, except by the receipt of rent, and the first rent received by him was paid on the 24th of September 1844, which is less than twenty years before the filing of the bill. Neither the payment of insurance nor the demand of rent is a possession or receipt of rents required by the statute. The Defendant has been more than paid the £40 and interest, but we waive all these accounts, and ask a conveyance with costs.

Mr. Hobhouse and Mr. G. N. Colt, for Pugh. Carttar, from the time he paid the mortgage, was in receipt of the rents in the character of mortgagee, and not as agent, and there is no proof of his accounting to the Plaintiffs for the rents. He continued in possession until Pugh entered, for otherwise the possession was vacant. More than twenty years before the filing of the bill, Pugh called on the tenant for his rent; the tenant accounted, and the amount was allowed by Pugh to the tenant for repairs. This was an acknowledgment of his title and equivalent to the payment of the rent itself. The possession of the tenant was that of the landlord, and, by this attornment to Pugh, he entered into possession.

Mr. Bilton, for Carttar, asked for costs.

Mr. Southgate, in reply.

Nov. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. This is a bill for redemption, and the defence set up is twenty years' adverse possession by a mortgagee in pos-[174]-session. The subject of the suit is a house called No. 9 Union Street, Greenwich, which was mortgaged by the testator, on the 16th of March 1828, to Matthews and Pearson for a sum of £40. Shortly after this, in 1829, the testator died; he left the whole of this property to his wife for life, and after her death to his four sons, two daughters and a granddaughter.

The widow died in April 1836.

For a considerable time after the death of the testator, Carttar was the solicitor of the family, and he received the rents of this house, which, it appears, was never in the possession of Matthews and Pearson, the mortgagees. In August 1836 Carttar paid Matthews and Pearson the £40, but he took no assignment, and there the matter rested. It is material to consider what, at that time, was the effect of these transactions. I am of opinion that Carttar must be considered as the agent of the legatees, and not as taking the mortgage for himself. There was an account between him and his clients; he had received rents and done work and labour for them, and if the account had then been taken, I should have taken it against him as an agent, and not as a mortgagee in possession and making him account for the rents which, without his

wilful default, he might have received. It is impossible to say that if my solicitor pays off a mortgage on my property, either with or without my instructions, he can alter the character in which he acted and consider that he has become a mortgagee in possession. I am clear that, in such a case, I should take the account against the solicitor as the agent of his client, charging him with his receipts, but not with wilful default, as I should against a mortgagee in possession, if the house had not been properly [176] let by him. I am of opinion that, after the payment to Matthews and Pearson, the possession was the possession of Carttar's clients.

In 1841 Carttar became bankrupt, and then, for a time, no rents were received by anyone; but I am of opinion that his bankruptcy did not alter the possession, which was still in possession of the legatees, the clients of Carttar, and that it continued such until some adverse possession was taken.

In January 1843 Carttar assigned his property to Pugh and another (of whom Pugh is the survivor) in trust for distribution amongst his creditors, and in September 1843 they took an assignment of this house, No. 9 Union Street, from Matthews and Pearson. It is necessary to pause here and observe that this was more than twenty years before the bill was filed. I am disposed to think that if the account between Carttar and his clients had then been such that nothing was due to him, he could not have taken an assignment from Matthews and Pearson for his own benefit, but that he would have been a trustee for the Plaintiffs, his clients, and no question on the statute could then have arisen, for Pugh and his co-trustee could not stand in a better situation than Carttar did. It would therefore have been impossible to decide the question, without ascertaining the state of the accounts between Carttar and his clients.

But assuming that Carttar was a creditor of the legatees at that time, and that a balance was due to him, I am still of opinion, on the evidence, that possession was not taken by Pugh until September 1844. What the Defendant Pugh relies on is, first, that in April 1843 [176] he effected an insurance against fire; but this amounts to nothing. A mortgagee out of possession may effect an insurance, but that is not taking possession, and the payment can only form an item of allowance in the account.

Secondly, it is admitted that no rent was actually received until the 24th of September 1844, which is less than twenty years before this bill was filed, which was in January 1864. It appears that before September an application was made by Pugh and his co-trustee to the tenant in possession for the rent, and the tenant answered it by saying that he had laid it out in repairs, and that the trustees acquiesced in this. This is very doubtful and ambiguous, and there is no evidence that the tenant said, "I accept you as landlord," or did anything that amounted to an attornment. There is only a statement that the trustees made some inquiry about the rents, but that they received nothing. In the absence of further evidence, possession can only be considered to have been taken at the time when the rent was first received, and the first money which was actually received by the trustees was on the 24th of September 1844, which is less than twenty years before this bill was filed.

The Plaintiffs are entitled to redeem, I must order an assignment, and Pugh must pay the Plaintiffs' costs.

[177] BAILLIE v. M'KEWAN. Nov. 3, Dec. 8, 1865.

[Approved, *R. v. Shropshire Union Company*, 1873, L. R. 8 Q. B. 434.]

A. B., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice (as the fact was) that A. B. was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate. Held, that the *cestuis que trust* had priority over the bankers.

In July 1861, by the settlement made on the marriage of the Plaintiffs (Mr. and Mrs. John Baillie), some East India stock and some £3 per cents. and Railway stock,

which had been transferred into the name of Dr. James Baillie, as sole trustee, were settled upon the Plaintiffs and their children on the ordinary trusts.

Shortly after this, in the month of November 1861, Dr. James Baillie suggested to the Plaintiffs the expediency of laying out £2100 (part of the trust property) in the purchase of a leasehold house, No. 9 Westbourne Square, which, as he alleged, belonged to him. Mr. and Mrs. Baillie seemed to have trusted to this representation, without making any further inquiry as to the value of the house. They assented to this disposition of the trust funds, and gave the authority required by the settlement for the change of the investment.

On the 20th of December 1861 Dr. James Baillie, who had previously been only negotiating for the purchase, obtained a conveyance of the house to himself in consideration of £900; but the deed did not, on the face of it, shew that it was to be held on any trusts whatever. Two days previously to the conveyance, he had sold out £700 New £3 per cents. (part of the trust funds), which produced £630, and this sum he applied in part discharge of the purchase-money. In January 1862 he sold out £800 East India stock, and later in the same year he sold out and misappropriated a further portion of the trust funds.

[178] About Christmas 1861, Mr. and Mrs. Baillie sent the whole of their furniture to the house, but they did not actually go to reside there until November 1862. But the Court came to the conclusion that they took possession at Christmas 1861, though it was alleged that the trustee continued to reside there.

On the 25th February 1862 Dr. James Baillie deposited the lease with the London and County Bank, as a security for £1500 and the floating balance of his banking account, and the documents of title relating to the house were also, at the same time, deposited with the bank. Dr. James Baillie, at the same time, signed a written undertaking to execute to the bank, when required, a valid legal mortgage. The banking company, however, made no inquiry as to the ownership or possession of the house.

Mr. and Mrs. Baillie, having discovered that Dr. James Baillie had misapplied the trust funds, instituted a suit (*Baillie v. Baillie*) against him, on the 10th of January 1863, and, on the same day, obtained an injunction to restrain him from parting with the railway stock, the only residue of the trust funds. Three days previously (7th January 1863) Mr. Waley, a stock-broker, on behalf of the Plaintiffs, informed Mr. Gray, the accountant of the bank, that the trustee had applied the trust funds to his own purposes, but he said nothing of the leasehold property.

On the 14th of January 1863 Mr. Jennings, the clerk of the Plaintiffs' solicitor, called on Mr. Stevens, the solicitor of the bank, to whom he had been referred, and, amongst other things, delivered to him a copy of the bill in *Baillie v. Baillie*. This, as the Court held, gave "full knowledge of the nature and extent of the [179] claim made by the Plaintiffs to this house, and the facts which they alleged in support of it."

On the 16th of January 1863 Dr. James Baillie executed a legal mortgage of the house to the trustees of the bank.

The bank, on the 17th of March, commenced an action at law against the Plaintiff, Mr. Baillie, for the use and occupation of the house, and, in April 1864, the Plaintiffs instituted this suit against the public officer and trustees of the bank, to obtain a declaration of the invalidity of their mortgage.

Mr. Baggallay and Mr. C. Parke, for the Plaintiffs. First, as between the *cestui que trust* and the bank, in respect of its equitable mortgage, the Plaintiffs' rights must prevail; for the equitable mortgagees could only acquire the interest of the trustee. Secondly, the bank obtained the legal estate, with knowledge of the Plaintiffs' rights, and by a breach of trust. They had constructive notice of every equity of the Plaintiffs, the house being then in their occupation. They had also actual notice from the bill in *Baillie v. Baillie*. They cited *Jones v. Smith* (1 Hare, 60); *Knight v. Bowyer* (23 Beav. 640); *Manningford v. Toleman* (1 Coll. 670); *Daniel v. Davison* (16 Ves. 249); *Carter v. Carter* (3 Kay & J. 617); *Allen v. Knight* (5 Hare, 272); *Willoughby v. Willoughby* (1 Term Rep. 763); *Moore v. Jervis* (2 Coll. 60).

Mr. Selwyn and Mr. Surridge, for the bank. The Plaintiffs have no interest in

this house under any contract or agreement; having failed in the other suit to [180] get the funds, they now turn round and claim the house. It is a mere attempt to follow the trust money without ear-marking it.

The bank had obtained a valid equitable mortgage before, it is even alleged, they had notice of any trust. They were purchasers for valuable consideration without notice, and were entitled, at any time, to protect themselves by getting in the legal estate.

The cases of notice by the possession of a tenant are inapplicable to this case. The Plaintiffs, according to their own representation, were the equitable owners, and the trustee himself was actually in possession. The Plaintiffs have been guilty of gross negligence in not seeing that notice of the trusts was indorsed on the deed, and they are not entitled to the assistance of the Court as against innocent parties. They cited *Colyer v. Finch* (19 Beav. 500; 20 Beav. 555, and 5 H. of L. Cas. 905); *Rice v. Rice* (2 Drew. 73); *Evans v. Bicknell* (6 Ves. 174); *Kennedy v. Green* (3 M. & K. 699); *Perry-Herrick v. Athwood* (25 Beav. 205).

Mr. Baggallay, in reply.

Dec. 8. THE MASTER OF THE ROLLS [Sir John Romilly]. The question which arises in this case is, whether the London and County Banking Company, represented by the Defendant Mr. M'Kewan, their public officer, have a valid mortgage in the house No. 9 Westbourne Square, as against the Plaintiffs. This mortgage, the Plaintiffs allege, was made after the house had been sold to their trustee, Dr. James Baillie, in trust for them.

[181] It was, in my opinion, an important matter for consideration, in this case, in whose occupation the house was in February 1862, when the lease of it was deposited by Dr. Baillie with the banking company. It was not until November 1862 that the Plaintiffs Mr. and Mrs. Baillie went to reside there, but at Christmas 1861 they sent the whole of their furniture to the house, with which it was then, and has subsequently remained, fitted up. This is distinctly proved, and I think that this was virtually a taking possession of the house by the Plaintiffs, and that Dr. James Baillie (if he lived in the house, which, though doubtful upon the evidence, I assume to be the case) did so only as the agent of the Plaintiffs. In my opinion, the relation of the trustee and *cestui que trust*, as regards this house, was then established between them, and that Dr. James Baillie, while residing in the house and superintending the alterations, was only acting as their agent, and that, if no further incident has occurred, he would have been unable successfully to contend that he was not the trustee of this house.

On the 25th February 1862 following, the lease was deposited by Dr. James Baillie with the bank as a security for £1500 and the floating balance of his banking account, and the documents of title relating to the house were also deposited at the same time.

The question is, whether this gave the banking company a right to enforce this security against the Plaintiffs? I think that it did not. If Dr. James Baillie had no interest in the house, it is, in my opinion, established, both by principle and authority, that he could not, by depositing the deeds of property belonging to another, create in that deposit an interest which he did not himself possess. Upon the evidence before me and to [182] which I have referred, I think that the equitable interest in the lease of the house No. 9 was vested in the Plaintiffs, and I find no evidence on the part of the Defendant to contradict or affect this testimony on behalf of the Plaintiffs.

It is also to be observed that no further conveyance could have been made to the Plaintiffs; the property had been assigned to Dr. James Baillie alone, and, on the assumption of his having no beneficial interest in the house, all that he need or ought to have done was to have executed a declaration of trust of the house in favor of the Plaintiffs and their children, according to the trusts of the marriage settlement.

It is also to be observed, which is a material circumstance, that the banking company made no inquiry, either directly or through their solicitors, as to the ownership or the possession of the house, which, if it had been made, would, in all probability, have disclosed the whole truth; but they took the deeds for what they were worth, that is, as a security for the repayment of the debt then and thereafter to become due

to them from Dr. James Baillie. They took, without inquiry, an equitable mortgage of his interest in No. 9 Westbourne Square; but, if I am right, his interest in that house was nothing, and, accordingly, this security was nothing.

If this view of the case be correct, it disposes of the whole matter; but the subsequent events, which are much relied upon by the banking company, must be referred to, although they do not, in my opinion, mend their case.

On the 14th January Mr. Jennings served a copy [183] of the bill in *Baillie v. Baillie* on Mr. Stevens, the solicitor of the company. Two days after this, and, probably, in consequence of the general information respecting Dr. James Baillie obtained in the interval by the company, they obtained a legal mortgage of the house in question from Dr. James Baillie, which as I collect from the evidence, was prepared and the execution thereof by Dr. Baillie obtained by Messrs. Wilkinson, Stevens & Co., the solicitors of the bank, after they had received a copy of the bill in *Baillie v. Baillie*, and, therefore, after they had full knowledge of the value and extent of the claim made by the Plaintiffs to the house, and also of the facts they alleged in support of it.

It is obvious that the obtaining the legal estate by the banking company, after this full notice to their solicitors, cannot improve their equity or give them any better security than they possessed before it.

This is one of those distressing cases in which the question is, which of two innocent persons is to bear the loss occasioned by the misconduct of the third. There has been, undoubtedly, much negligence on both sides; on the part of the Plaintiffs, in allowing all the property settled on their marriage to be transferred into the name of a single trustee, which, however respectable he may be, ought never to be permitted, and, on the part of the company, when the lease and deeds relating to the house were proposed to be deposited, in not making proper inquiries for the purpose of ascertaining who was in possession of the house, and in what character. But I am of opinion that the imprudence of the Plaintiffs, in having a single trustee of their settled property is not sufficient to deprive them of their property, or to enable their trustee to dispose of it as his own. In my opinion the conveyance of the house of the 20th of [184] December 1861, made to Dr. James Baillie, must, in the circumstances of this case, be considered as having been made to him in his character of trustee for the Plaintiffs, as it was subsequent to the arrangement made between him and his *cestuis que trust*, which was that the trust property should be employed in purchasing the house, and, in fact, the trust property was actually so employed.

In this state of circumstances, in my opinion, the assignment to him could not be taken by him in any other character than that of trustee, and this relation being then created, it was not in the power of Dr. James Baillie to mortgage the property which did not belong to him to the company.

I am of opinion that the Plaintiffs are entitled to the decree they ask against the banking company, who must reconvey the legal estate in the house No. 9 Westbourne Square to the new trustee, upon the trusts of the settlement.

The costs must follow the event, including the costs of the action.

NOTE.—See *Prosser v. Rice*, 28 Beav. 68; *Carter v. Carter*, 3 Kay & J. 617; *Sturgis v. Morse*, 3 De Gex & Jones, 1; *Sharples v. Adams*, 32 Beav. 213; *Drew v. Lockett*, 32 Beav. 499.

[185] LEACH v. LEACH. Jan. 30, 1866.

Gift of residue to widow for life, and afterwards to fifteen designated persons, "or their executors, administrators or assigns," and "to be absolutely vested" on the testator's death, and to be payable at twenty-one, provided the widow had died. Held, that the shares of two of the fifteen who had predeceased the testator had lapsed.

The testator, by his will dated in 1858, gave his residuary estate to his widow for life, and after her death he gave a portion of it as follows:—

"I desire that the same may be divided, in equal proportions, between all my

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nephews and nieces (being thirteen in number), that is to say, the four children of my brother-in-law George Richard Corner, the four children of my brother Charles Leach, and the five children of my sister Elizabeth Rawson, widow of Stansfield Rawson, Esquire, deceased, or to their executors, administrators and assigns. And the respective shares of such children to be absolutely vested on my decease, and as to sons, to be payable at the respective ages of twenty-one years (provided my said wife should have departed this life), and in a daughter or daughters at that age or marriage."

The thirteen nephews and nieces were living at the date of the will.

The testator made a codicil in 1863, by which he confirmed his will.

The testator died in 1864, but previously to that time two of the nephews (Francis and Charles Rawson) had died after attaining twenty-one. Francis had died in the interval between the will and the codicil, and Charles between the date of the codicil and the testator's death.

The question was whether the executors of these two legatees were entitled to the one-thirteenth share.

[186] Mr. Baggallay and Mr. George E. Cottrell, for the Plaintiffs.

Mr. Southgate and Mr. W. H. Terrell, for the Defendants, argued that the executors took by substitution for their testators. That as to Francis, the codicil confirmed the will, which was therefore brought down to the date of the codicil, when the executors of Francis had become designated persons.

They cited *Gittings v. McDermott* (2 Myl. & Keen, 69).

THE MASTER OF THE ROLLS [Lord Romilly]. I think it is quite clear that these two legacies lapsed. The estate is given to the widow for life, and, after her decease, a portion of it to thirteen nephews and nieces. The testator was evidently desirous that they should all take vested interests at his death, and he pointed out the legatees, and declared that they were not to lose their shares if they should die in the life of the tenant for life. He gives to them "or" to their executors, administrators and assigns; what he means is this: that if they died before the period of distribution they might still assign their shares, and if not, it was to fall into their estates. To make it more clear, the testator says "to be absolutely vested on my decease." That is the period of vesting, and there is nothing to shew that the "executors, administrators and assigns" were to take as *personae designate*, if the legatees died in the testator's lifetime.

I am of opinion the use of the word "or" does not take this case out of the ordinary rule, which is, that the [187] interest of a legatee cannot become vested until the death of the testator, and that it lapses if the legatee dies before the testator, though the legacy is not payable until the death of the tenant for life.

[187] LE BLANCH v. GRANGER. Jan. 31, 1866.

[See *Adamson v. Gill*, 1868, 17 L. T. 465.]

This Court cannot decree the specific performance of a charter-party, but it can restrain the parties from employing the ship in a manner inconsistent with the rights under a charter-party.

Whether, when the ship and owner are both in this country, the captain can, without the special authority of the owner, charter the ship, *quære*?

In this case the captain in charge of a ship, which was in dock in this country, had entered into a charter-party with the Plaintiff for its employment. The owner was resident in this country, and had not, so far as appeared, authorized the captain to charter the ship.

The Plaintiff, insisting that the charter-party was binding on the owner, instituted this suit and obtained, *ex parte*, an *interim* injunction to restrain the employment of the ship otherwise than as agreed by the charter-party. This raised the question whether the captain, under these circumstances, had an implied authority to charter the ship.

Mr. North now moved, on notice, for the injunction. He cited Smith's *Mercantile Law* (p. 191 (6th ed.)); *Maclachlan on Shipping* (p. 121); *Story on Agency* (sects. 36, 116, 123); *Grant v. Norway* (10 C. B. Rep. 665); *The Messageries Imperiales v. Baines* (11 W. R. 322); *De Mattos v. Gibson* (4 De G. & Jones, 298); *Sevin v. Deslandes* (30 L. J. (Ch.) 457).

Mr. Hobhouse and Mr. W. W. Mackison, for the owner of the ship. When the ship and its owner are in this country a captain has no authority to enter [188] into a charter-party without the express authority of the owner. Secondly, it is a case for damages and not for an injunction.

Mr. North, in reply.

THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion that upon the Defendant giving an undertaking to be answerable in damages I ought to dissolve this injunction. I have no doubt as to the correctness of the proposition, which Mr. North mentioned, that where there is no question about the charter-party, though this Court cannot decree the specific performance of it, yet it can restrain the employment of a ship in a manner inconsistent with the rights given by the contract. But when there is a question as to the validity of the charter-party, the Court is bound to see which course will produce the greatest amount of damage, whether by dissolving or continuing the injunction. The ship may remain idle and at the hearing the charter-party may be found to be worth nothing.

The sole question here is as to the validity of the charter-party, and this does not depend on whether an agent, acting within the scope of his authority, can bind his principal, for nobody doubts that, or that the captain is, to some extent, the agent of the owner. But this is certain, that the captain cannot do everything in respect of the ship: thus he is not able in this country to sell the ship without the consent of the owner, or to create a bottomry bond, though he may, under certain circumstances, do so if the ship is abroad.

[189] The question is, whether a captain in this country has authority to grant a charter-party without the sanction, authority or consent of the owner, and, on the evidence I have now before me, I am of opinion that it is not shewn to be within the scope of his authority. If the case rested on that alone, I should simply dissolve the injunction; but the Plaintiff may still bring forward further evidence at the hearing, and therefore I put the Defendant under an undertaking to be answerable in damages.

NOTE.—The bill was afterwards dismissed for want of prosecution, and the Plaintiff brought an action against the captain for contracting without authority.

[189] HAMP v. HAMP. Jan. 18, 1866.

Motion for an issue before the evidence had been completed, held irregular, and refused with costs.

The question in this case was as to the right to a real estate, and which involved a point of legitimacy.

The Plaintiff filed his affidavits and gave notice of motion for a decree. Thereupon the Defendant, instead of filing his affidavits, moved for an issue to try the question.

Mr. Selwyn and Mr. Bevir, for the Plaintiff.

Mr. Hobhouse, Mr. Hardy, Mr. Baggallay and Mr. Babington, *contrâ*.

George v. Whitmore (26 Beav. 557); *Morrison v. Barrow* (1 De G. F. & J. 633), were cited.

[190] THE MASTER OF THE ROLLS [Lord Romilly] (without hearing the other side) said, I am of opinion that this motion fails. The Plaintiff files a bill to establish his right to an estate, and he gives notice of motion for a decree, specifying all the affidavits by which he supports his case. The Defendant, knowing all the evidence on which the Plaintiff relies, moves for an issue, without entering into a word of evidence in support of his defence. This proceeding is perfectly novel.

I am referred to a case in which I laid down that the Court never does what is asked except by consent.

It does not stop here, for, in this very case, on the application for a receiver, I pressed on the parties to make an arrangement as to trying the matter by an issue, but I stated expressly that, except by consent, I could not make an order to that effect.

It does not end here. The Defendant, who knows the Plaintiff's evidence, instead of producing his own, asks for an issue.

When he brings forward his evidence, the Court will direct an issue if it finds it proper, but the only order I can now make is to refuse this motion with costs.

[191] CHARD v. COX. Jan. 31, 1866.

Upon a motion for a decree, a *subpoena duces tecum* to produce a document at the hearing does not issue as of course.

The Plaintiff, having given notice of motion for a decree, applied to the Record and Writ Clerks for a *subpoena duces tecum* to compel the production of a document at the hearing. The Record and Writ Clerks declined to issue it as of course, on the ground that it could only be so issued where a replication had been filed.

Mr. Villiers moved that the writ might issue.

THE MASTER OF THE ROLLS [Lord Romilly] made the order.

[191] MILES v. MILES. Jan. 12, 15, 1866.

[S. C. L. R. 1 Eq. 462; 35 L. J. Ch. 315; 12 Jur. (N. S.) 116; 13 L. T. 697; 14 W. R. 272. See *Mathews v. Mathews*, 1867, L. R. 4 Eq. 281; *Castle v. Fox*, 1871, L. R. 11 Eq. 552; *Saxton v. Saxton*, 1879, 13 Ch. D. 363.]

By his will, the testator gave "all that my messuage, partly freehold and partly leasehold," in Cannon Street, according to the nature and tenure thereof, respectively, in trust for his widow for life, or, as to the leaseholds, for so long as the term and interest in them should exist, with remainder over. After the date of his will, the reversion in fee of the leaseholds was purchased by, and conveyed to, the testator. Held, that the fee of the whole passed under the specific gift of "my messuage" at C., and that the rent of the devise was descriptive.

At the date of his will, in 1862, the testator was the owner of a house in Cannon Street, London, built partly on fee-simple land of his own, and partly on land held by him of the governors of St. Thomas's Hospital, under a lease dated in 1855, for the residue of a term of eighty years, at a rent of £100.

By his will, dated in 1862, the testator devised to trustees, their heirs, executors and administrators, real estates in the counties of Hereford and Radnor, and [192] also the messuage No. 3 Cannon Street, in the City of London, by the description following:—

"And also all that my messuage, partly freehold and partly leasehold, No. 3 Cannon Street, in the City of London, being erected partly on my freehold ground there and on ground held by me of the treasurer and governors of St. Thomas's Hospital," with their respective appurtenances, according to the nature and tenure thereof respectively, upon trust for his wife during her life, or, as to the said leasehold premises, for so long as the term and interest in the said leasehold premises should exist, but subject to keeping down the ground-rents and other outgoing incidents thereto in the meantime, and after her decease, to the use of his son Henry Hugh Miles for life, and after his decease to the use of his first and other sons, successively, according to seniority, in tail, with divers remainders over.

The testator declared it to be his wish that the said estates, hereditaments and premises should not be sold.

The testator afterwards gave and bequeathed the residue of his estate and effects to his trustees, "upon trust, *with all convenient speed after his decease, to sell, dispose of and convert into money*" all such parts as should not consist of monies, and to divide the produce between his wife and his three children.

In February 1865 the testator purchased, from the Governors of St. Thomas's Hospital, the reversion of the premises comprised in the lease, and which was, by indenture of the 23d of February 1865, conveyed to him in fee. By means of this conveyance the testator's [193] leasehold interest in the messuage, No. 3 Cannon Street, became merged in the freehold.

The testator died in April 1865, without having altered his will.

The widow and one of the children contended that the premises comprised in the indenture of the 23d of February 1865 did not pass under the specific devise. The other children contended that the fee-simple of the premises passed.

Mr. Whately, for the Plaintiff, a trustee.

Mr. Hobhouse and Mr. Blackmore, for the residuary devisees. The part of the Cannon Street premises, held originally under St. Thomas Hospital, passed under the residuary gift, for, at the testator's death, his "term and interest" which alone was the subject of the gift, had merged and ceased to "exist."

The case of *Capel v. Girdler* (9 Ves. 509) distinctly shews that, before the late Wills Act, the bequest of these leaseholds would have been adeemed. In that case, a tenant for years purchased the reversion in fee after the date of his will, and it was held that the whole interest of the testator passed to the heir, and not to the residuary devisees and legatees. In *Emuss v. Smith* (2 De G. & Sm. 722), a point precisely similar to the present was decided, though it does not appear by the report. In that case, the testator, by his will (1830), devised a leasehold garden at Falsam Pitts for the residue of his term therein (p. 723). In 1840 he took a conveyance in fee to himself of the property (p. 728), and he died in 1841. [194] It was declared, by the decree (p. 738), that the bequest of the leasehold garden and premises at Falsam Pitts was adeemed by the subsequent conveyance in fee to the testator. Under the Wills Act, 1 Vict. c. 26, s. 24, the will is to speak "with reference to the real estate and personal comprised in it," immediately before the death of the testator, and if that which is purported to be given does not exist at that time, it cannot pass. Here the gift is merely of a leasehold, and it had ceased to exist between the date of the will and the death of the testator.

They also referred to *Douglas v. Douglas* (Kay, 400); *Goodlad v. Burnett* (1 Kay & Johns. 341); *Blagrove v. Coore* (27 Beav. 138); Lord St. Leonards' Real Property Statutes (p. 365).

Mr. Selwyn, Mr. Chapman Barber, Mr. Henry Hugh Miles, in the same interest. The cases before the late Wills Act have no application, for they proceeded on the principle of a conveyance, and that a man could not devise that of which he was not then seised. But now, the devise speaks as at the death of the testator, and not as at the date of the will, and therefore if the testator, at his death, was seised of the estate described, it will pass by his will. Here the devise is of the testator's messuage No. 3 Cannon Street, all the rest is descriptive and redundant. He devises one entire thing.

[THE MASTER OF THE ROLLS. What presses upon my mind is the burthen which the testator imposes on the devisees.]

That is no more than the law does; it means the devisee is to take *cum onere*. The case is like *The Otley* [195] and *Nkley case* (34 Beav. 525), where there was a devise of a house, with the appurtenances, and two after-purchased fields, were held to pass. Again, it would be inconsistent with the testator's declared intention that the property should pass under the general devise, for he declares his wish that this specific property shall not be sold, but he directs the residue to be sold "with all convenient speed."

Jan. 15. THE MASTER OF THE ROLLS [Lord Romilly]. The question in this cause is the effect of the following devise and bequest. [His Honor read it, see *ante*, p. 192.] What took place was this: after the will, the testator bought the reversion of the leasehold, and the term thereupon became merged in fee, and the testator became the owner in fee of the whole. The question is, whether this merger revoked the bequest

of the leasehold portion? On this, reference is made to the 24th section of the Wills Act (1 Will. 4, c. 26), which is in these words: "Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

I think that a contrary intention is not shewn. I think that if this will had been executed after the testator had bought the reversion, these words would have been a gift of the whole messuage, and that there would have been a mere misdescription of it. The only question is, as to the effect of the merger. The gift is entire, of the whole messuage, to two persons in succession for life, with remainder to others in tail. I think that what [196] is given is the messuage itself, and that the words "partly freehold and partly leasehold" are merely descriptive of the parcels; it means, I give the whole of the messuage No. 3 Cannon Street. The words, "so long as the term and interest in the said leasehold premises should exist," means any interest in that part which is described as leasehold. He has since increased this from a term to a perpetuity, and I think the intention still subsists.

The opposite conclusion would tend to the incongruity pointed out by counsel, viz., that having, in his will, expressed his wish that this particular messuage should not be sold, he directs that his residuary real and personal estate shall, with all convenient speed after his decease, be sold, which would include the reversion of this messuage unless the whole passed by the specific devise of it. This, I think, shews that the intention of the testator was, that the whole messuage should so pass.

It is scarcely possible that the testator should have intended to devise the freehold portion of the premises, so as to go in a particular way to persons in succession, and the remainder of the messuage, being leasehold, should go in a different way, by being sold and divided between the children as tenants in common.

I treat the word "messuage" as I did the word "estate" in the case of *In re The Midland Railway Company v. The Oxley and Ilkley Branch* (34 Beav. 525), where an addition was made to the estate after the date of the will, and I held that the whole passed. Here, I think the messuage is described, and an addition has been made to it. Suppose he had renewed the lease, or had obtained an extension of the term for 100 or 1000 years still it would have passed; here the question only arises because the time is merged.

[197] But I think that the will shews that the gift is to operate, and that not only no contrary intention appears by the will, but that an intention in favor of its passing is to be found in the will. The facts I have mentioned distinguish this case from *Emus v. Smith* (2 De G. & Sm. 722), and reconcile it with the other cases cited.

I will make a declaration accordingly.

[197] MOSS v. BARTON. Jan. 12, 1866.

[S. C. L. R. 1 Eq. 474; 13 L. T. 623. See *Buckland v. Papillon*, 1866, L. R. 1 Eq. 480; 35 Beav. 286; L. R. 2 Ch. 67.]

A. agreed to let some premises to B. for three years, and at the expiration of that term, to grant him a lease for an extended term. A. died, and, three years having expired, B. continued to hold on under A.'s executors four years for without asking for a lease. He then required a lease. Held, that B.'s option had not determined, and that he was entitled to the extension of the term.

By a memorandum of agreement, dated in November 1857, Alderman Wire agreed to let some premises in Moorgate Street, London, to the Plaintiff Mr. Moss at a rent of £111, for a term of three years, to be computed from Christmas Day 1857. Alderman Wire also agreed "at the request of" the Plaintiff "to grant him a lease of the said premises for five, seven, fourteen or twenty-one years, from the expiration of the aforesaid three years' occupancy, at the same rent." The Plaintiff, on his part, agreed, during his occupancy, to keep the premises in good, substantial and ornamental repair.

The Plaintiff was in possession at the date of the agreement, and he continued in the occupation and paid his rent to Alderman Wire until the alderman's death, which occurred on the 9th of November 1860. The three years expired on the 24th of December 1860, and the Plaintiff still continued in occupation as before, and paid his rent to the Defendants, the executors of Alderman Wire. The Defendants appeared to have been, for some time, ignorant of the Plaintiff's right of option to [198] take an extended term, which he, for some time, never attempted to exercise, and they seemed to have treated him as a tenant from year to year. The Plaintiff entered into a negotiation with the Defendants for the purchase of the premises, and in February 1862, in a letter to them, he stated that he had the option of quitting the premises at the end of the year, or of taking a lease for a lengthened period, and he proposed taking a lease for seven, fourteen or twenty-one years at his option, "if the rent were very considerably reduced." Nothing came of this. It appeared also, that, in September 1863, the Plaintiff had called on the Defendants to pay for the repairs of the front wall, which was falling, and that they had consequently paid the builder £16, 8s. for them, and that through the hands of the Plaintiff.

The Defendants having, in September 1864, given the Plaintiff notice to quit, he, in October 1864, claimed a lease for the extended term. This the Defendants refused to grant, and the Plaintiff instituted this suit, in February 1865, for the specific performance of the agreement of November 1857.

Mr. Baggallay and Mr. Rigby, for the Plaintiff. The agreement of November 1857 is not a lease at law, but an agreement for occupancy for three years, with an option of extending it to seven, fourteen or twenty-one years, and such an agreement this Court will enforce; *Parker v. Taswell* (27 L. J. (Ch.) 812). The Plaintiff's right to have a lease continued until his tenancy had been put an end to; *Hersey v. Giblett* (18 Beav. 174). In that case, the yearly tenancy commenced in 1845, and the option was not exercised until 1852, but it was held valid. The Plaintiff's letter of February 1862 was no waiver of his right, it [199] stated that he was entitled either to a lease or to give up possession, and the Plaintiff, before he exercised his option, asked the executors if they would grant him a lease at a reduced rent; this was no waiver or abandonment. Neither did the claim for the repairs determine the right of option, it was made under a mistake of law, for whether holding over or not, the tenant was bound to do the repairs; *Richardson v. Gifford* (1 Adol. & Ellis, 53); *Digby v. Atkinson* (4 Camp. 275). There has been no abandonment or waiver of the right; *Clarke v. Moore* (1 Jones & Lat. 723); *Price v. Dyer* (17 Ves. 356); and the tenant, who has laid out money on the faith of his agreement, is entitled to have it performed; *Dann v. Spurrier* (7 Ves. 231).

Mr. Southgate and Mr. Surridge, for the Defendants. The Plaintiff has waived and abandoned any right he ever had. An option like the present ought to be exercised within a reasonable time, especially after the death of the lessor. Here the Plaintiff has thought fit to remain in possession as tenant from year to year, instead of binding himself for a term. His conduct has been quite inconsistent with having a continued right to take a lease. He proposed to take a different lease at a very considerable reduction of rent, and he insisted that the Defendants were bound to repair, though, by the agreement, he had contracted to do so, and he forced the Defendants to pay for them. All this is inconsistent with a continuing right to have a lease of a different description. This case differs from *Hersey v. Giblett* (18 Beav. 174), for there the Plaintiff, from the first, was a mere yearly tenant and he was allowed to continue and his right, therefore, to an extended term continued. But here the Plaintiff's tenancy was for three years certain, which expired nearly [200] four years before he made his claim, and more than five years before the bill was filed.

THE MASTER OF THE ROLLS [Lord Romilly]. I think the Plaintiff is entitled to a decree. In the first place, the document of 1857 is a clear agreement to grant a lease for five, seven, fourteen or twenty-one years, and the Plaintiff is entitled to call upon the Court for its specific performance, unless he has done something to deprive himself of that right. The only facts relied on by the Defendants are these; the Plaintiff had continued to occupy the premises to the death of Wire, which was a month prior to the expiration of the three years, and from that time he was entitled

to call on the executors for the performance of their testator's agreement to grant him a lease. There was no time specified in the agreement within which he was to call for it, and both parties may have considered that he was afterwards holding over as tenant from year to year. But if the executors thought fit to allow him to hold the property from year to year, there was nothing to prevent him from insisting on the lease; his right to take a lease would exist at any time, unless he gave it up. They might have called on him either to go out or take a lease; but they did nothing of the sort. They say that they had no notice of the document; but the letter of February 1862 gave them full notice of it. Why did they not then call on him to exercise his option? If they knew of its existence, they also knew that the right continued until positively waived; but they did nothing.

The case of *Hersey v. Giblett* (18 Beav. 174), shows that a person having such an option may exercise it at any time while [201] he remains tenant, if the landlord does not call on him either to exercise or decline it at an earlier period. That is when no time is specified in the agreement within which the option is to be exercised.

I do not think the claim for payment of the repairs any waiver of the agreement. The Plaintiff seems to have thought that if he was tenant from year to year, he was not bound to pay for these repairs; in that I think he went too far.

I am of opinion that the Plaintiff is entitled to a decree with costs, but he must refund the £16, 8s.

[201] TEMPEST v. LORD CAMOYS. Jan. 18, 1866.

To a bill for the administration of real and personal estate, and for the appointment of a receiver and a new trustee, a plea in bar, by the alleged executors, that they had been prevented proving by the Plaintiff's entering a *caveat* in the Court of Probate, was overruled.

The testator, Sir C. R. Tempest, died in 1865, having, by his will, devised real estates to Mr. Stonor and Mr. Fleming upon certain trusts, and having appointed Mr. Stonor, Mr. Fleming and Lord Camoys his executors.

Mr. Stonor died in the lifetime of the testator.

This suit was instituted by Mr. Tempest, who was interested under the trusts of the will, for the administration of the real and personal estate for a receiver, and for the appointment of a new trustee, in the place of Mr. Stonor. The bill alleged that the will had been proved by the surviving executors, Lord Camoys and Mr. Fleming.

Mr. Fleming and Lord Camoys put in the following [202] plea in bar to the whole relief and discovery sought by the bill:—

We say that, immediately after the death of the testator, the solicitor of the Plaintiff entered a *caveat* in the Court of Probate to prevent any person from proving the will and codicil of the testator, and that he thereby prevented probate being obtained of such will and codicil, or the constitution of a legal personal representative of the testator, and that, in consequence of the aforesaid act of the Plaintiff's solicitor, and, in fact, we have not, nor has either of us, proved the said will or codicil, or been constituted, in any manner, legal personal representatives or legal personal representative of the testator, and we are not, nor is either of us, nor have we, nor has either of us, ever been executors or executor or legal personal representatives or legal personal representative of the said testator.

Mr. Hobhouse and Mr. Kay, in support of the plea. This negative plea, that the will has not been proved, as alleged by the bill, but that it is in litigation, is a complete answer to the bill. Such a plea was allowed in *Cooke v. Gittins* (21 Beav. 497).

The bill should have been confined to the protection of the estate pending the litigation in the Probate Court; *Overington v. Ward* (34 Beav. 175); *Rawlings v. Lambert* (1 John. & Hen. 458). The estate can only be administered after some duly constituted legal personal representatives have been appointed. The Plaintiff cannot be allowed to contest the will in the Probate Court and assert that these gentlemen

are not the executors, and to insist, in this Court, on the validity of the will, and that the Defendants are executors under it.

[203] THE MASTER OF THE ROLLS [Lord Romilly]. I cannot allow this plea *simpliciter*; it is clear that the Plaintiff is entitled to have a new trustee appointed. The bill alleges that one of the trustees has died, and it asks for the appointment of a new one. That does not depend upon the probate of the will, for there might be relief here as to the real estate, which would not depend on the Defendants being the legal personal representatives. I am inclined, subject to what I hear, to allow the plea to stand for an answer. Then there would remain the question of costs.

Mr. Cole and Mr. Little, in support of the bill. This is a plea "in bar," and not for want of parties. The relief asked by the bill is in respect both of the real and of the personal estate. The Defendants might have pleaded for want of parties to the part relating to the personal estate alone; but such a plea is inapplicable to the realty, as to which the Plaintiff is clearly entitled to relief independently of the executors. The Defendants' character of executors depends on the will, and not on the probate, they insist on their filling that character, and they may have acted as such. They referred to Van Heythusen (vol. 2, p. 95); *Penny v. Watts* (2 Phil. 149); *Fry v. Richardson* (10 Sim. 475).

THE MASTER OF THE ROLLS. This plea must stand for an answer, with liberty to except, and the Plaintiff may file interrogatories. The costs must be costs in the cause. (NOTE.—See *Hinde v. Skelton*, 34 L. J. (Chanc.) 378.)

[204] *Re THE BRIGHTON CLUB AND NORFOLK HOTEL COMPANY (LIMITED).*
May 8, 1865.

[S. C. 12 L. T. 484; 11 Jur. (N. S.) 436; 13 W. R. 733. See *In re London and Paris Banking Corporation*, 1874, L. R. 19 Eq. 447.]

The provisions in the 25 & 26 Vict. c. 89, ss. 79, 80, for winding up a company, in default of its paying a debt three weeks after notice, do not apply, where there is a *bond fide* dispute as to the amount due, though there may be an admitted debt exceeding £50.

The Petitioner, Mr. Reynolds, had, in June 1864, contracted with this company for the erection of certain buildings, to be certified in the usual manner by their architect. The architect, being dissatisfied, had refused to make further certificates. The Petitioner, in February 1865, served the company with notice, under "The Companies Act, 1862," to pay him the balance of £4358 claimed by him. The company not having paid the Petitioner, he, at the expiration of three weeks, presented a petition for winding up the company. The Petitioner's claim was *bond fide* disputed by the company, but more than £50 was confessedly due to the Plaintiff.

By "The Companies Act, 1862" (25 & 26 Vict. c. 89, ss. 79, 80), a company "may" be wound up under the following circumstances:—

"Whenever a creditor, to whom the company is indebted in a sum exceeding £50, has served a demand requiring payment, and the company has, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor."

Mr. Selwyn and Mr. Swanston, in support of the petition, relied on the strict terms of the Act, there being a clear debt above £50, and a default for more than three weeks after demand in payment. They [205] argued that, at all events, the petition ought to stand over until the Petitioner had either substantiated his claim or had failed in doing so; *Re The Rhydyfed Colliery Company* (3 De G. & J. 80); and see *The Catholic Publishing, &c., Company* (2 De G. J. & Sm. 116).

Mr. Jessel and Mr. E. Romilly, for the company, were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. This is a novel experiment, and if I acceded to the application, the consequence would be very serious to public companies. The meaning of the Act is this:—If a debt above £50, which is not *bond fide* contested, be not paid or arranged within three weeks after demand, the Court

may order the company to be wound up. It is not sufficient for a company to say, "we dispute the debt;" they must shew some reasonable ground for doing so. This is a *bond fide* contested debt, and, though more than £50 appears to be due, I do not think that it is such a case as was intended by the Act.

[His Honor then referred to the following cases: *Bliss v. Smith* (34 Beav. 508); *Hotham v. East India Company* (1 Term Rep. 638); *Ambrose v. The Dunmow Union* (9 Beav. 508); *Kirk v. The Bromley Union* (2 Phil. 640); *Waring v. The Manchester, &c., Railway Company* (7 Hare, 482); *Scott v. The Corporation of Liverpool* (3 De G. & J. 334); *M'Intosh v. The Great Western Railway Company* (2 De G. & Sm. 758; 3 De G. & Sm. 146, and 2 Mac. & Gor. 74), to shew that, under building [206] contracts, this Court only interferes in cases of fraud or complication of accounts, and he proceeded:—

The whole of the evidence which has been laid before me clearly establishes that this is a contested question of account between the company and the Petitioner, though something is due to him which would exceed the £50 mentioned by the statute. This, however, is not the case within the statute, for what should I have to do if I made the order? I could do nothing but take an account between these parties. If I made the order, I should still say to the company, provided you pay what is now due to the Petitioner, I will stop the proceeding.

Suppose the company said, "We are now willing to pay the debt," then this question would arise: What is the debt, what is really due to the Petitioner on the claim? I must then take the accounts, and do the very thing which cannot be done except by bill, unless in cases where there is fraud and collusion, and I should thus take complicated and contested accounts, between solvent persons, under the powers of an Act of Parliament which meant to do nothing but to wind up insolvent companies and to make them pay their debts, so far as their assets would extend. Far from being insolvent, this company is carrying on a thriving business, which I am asked to stop, merely because there is a quarrel between the company and their contractor as to what is due to him.

The petition must be dismissed with costs.

[207] *Re THE GENERAL ROLLING STOCK COMPANY (LIMITED)*. Jan. 16, 1866.

[S. C. L. R. 1 Eq. 346; 12 Jur. (N. S.) 44. Followed, on point as to notice, *In re Oriental Bank Corporation*, 1886, 32 Ch. D. 366. On point as to preferential payment of wages, see *Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 Vict. s. 62).]

The Court cannot direct payment, in full, to a clerk in a company which is being wound up of three months' arrears of salary, as in the case of a bankruptcy, but he must come in *pari passu* with the other creditors of the company.

The order to wind up a company is notice to the servants of the company of their discharge from its service.

Chapman was a clerk of this company at a salary of £50 a year, which had been duly paid to him down to Michaelmas 1864.

In February 1865 an order had been made to wind up the company, and Chapman now asked to be paid three months' arrears of salary in full, and to prove for his subsequent salary down to the date of the notice of discharge, together with a quarter's salary from that time in lieu of notice. This raised a question whether he was to be considered discharged as from the date of the winding-up order, or continued until some formal notice had been given to him by the liquidator.

Mr. Phear, in support of the application. The Bankrupt Act (12 & 13 Vict. c. 106, s. 168) authorizes the Court to order three months' arrears of salary to be paid to any servant or clerk, and, by analogy, the Court may exercise its discretion in favour of the clerks and servants of a bankrupt company under "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 98), which empowered the Court to apply the assets of a company "in discharge of its liabilities." Clerks and servants cannot be discharged except by due notice.

Mr. Southgate and Mr. Wickens, for the official liquidator, argued that the discharge of the clerks and servants of the company must be considered as having occurred upon the making of the winding-up order, when the company could no longer employ them.

[208] THE MASTER OF THE ROLLS [Lord Romilly] said that the "Companies Act, 1862," gave him no authority to order payment to the applicant of a quarter's salary in full; and that this could only be done, as under the Bankruptcy Act, by an express enactment, and that therefore the applicant must come in like the other creditors. Secondly, that the advertisements as to winding up the company were notice, and that the order for winding up, when made, must be considered as notice to the clerks and servants of the company of their discharge from the company's service.

[208] DAVIES v. OTTY (No. 2). Feb. 8, 10, 15, 1865.

[S. C. 33; 34 L. J. Ch. 252; 12 L. T. 789; 5 N. R. 391; 13 W. R. 484. See *Haigh v. Kaye*, 1872, L. R. 7 Ch. 474; *Booth v. Turler*, 1873, L. R. 16 Eq. 188. For proceedings on demurrer, see S. C. Beav. 540; 55 E. R. 478; 2 De G. J. & S. 238; 46 E. R. 366.]

The Plaintiff, apprehensive of being indicted for bigamy (which it turned out he was not liable to be) conveyed real property to the Defendant, on a parol agreement to retransfer when the difficulty had passed. On a bill for a retransfer, the Defendant denied the agreement and insisted on the Statute of Frauds, the trust not being in writing. Held, that this was a case of fraud and that the statute did not apply.

A witness made an affidavit and died four days afterwards, and before she could be cross-examined. Her evidence was admitted at the hearing.

This case, which is reported (33 Beav. 540), on a demurrer, now came on for hearing, but upon allegations of a different state of facts, which the Plaintiff had introduced by amendment. The following statement is founded on the conclusions arrived at by the Court, upon the evidence in the cause.

It appeared that in 1860 the Plaintiff Davies was entitled to three and a half shares in a building society and to a piece of land and some houses, which he had mortgaged to the society, in the usual way in such cases, for securing to the society an advance of money made to him.

By an indenture dated the 17th of January 1860, made between the Plaintiff Davies of the one part and [209] the Defendant Otty (his step-son) of the other part. This indenture recited the Plaintiff's title, and proceeded as follows:—

: "And whereas Matthew Otty has taken from Thomas Davies all his shares in the said benefit building society, and has contracted and agreed with Thomas Davies for the absolute purchase of the said piece of land, messuages," &c. "(subject to the payment by Matthew Otty, his heirs, executors, administrators or assigns, of all the payments which, from the 6th day of January instant, shall become payable for or in respect of the shares in the said society so taken by the said Matthew Otty from the said Thomas Davies as aforesaid) for the sum of £20." It then witnessed that the Plaintiff, in consideration of £20 paid by the Defendant to the Plaintiff and of the Defendant's covenant, conveyed to the Defendant and his heirs the land and houses, subject to the mortgage and to the payments to the building society. And the Defendant covenanted to make the several payments to the building society, and to indemnify the Plaintiff therefrom.

The circumstances under which this deed was executed appeared to be as follows:—In 1844 the Plaintiff's wife deserted him, and left the place with her paramour. In 1854 the Plaintiff (who had never heard of his wife since her elopement, and believed her to be dead) married a second wife. Five or six years afterwards (1860) the Plaintiff was informed that his first wife was still living, and fearing a prosecution for bigamy, an arrangement was come to, between the Plaintiff and Defendant that the Plaintiff should transfer the above property until the "difficulty" in which the Plaintiff was had passed over. It was proved by two witnesses that the "distinct under-

standing" between them was that the transfer "was to be a nominal one, and was to [210] be done away with when the unpleasantness was over." The Plaintiff afterwards discovered that the lapse of seven years from the time he knew that his first wife was alive protected him against any proceedings for bigamy, and, in 1863, he called on the Defendant to reconvey the property to him. This the Defendant refused to do, and he claimed it beneficially as his own.

It was proved that the Plaintiff had, in the meantime, been allowed to remain in possession of the property, and that the Plaintiff had himself made the several payments to the society. The consideration of £20 was not paid in money on the execution of the deed; but the Defendant, who, at that time, held the bill of the Plaintiff for that amount, alleged that the non-payment of this bill was the real consideration. But it was also proved that the amount of this bill had been paid by the Plaintiff to the Defendant since the execution of the deed.

The Defendant denied the trust, and insisted on the Statute of Frauds (29 Car. 2, c. 3), the sections relating to which are as follows:—

Sect. 7. "And be it further enacted that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Sect. 8. "Provided always that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by any Act or operation of law, then and [211] in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

Mr. Baggallay and Mr. H. M. Jackson, for the Plaintiff, argued, first, that the Plaintiff was entitled to a reconveyance, the deed having been executed under a misapprehension and mistake, and also on the express undertaking of the Defendant to reconvey. That there was no illegality in the nature of the transaction to prevent the Plaintiff from obtaining equitable relief, there being no crime in his second marriage after the disappearance for so long a time of the first wife. Secondly, that the 7th section of the Statute of Frauds was inapplicable, there being a part performance and a fraud, and that these were sufficient grounds for taking the case out of the statute, for Courts of Equity never allow the Statute of Frauds to cover a fraud. But that if the case were within the statute, it came within the 8th section, there being a constructive trust in favour of the Plaintiff, who had never received the alleged purchase-money. They cited *Childers v. Childers* (3 Kay & J. 310, and 1 De G. & J. 482); *Birch v. Blagrove* (Ambl. 264); *Platermone v. Staple* (Sir G. Coop. 250); *Roberts v. Roberts* (2 Barn. & Ald. 369); *Cecil v. Butcher* (2 Jac. & W. 565); *Ward v. Lani* (Prec. Ch. 182); *Dale v. Hamilton* (5 Hare, 369); *Lincoln v. Wright* (4 De G. & J. 16); Statute of Frauds (29 Car. 2, c. 8); 24 & 25 Vict. c. 100, s. 57.

Mr. Hobhouse and Mr. W. W. Cooper, for the Defendant. The evidence and the nature of the transaction shew that an absolute conveyance was contemplated [212] and was essential for the object, and the alleged agreement is expressly denied by the Defendant. The case is one intended to be met by the statute, the 7th section of which is express:—that all creations of trusts shall be in writing or else be utterly void. No parol evidence is, therefore, admissible of such a trust. There is no constructive trust or part performance. If the denial of a parol trust is to be considered a fraud, this section of the statute would be inoperative, the object of it being to prevent perjury by excluding parol evidence, and by not allowing a trust of land to be proved by anything but by some writing. They cited *Brackenbury v. Brackenbury* (2 Jac. & W. 391); *Curtis v. Perry* (6 Ves. 739); *Lindsay v. Linch* (2 Sch. & Liff. 1); *Kendall v. Beckett* (2 Russ. & M. 88); *Wright v. Wilkin* (4 De G. & J. 141); *Gascoigne v. Thuring* (1 Vern. 366); *Groves v. Groves* (3 Y. & Jer. 163); Statute of Frauds (29 Car. 2, c. 3, s. 4); *Bartlett v. Pickersgill* (1 Cox, 15, and 1 Eden, 515); *Lord Irham v. Child* (1 Bro. C. C. 92); *Cawley v. Poole* (1 Hem. & Mil. 50).

Mr. Baggallay, in reply.

Feb. 15. THE MASTER OF THE ROLLS [Sir John Romilly]. Upon considering this case, and looking at the various authorities on the subject, and after referring again

to the evidence, I am of opinion that the Statute of Frauds can have no application to this case.

Assuming (which I do for the present) that there was nothing whatever illegal in the transaction (the existence [213] of which would, of course, alter the case), I consider it is proved, by the evidence, that the Plaintiff, apparently in a difficulty, or afraid of getting into one, transferred this property to the Defendant, who thereupon agreed that he would retransfer it to the Plaintiff when required; but when the time for the retransfer arrived, the Defendant refused to retransfer it. Such being the facts, I am of opinion that it is not a case to which the Statute of Frauds applies. There was no consideration paid by the Defendant, the £20 mentioned in the deed never having been paid; for the Plaintiff's bill of exchange held by the Defendant, and which he states to be the consideration for the deed, appears, by the evidence, to have been afterwards repaid by the Plaintiff by instalments in various sums. This being so, I am of opinion that "it is not honest to keep the land." If so, this is a case in which, in my opinion, the Statute of Frauds does not apply. I think that the subsequent course of dealing confirms this view; for the Plaintiff has ever since been allowed to remain in possession of the property, and he has paid all the instalments to the benefit building society. In my opinion, therefore, this case comes within the 8th section of the Statute of Frauds, and is excepted from the operation of the prior section. Therefore, the case is not such as entitles the Defendant to set up the Statute of Frauds as a ground for allowing him to retain the property.

I am also clearly of opinion there was no illegality in the transaction, and that the Plaintiff was quite justified, morally and legally, in marrying the second wife, although the effect of it may have been that she did not become his wife. The long absence of his first wife was sufficient to justify the Plaintiff in coming to the conclusion that she was dead, and would have [214] induced this Court to have come to the same conclusion, and, possibly, to have acted on it, by paying money out of Court on that footing. That being so, I am of opinion that the Plaintiff is entitled to a decree.

The costs of the conveyance were paid for by the Defendant, and I am of opinion that the Plaintiff ought to repay them; and, upon the Plaintiff's undertaking to repay them, I shall order a reconveyance at the expense of the Plaintiff. Cancelling the deed would not be sufficient, unless it was originally void, and I do not think it was. The Plaintiff must have his costs of suit.

Another point arose in this case in regard to the evidence. Susannah Davies made an affidavit on behalf of the Plaintiff, which was sworn on the 28th of August 1864. She died on the 1st of September 1864, and her affidavit was filed on the 14th of December 1864. Thus the Defendant had had no opportunity of cross-examining her. It was objected that her affidavit could not be received in evidence. As to this—

THE MASTER OF THE ROLLS said—I stated that I thought the evidence of Susannah Davies must be admitted. It appears that her evidence was given on the 28th August last year, and that she died two or three days afterwards, which made it impossible to cross-examine her; but there being no impropriety and nothing wrong in examining her, and no keeping her out of the way to prevent a cross-examination, I must receive her evidence and treat it exactly in the same way that I should the evidence of any other witness who, from any cause whatever, either had [215] not been cross-examined, or whom it was impossible to cross-examine.

NOTE.—See 19th Order of the 5th of February 1861; *Braithwaite v. Kearns*, 34 Beav. 202, and the references; *Ridley v. Ridley*, *ibid.* 329.

[215] *In re GRATWICK'S SETTLEMENT.* Nov. 26, 1865.

[S. C. L. R. 1 Eq. 177.]

A testatrix bequeathed "all moneys belonging to her in the £3 per cent. consols" to two children and her son's widow. The only consols she was interested in were

settled on her for life, with power to appoint amongst her children. Held, that the will operated as an execution of the power as regarded the two-thirds to the children, although it contained no other reference to the power or to the subject of it.

On the marriage of A. and B. personalty was limited to them for their lives, and after the decease of the survivor, "leaving one or more child or children then living," on trust "for all and every the child and children" of A. and B. as B. should by will appoint, and, in default of appointment, "upon trust for all and every such child and children" equally. Held, that, to entitle a child to take in default of appointment, it was not necessary that he should survive his parents.

By a settlement, made in 1811, on the marriage of Edward and Ann Gratwick, a sum of £600 consols was held in trust for Ann Gratwick for life, with remainder to Edward Gratwick for life. "And from and after the decease of the survivor of them, Edward Gratwick and Ann Gratwick, *leaving issue one or more child or children then living*, then, as to the said sum of £600 and the stocks, funds or securities on which the same may be invested, upon trust for all and every the child or children of Edward Gratwick and Ann Gratwick, in such parts, shares and proportions" as they should jointly by deed or as Ann Gratwick should by her will appoint. "And in default of such direction or appointment, upon trust for all and every *such* child or children" in equal shares, the shares of sons to vest at twenty-one, and of daughters at that age or marriage.

There were four children, all of whom attained twenty-one, viz., Edward (deceased), Thomas, Mary and John (deceased).

[216] Ann Gratwick survived her husband and two of her children, and she died in 1864.

By her will, made in 1864, "she gave and bequeathed all money belonging to her in the £3 per cent. consols, or in any other stocks or funds of Great Britain, with the dividends thereon, and all other money that she might die possessed of or become entitled to," to her son Thomas, her daughter Mary and Ann Gratwick the younger (the widow of her deceased son Edward) in equal shares.

The will of the testatrix contained no reference to the power of appointment given to her by the settlement, and no expression of her intention to exercise such power. The testatrix was not possessed of or entitled to any Government stocks or funds whatever, either at the date of her will or at the time of her decease, save only, so far as she was entitled to the sum of £600 consols during her life, and to her power of appointment over it in favor of the children.

It was admitted that the appointment in favor of the widow of the deceased son Edward was invalid; and the questions on this petition were, whether the testatrix had duly appointed the fund in question, and to whom it belonged?

Mr. Hallett, for the Petitioners Thomas and Mary. First, the appointment to the surviving children exclusively is a good execution of the power; *Boyle v. The Bishop of Peterborough* (1 Ves. jun. 299); *Woodcock v. Renneck* (4 Beav. 190; 1 Phil. 72); *Paske v. Haselfoot* (33 Beav. 125). The appointment to the widow [217] of Edward being invalid, two-thirds of the fund are therefore well appointed to the Petitioners. Next, the surviving children alone take the remaining one-third, for the power arises after death of the parents "*leaving issue one or more child or children then living*." The children then living alone are objects of the power, and the gift in default of appointment is to the same class, namely, "for all and every *such* child and children," i.e., those then living or living at the death of the surviving parent.

[THE MASTER OF THE ROLLS. The words "every such child and children" refer to the last antecedent, which is "all and every the child and children."]

Secondly, the consols held in trust were duly appointed, for the testatrix had none of her own to answer the description; *Walker v. Mackie* (4 Russ. 76); *Mackinley v. Sison* (8 Sim. 561); *Elliott v. Elliott* (15 Sim. 321); *Lake v. Currie* (2 De G. M. & G. 536); Sugden on Powers (pp. 312, 343 (8th edit.)); and see *Shelford v. Ackland* (23 Beav. 10).

Mr. W. Barber, for the trustees.

[THE MASTER OF THE ROLLS. I am of opinion that, in default of appointment,

the fund is divisible amongst the four children and their representatives in fourths. As to the testatrix's power to appoint to the two survivors, there can be no doubt of it.]

Mr. Everitt, for the representatives of the two deceased children. This will was not an execution of the power. The distinction between property and power is perfectly [218] settled and established; *Evans v. Evans* (23 Beav. 1). Here there is no reference either to the property or to the power, and the will is not that of a married woman, in which case it might be inferred that she must be dealing under some special power or authority. A general bequest, like the present, of "all monies belonging to her in £3 per cent. consols" and money she might die possessed of, is not an execution of a power of appointment. It is evident, also, that the testatrix herself did not consider she was dealing with the settled property, for she speaks of it as money she was entitled to, and she makes a son's widow, who was not an object of the power, an appointee under it. It is evident from this that she was dealing with a fund which she thought she could give to his widow. The *onus* of proof lies on the Petitioners, and they have shewn no intention on the part of the testatrix to execute this power; *Rooke v. Rooke* (2 Drew. & Sm. 38).

THE MASTER OF THE ROLLS [Sir John Romilly]. I think that this will was a perfectly good execution of the power as regards the children. The testatrix had no stock except her interest in the sum of £300 consols, which she had power to appoint by will, and the dividends on which she had been regularly receiving under a power of attorney. She bequeathed as follows:—"I give all money belonging to me in the £3 per cent. consols," &c. I am of opinion that the inference is irresistible, that she applied these words to the stock of which she was receiving the dividends, and that no other construction is possible.

I am of opinion that the appointment is good in favour of her two children, and that the one-third intended for the widow of the son goes between the four children as unappointed.

[219] *Re BLITHMAN.* Dec. 16, 1865; Jan. 17, 1866.

[S. C. L. R. 2 Eq. 23. Discussed, *In re Davidson's Settlement Trusts*, 1873, L. R. 15 Eq. 383. Followed, *In re Hayward* [1897], 1 Ch. 905.]

A. B. was adjudged insolvent under an Act of the Australian Legislature, which enacts, that the personal property of insolvents shall vest in their assignees by virtue of their appointment. No assignment was executed by A. B. He was entitled to a share of a residue consisting of a sum of stock in the Court of Chancery in England. The fund was claimed by the assignees, and by the executrix of A. B. in England. Held, that the right to receive it depended on the domicile of A. B.; that if he were domiciled in Australia, his assignees were entitled to receive it; but if in England, his executrix was entitled.

The question raised on this petition was, whether some personal property in England, belonging to an insolvent residing in South Australia, passed to the official assignee of such insolvent or to the executrix of the insolvent, who had since died.

A testatrix died in 1837, having bequeathed her residue to Mrs. Henwood, *durante viduitate*, and after her death or marriage, upon trust for her children, equally, as and when they should respectively attain the age of twenty-five years, with benefit of survivorship.

George Henwood, one of such children, and a domiciled English subject, went to South Australia previous to the year 1863, and he resided there for some time, and carried on business there. In 1863 he was duly judged insolvent in South Australia, under the Insolvent Act, No. 16, of 1860. By that Act, when any person is adjudged an insolvent, all his personal estate, present or future, before certificate, becomes absolutely vested in his assignees, by virtue of his appointment, and such assignees alone have power to recover the same in their own names. The insolvent executed a conveyance of his real estate to his assignees, but he did nothing to affect his personal estate.

Mrs. Henwood, the tenant for life, died in November 1864, after the insolvency, and George Henwood died in South Australia on the 22d of January 1864. His wife was his sole executrix in England and his uni-[220]-versal legatee; and the share of George Henwood in the residue (£425 stock) having been paid into Court, under the Trustee Relief Act, she presented this petition for payment of it to her. This was resisted by the assignees in insolvency of her husband, who claimed to be entitled to the money under the Australian insolvency.

Mr. Baggallay and Mr. Horsey, for the English executrix. The Act of the Colonial Legislature could not operate on property in a foreign country and out of its jurisdiction. Some limit must necessarily be placed on the Acts on the subject, 4 & 5 Will. 4, c. 98, s. 2; 1 & 2 Vict. c. 60, s. 59; 28 & 29 Vict. c. 63; 23 & 24 Vict. c. 16 (Colonial Act), and their operation must be confined to property within the jurisdiction and power of the Colonial Legislature. According to the law of England, this fund could only pass by transfer or by some instrument executed by the owner. No Act of the Colonial Legislature could make it vest in any other person without some act done by the rightful owner, which can be recognised in this country, and in this case, the insolvent has done no act whatever to affect his personal estate here. If, therefore, it be necessary that there should have been some Act binding on the insolvent which passed the property, then it becomes a question of domicile, and his domicile was always that of his origin, namely, in England, for no change in it has been proved to have taken place.

Secondly, the discharge under an Australian insolvency would not have discharged him from his debts in England; *Bartley v. Hodges* (1 Best & Smith, 375); *Smith v. [221] Buchanan* (1 East, 6); *Solomon v. Ross* (1 H. Bl. 131, n.); *The Royal Bank of Scotland v. Guthbert* (1 Rose, 462). If the insolvency in Australia cannot be pleaded in bar here, neither can his property here vest in the assignee; for the discharge from all his debts is the condition on which an insolvent gives up all his property to his creditors. If it were otherwise, he would be liable here for his debts, though all the means of paying them had been taken from him by his creditors.

They also referred to *Townsend v. Early* (34 Beav. 23).

Mr. Martelli, for the assignees. The property in question passed under the Australian insolvency; *Solomons v. Ross* (1 H. Bl. 131, n.); *Sill v. Worswick* (1 H. Bl. 691); *Stein's case* (1 Rose, 262); *Potter v. Brown* (5 East, 124); *Selkrig v. Davies* (2 Rose, 97, 291); *Ex parte Cridland* (3 Ves. & B. 94).

Secondly, the domicile of the insolvent was in Australia, where he resided and carried on his trade; *Jopp v. Wood* (34 Beav. 88); *Bempde v. Johnstone* (3 Ves. 198, 201).

The adjudication in insolvency is equivalent to the judgment of a foreign Court, which, by the comity of nations, the Courts of foreign countries will give effect to; Kent's Commentaries; Story on Conflict of Laws; Wheaton; and Westlake.

Mr. Bristowe, for trustees.

Mr. Baggallay, in reply, cited *Lord v. Colvin* (4 Drew. 366, and 10 H. of L. Cas. 272).

[222] Jan. 17. THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion, on examining the cases, that the question as to the hand to receive this money is one which depends on the domicile of George Henwood. If his domicile was Australian, I think the property passed to his assignees; but if the domicile, at the time of his death, was English, then his legal personal representative is the person entitled to receive the personal estate belonging to him in this country.

It was argued that if the domicile were English, still, nevertheless, that, on the principle of the comity of nations, this insolvency was in the nature of a foreign judgment, and that this Court would give effect to it against the property in this country, and several cases were cited for that proposition. I am disposed to assent to that argument, but with this qualification:—I think that the legal personal representative would be entitled to receive the money, and that the assignees can only obtain payment here by suing for the amount as in an ordinary case. If a person domiciled in this country had, in his lifetime, contracted debts abroad, for which a foreign judgment had been obtained, the judgment creditor might sue the legal personal representative in this country for the purpose of recovering his debt; but various

questions might then arise between different classes of creditors, such as whether he was or was not entitled to take the whole of the fund, or questions of priority, and whether the other judgment creditors of the deceased were not entitled to share in the assets *pari passu*.

I am of opinion, assuming that the domicile was English, that the money ought to be paid to the Petitioner, and it will then be for the assignees to take such [223] steps against her as they may think fit and proper, and I would allow them time for that purpose. But if the domicile of George Henwood was Australian, then I think that the property in this country passed to and vested in the assignees immediately, under the provisions of the Act of South Australia already referred to.

As I think the question depends on the domicile, I cannot determine it, unless both parties admit that there is no further evidence. But, on the meagre evidence before me, I am bound to say that I should not consider that there was sufficient to shew any change of the domicile of origin.

[223] THE NORWEGIAN TITANIC IRON COMPANY (LIMITED). Nov. 25, 1865.

It is not an abandonment of the objects of a company if, where, being established for three or four purposes, it abandons one and carries on the others; provided such abandonment does not alter the fundamental principle of the company.

This company had been registered in October 1863, and its objects as stated in the articles of association were:—

“The purchase of certain leasehold collieries situate at Neville Hills,” in Yorkshire, and “of certain mines and mining rights” in Norway, the working of the coal in the collieries at Neville Hills, and of the iron ore in the said mines in Norway, the conveyance of such coal and iron ore to and from Norway, and Neville Hills and elsewhere in England, and the smelting of such iron ore, and of other ore necessary to be mixed therewith, at either or both places or elsewhere, by means of such coal and of coke to be made therefrom, and of other coal and coke; the manufacturing and sale of the iron so to be made, and of such other coal, coke, clay, bricks, and [224] doing acts incidental to the attainment of these objects, and to the selling the iron, iron ore, coal and coke.

Mr. Holdforth was the holder of seventy shares in the company; he died in 1864, and his executrix presented this petition for winding up the company. She founded her application on various grounds which failed; but one of them was as follows:—

The directors had thought it best to sell the leasehold colliery at Neville Hills (valued at £25,000), to pay off the debts and to provide capital for their works in Norway. It had originally been intended to smelt the Norway iron with the coal of the English colliery; but the directors had been advised that it would smelt better in combination with other ore, and they decided upon selling the colliery and retaining the Norway mines.

Mr. Jessel and Mr. Jones Bateman, in support of the petition, argued that the company had failed to realize the objects for which it had been formed; that it had no funds for carrying on the business, and that, by the intended sale of the Neville Hill property, the objects of the company had been varied by the abandonment of one of them.

They referred to *Bengal Tea Company* (Master of the Rolls, 9th March 1864); *Wheal Lovell Mine* (1 Mac. & Gor. 1).

THE MASTER OF THE ROLLS [Sir John Romilly]. I do not think that this is a case for winding up the company. The Court holds it to be the right of every shareholder in a limited company to have any surplus [225] divided, but that is only where the business of the company cannot be carried on. The only question is, whether the company has abandoned the object for which it was formed. The Court must see whether the company is carrying into effect the objects stated in the memorandum of association; these the directors cannot alter. Then, is the sale of the leaseholds at Neville Hill an abandonment of the objects of the company? I am of opinion that it is not an abandonment of the object of a company if, when established

to accomplish three or four, it abandons one and carries on the others, provided such abandonment does not alter the fundamental principle of the company, and that such a change does not justify a shareholder in coming to the Court, and saying the company has abandoned its object.

Here are two objects, and the principal of which was to be effected by the outlay of a large part of the assets in Norway. If so, these fourteen persons, who united together as shareholders, must have intended that the Neville Hill collieries should be ancillary to the working of the minerals in Norway. If they abandon the working of the colliery, it is not abandonment of the fundamental objects for which the company was established.

I think this is not a proper case to come for a winding-up order, and I must dismiss the petition with costs.

[226] THE VESTRY OF THE PARISH OF BERMONDSEY v. BROWN.
Nov. 23, Dec. 7, 1865.

[S. C. L. R. 1 Eq. 204; 13 L. T. 574; 11 Jur. (N. S.) 1031; 14 W. R. 213. See *Nuneaton Local Board v. General Sewage Company*, 1875, L. R. 20 Eq. 133; *Vernon v. Vestry of St. James, Westminster*, 1880, 16 Ch. D. 456; *Wallasey Local Board v. Gracey*, 1887, 36 Ch. D. 597.]

A vestry was empowered, by Act of Parliament, to indict any person who should stop or impede rights-of-way in the parish, and to take such other proceedings for opening thereof as should appear expedient. Held, that the vestry must indict in the name of the Queen, and sue in equity in the name of the Attorney-General, and that they could not proceed in their own name.

A dedication to a parish of a right-of-way cannot be presumed; a dedication can only be presumed, from uninterrupted use, in favor of the public generally, and not in favor of a portion of the public, as of the inhabitants of a parish.

This suit was instituted by the Bermondsey vestry, to restrain the Defendant from building an archway over a passage called "The Ten Foot Way," leading from Bermondsey Wall to the River Thames, and which archway was intended to unite the Plaintiffs' warehouses on each side of the way. The vestry insisted, that "The Ten Foot Way" was a public highway, and had been enjoyed by the public for nearly forty years. The Defendant, on the other hand, insisted that it was a private road belonging to the estate of a family named West.

However, the evidence of the Defendant established that, down to 1845, it was a private road belonging to the owner of the West estate, and, upon the evidence of the Plaintiffs, it was established that since that time the public had no right to use it. In 1845 the vestry claimed this way as being the property of the parish, as opposed to and distinct from any dedication to the public. Accordingly, in that year, they put up a board by the side of the way, with this inscription upon it:—

"Free landing-place, belonging to the parish of Bermondsey.

"GEORGE HENRY DREW, Clerk of the Vestry."

The Acts of Parliament on which the Plaintiffs relied, as giving them a power to sue irrespective of the Attorney-General, were as follows:—

The 57 Geo. 3, c. xxix. (local and personal), s. 72, [227] gives authority to commissioners "to regulate or remove" projections from the sides of any house, which are inconvenient to any passengers along the carriage or footways of any streets.

8 & 9 Vict. c. clxxvii. (local and personal), s. 165, gives authority to commissioners to indict any person who should stop or impede the landing-places or rights-of-way [in the parish of St. Mary, Bermondsey], and to take such other proceedings for the opening thereof as should appear to the commissioners expedient.

By the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 96, vestries are to execute the office of surveyor of highways, and all streets, being highways, are

placed under their control. The 119th section empowers vestries to remove any projection or obstruction rendering less commodious the passage along any street in their parish.

This Act was amended by the 19 & 20 Vict. c. 112 and the 25 & 26 Vict. c. 102.

Mr. Hobhouse and Mr. Surridge, for the Plaintiffs. First. There has been a long user, from which a dedication to the public may be presumed; *Rugby Charity v. Merryweather* (11 East, 375); *Woodyer v. Hadden* (5 Taunt. 125); *Rex v. Lloyd* (1 Camp. 260); *Rex v. Inhabitants of Leake* (5 B. & Adol. 469); *Reg. v. Inhabitants of East Mark* (11 Q. B. 877); *Reg. v. Petrie* (4 El. & B. 737). Secondly. The Acts of Parliament give the vestry a right to sue irrespective of the Attorney-General. The soil is in them, and they are made custodians of the public [228] roads, and are authorized to indict and to take such other proceedings for opening the ways as may appear to them expedient; 28 & 29 Vict. c. 75, s. 10.

Mr. Selwyn, Mr. Mellish and Mr. Wickens, for the Defendant. First. There has been no dedication to the public; *Wood v. Veal* (5 B. & Ald. 454); *Jarvis v. Dean* (3 Bing. 447); *Daniel v. North* (11 East, 375). The Plaintiffs' present claim, in right of the public, is quite inconsistent with their claim since 1845. They have always insisted on the right-of-way as "belonging to the parish of Bermondsey," and not to the public generally. There could be no such thing as a dedication of a right-of-way to a parish; *Poole v. Huskinson* (11 Mee. & W. 827); it would be simply a grant, and must be by deed. After the leases to Creak and Rattenbury the owner had no right to dedicate the road to the public in derogation of his grant to the tenants.

Secondly. If this be, as contended, a public right, the Attorney-General alone can sue in respect of it.

Fisher v. Prowse (2 Best & Sm. 770) was also cited.

Mr. Hobhouse, in reply. The 57 Geo. 3, c. xxix. s. 72, gives the vestry the power to remove obstructions; and, if so, they are entitled to come into this Court to enforce that right.

Dec. 7. THE MASTER OF THE ROLLS [Sir John Romilly]. This suit is instituted to compel the Defendant to remove an arch and building which he has erected over [229] a certain passage from the street, called Bermondsey Wall, to the River Thames, called The Ten Foot Way. The Plaintiffs insist that this is a public way, whereas the Defendant insists that it belongs to the estate in Bermondsey formerly known by the name of Mrs. West's estate.

The difficulty in the way of the Plaintiffs in this case struck me early in the course of Mr. Hobhouse's argument, viz., that if this way is claimed as a public way, the suit ought to have been instituted, by way of information, by Her Majesty's Attorney-General. This difficulty had been previously felt by Mr. Hobhouse, who endeavoured to overcome it by referring to the various local and public Acts which relate to this matter, and especially to the 165th section of the 8 & 9 Vict. c. clxxvii., which is the local Act for improving the parish of Bermondsey, and which enables the commissioners thereby appointed to make and enforce rules for the use and maintenance of landing-places, and for indicting persons who stop up or impede the same, and this, Mr. Hobhouse contended, when combined with the 18 & 19 Vict. c. 120, which is an Act for the better local management of the metropolis, together with the Act passed, 21 & 22 Vict. c. 104, to amend that Act, made the vestry of Bermondsey the guardians or custodians of the rights-of-way, and enabled them in their own names, to sue or prosecute any person who should impede or destroy any of such rights-of-way. I thought, at the time, and further examination of the Act of Parliament has confirmed me in that view, that it was not intended, by these Acts or by any clauses to be found in them, to delegate to the commissioners named in the first Act, or to the vestry who have now vested in them the powers possessed by the commissioners, any power or authority which was previously vested in the Attorney-General, [230] and that accordingly, if the vestry indict anyone under that Act, they must proceed in the name of the Queen before a grand jury, who must find the bill before it can be tried; and if they apply to Chancery on behalf of the public, they must do so in the name of the Attorney-General at their relation and with his sanction.

As, however, I was very desirous not to determine the question between the parties on any ground founded on the frame of the suit, which might lead to another being

instituted, I determined to hear and consider the case, as if it had been brought before me in the shape of an information filed by Her Majesty's Attorney-General, at the relation of the vestry of the parish of Bermondsey. This I have accordingly done, and, after reading and examining all the evidence, I find that almost the whole of the evidence, on both sides, both for the Plaintiff as well as that for the Defendant, negatives the position that this Ten Foot Way was ever dedicated to the public; and that what little evidence there is, which is not of this character, but is in favour of a general use by the public, is consistent with the opposing evidence, or is explained and overpowered by the evidence negating the public right. This will, I think, appear manifest by a short recapitulation of the history of this Ten Foot Way, and the evidence relating to it.

Up to the year 1814, this way had no existence, the place where it now is was covered with buildings. It seems, as far as I can judge, to have been created in 1818, by the Wests, for the benefit of their tenants. It is first mentioned in a lease for eighty years to Creak, in October 1818, where the right to use the way is included in his demise granted by the owners of Mrs. West's estate in Bermondsey. This lease is still sub-[231]-sisting, and will continue unless merged, till 1898. The next mention of it is in a lease for fifty-one years, granted, under a power, in 1821 by Mr. West, the tenant for life of the estate, to William Rattenbury, which lease contains a power to him to build over this way, provided the breadth of it be allowed to remain ten feet and the height nine feet. These leases negative any dedication to the public at that time.

The general user of this Ten Foot Way by various persons is proved, I think, since 1818 till the present time, subject to the observations I am about to make; but whether it has been used by any other than the tenants of the West estate, or, if so, by any persons other than inhabitants of the parish of Bermondsey, is nowhere made clear. As long, therefore, as the lease of 1821, which gave authority to build over it, was in existence, no dedication from use could be presumed against the owner of the property. In July 1845, however, this lease was merged in the inheritance, and it is contended by the Plaintiff that since then there has been a constant user by the public, from whence this dedication is to be presumed. But the evidence given on behalf of the Plaintiffs themselves repudiates all inference of that character, for, in the same year, viz., 1845, when the lease to Rattenbury was merged in the inheritance, the Plaintiffs, the vestry, claimed the way as being the property of the parish, as opposed to and distinct from any dedication to the public. Accordingly, in that year, they put up a board by the side of the way with this inscription upon it:—

“Free landing-way, belonging to the Parish of Bermondsey.

“GEO. HY. DREW, Clerk to the Vestry.”

[232] This, it is obvious, is a claim of the way as of a property belonging to the parish, and a repudiation of the right of the public to use it. This board has continued up to the time of filing this bill, and so long has the vestry claimed the property as the exclusive right of the parish. If this evidence were ambiguous, the ambiguity is removed by the records of the Plaintiffs themselves, for so solicitous was the parish that “The Ten Foot Way” should be considered as the property of the parish and open to parishioners only, excluding the rest of the public, that, in the same year, the surveyor of the parish under the authority of the vestry, given on the 14th October 1845, repaired the posts and rails before “The Ten Foot Way,” and provided locks and keys, to be placed with some housekeeper residing near the way, in order to secure that the use of the way should be confined to the inhabitants of the parish, and this order was repeated in the following month of December.

Mr. Riches' affidavit, which is precise on this point is conclusive against any admission of the right of the public to use the way, and confines the use of it to the inhabitants of the parish. It is true that there is evidence that from 1818 it was open, and that till 1845 it was generally used, and probably by anyone that pleased to do so, because no one inquired whether the person using it was a tenant of the West estate, or a stranger; but during all that time to 1845, the leases negative any dedication to the public, and since that year 1845, the evidence of the Plaintiffs

negatives it. The evidence of the Defendant establishes that up to 1845 it was a private right belonging to the owner of the West estate, and since that time the evidence of the Plaintiffs insist that the public had no right to it, but that the use of it was claimed by the parish of Bermondsey, as a private right belonging to the parish [233] and to be used by parishioners alone. And, indeed, it seems to me as if the same feeling was now prevalent in the vestry, and that this explains why they alone are the Plaintiffs, and not the Attorney-General on behalf of the public.

Now I certainly do not doubt that a parish might possess, as private property belonging to the parish, such a right-of-way as this Ten Foot Way, just as they might possess a field; but, if so, it must be by grant from the owner of it; neither do I doubt that after continuous user from time immemorial by parishioners, and confined strictly to parishioners alone, such a grant would, in the absence of any contrary evidence, be presumed. But a dedication to a parish, by the owner of the soil, of a right-of-way cannot be presumed; a dedication, to be presumed from uninterrupted use, can only be presumed in favor of the public generally, and not in favor of a portion of the public, as the inhabitants of the parish. This is laid down in *Poole v. Huskinson* (11 Mees. & W. 827), and is unquestionable law. That case also established not only that no such dedication can be presumed, but that if actually made, it is simply void. That case is important in other respects also, it shews that, to constitute a dedication to the public by the owner of the soil, there must be an intention to dedicate on his part, and that this must not be rebutted by evidence of interruption by the owner. Here the intention to dedicate is negatived down to 1845, by the existence of Rattenbury's lease, it is negatived also by the contents of Creak's lease, which is still subsisting; the right claimed is further rebutted by the fact that since 1845 the public have not used the footway, inasmuch as the Plaintiffs themselves [234] have prevented the public, not being inhabitants of the parish of Bermondsey, from so using it, and have set up a claim for it, both in their books and by their acts, as being the private property of the parish.

The Defendant has built over it, but, in doing so, he has preserved the limits pointed out by the lease to Rattenbury; so doing he was entitled to build as he has done. This suit, on the part of the vestry, wholly fails on the merits, besides being defective in the frame of it.

The bill must, therefore, be dismissed with costs.

[234] EARL POULETT v. HOOD. Jan. 13, 17, 1866.

[S. C. 35 L. J. Ch. 253; 13 L. T. 783; 12 Jur. (N. S.) 85; 14 W. R. 298.]

A tenant for life of a real estate bequeathed all money due to him on mortgage: Held, that a charge on the estate of £10,000, to which the testator was entitled and which was secured by means of a term vested in a trustee, did not pass as a mortgage.

A tenant for life directed his executors to pay, out of a particular fund, his pecuniary legacies and annuities, "and the legacy and succession duty payable for the same or in consequence of his death:" Held, that the succession duty payable by the next remainder-man, under a prior settlement and in respect of family estates not devised, was charged on the fund.

The testator John Earl Poulett, amongst other things, bequeathed as follows:—

"Also I give and bequeath to A. N. Hood and W. Speke, all monies and stock which I may have or be entitled to at the time of my decease, in any of the public stocks or funds of Great Britain, and all money which, at the time of my decease, shall be due or owing to me on mortgage from any person or persons whomsoever, and also all money which, at the time of my death, shall be due or owing to me from Messrs. Coutts & Co., Bankers, London, Messrs. Child & Co., Bankers, [235] London, or Stuckey's Banking Company, or any person or persons whomsoever (except the said rents), upon trust that they, my said trustees or trustee do and shall, thereout, pay the said several pecuniary legacies and annuities by me hereinbefore given, and the legacy and succession duty payable for the same or in consequence of my death, and all my just debts

and funeral and testamentary expenses." He directed the surplus to be invested in real estates to be settled upon the same trusts as thereinbefore expressed and declared respecting his residuary and real estate, thereinbefore devised by him in strict settlement. And he bequeathed all the residue of his personal estate to his executors, upon trust and for the benefit of his nephew, the Plaintiff. He appointed the Defendants A. N. Hood and W. Speke executors in trust of his will.

The testator died on the 20th of June 1864.

The questions now arising upon the testator's will related to his interest in two sums of £7000, and the two sums of £10,000 each, charged upon the family estates, and to the succession duty payable in performance of the above trust.

These questions depended on the following circumstances, in regard to the position of the testator's property:—

The testator was tenant for life of large family estates in Devonshire. He was also entitled, as representing two deceased sons, to two portions of £10,000 each, raisable on his death and charged on the same estates. These were secured by a term of 1500 years, vested in trustees in trust to raise them "by demise, sale or mortgage."

[236] The testator was also entitled, absolutely, to the fortune of his wife (who was still living), subject to her life interest therein. This consisted of a sum of £7000, which had been lent to the testator and was secured on a charge on the Devonshire estates, to which charge the testator was absolutely entitled and was made redeemable. This charge was secured by another term of 500 years, vested in trustees.

The testator was entitled, in his own right, to a mortgage in fee of some property in Somersetshire.

The Plaintiff (William Henry Earl Poulett) insisted that the two portions of £10,000 passed to him as part of the testator's residuary estate, and that it did not come within the specific bequest of money owing "to me on mortgage."

The Plaintiff also insisted that the £7000 charged on the Devonshire estates and assigned to secure the fortune of the testator's wife also formed part of the testator's residuary estate, and was not comprised within the bequest of money due on mortgage.

Sir R. Palmer (Attorney-General) and Mr. Faber, for the Plaintiff. These sums of £10,000, £10,000 and £7000 pass under the residuary bequest, and not under the specific gift of money, at the time of his death, due to the testator on mortgage from any person whatsoever. The two sums of £10,000 were charges on the family estates, but they were in no sense mortgages. Mortgages and charges are quite distinct in their nature and incidents. A mortgage is a debt due from the mortgagor, and the mortgagee is a person to whom the estate has been conveyed and which he holds until payment, upon which he is bound to restore it and be redeemed. [237] One of the remedies of a mortgagee is by ejecting and entry. But a person having a charge has no right to the possession of the estate or to foreclose, all he can do is, to require his trustee to raise the charge by sale or mortgage; and then the person who advances the money, and not the trustee or the owner of the charge, becomes the mortgagee; he it is to whom the money is due and owing on the mortgage, and who alone is entitled to a mortgagee's remedies, and can be redeemed. A charge is no debt at all, but an interest carved out of the estate, or an aliquot portion of the beneficial interest in the property itself, raisable out of it but not due "from any person or persons whomsoever." Again, these two sums were not due and owing to the testator "at the time of his death;" they became due afterwards, and were subject to the debts of the sons.

The same objections apply to the £7000 charge on the estate which the testator has mortgaged to secure his wife's fortune, and of which the testator was therefore mortgagor, and not mortgagee. They cited *Taylor v. Lord Harewood* (3 Hare, 372); *Gardiner v. Jellicoe* (12 C. B. Rep. (N. S.) 568, and 11 H. of L. Cas. 323).

Mr. E. R. Turner, for the Countess Poulett.

Mr. Hobhouse and Mr. J. Pearson, *contra*, for the parties entitled in remainder. These charges pass under the specific gift. The scheme of the will shews that the testator intended to bequeath all monies due to him, for securing which the estates

were pledged, and which, in ordinary language, are termed mortgages and include charges. The money was due to the testator, though payable through the trustee, and he was [238] entitled to require the trustee to execute a mortgage to him for better securing it. The owner of the estate could not get rid of the term except by redemption, and a suit to redeem would be the proper course to liberate the estate.

The money was due to the testator at his death, for the portions became vested in the sons on attaining twenty-one, although not raisable until the death of the tenant for life. Each charge was *debitum in presenti et solvendum in futuro*.

[THE MASTER OF THE ROLLS. If a testator charged his real estate with debts and legacies, would the claims of all the creditors and legatees be money due on mortgage?]

Perhaps not, that security being secondary; but here the substance is the charge upon the estate. They cited *Phillips v. Eastwood* (Lloyd & G. temp. Sug. 270).

Mr. Southgate, for the trustee of the settlement.

Sir R. Palmer, in reply. The word mortgage must be taken in its ordinary sense; *Slingsby v. Grainger* (7 H. of L. Cas. 273). Here there is no personal charge or anyone from whom it is due, and the term to raise the charge did not arise until the testator's death. It is said that this is practically a mortgage, because the owner can redeem; but the test of being a mortgage is the right to foreclosure, and to retain the estate itself if not paid. This right the owner of a charge does not possess.

[239] Jan. 17. THE MASTER OF THE ROLLS [Lord Romilly]. A simple statement of the circumstances will shew that the £7000 cannot come within the words of this bequest. [His Lordship stated the facts.] It is clear that this sum of £7000 was not a mortgage due to the testator. So far as it was a mortgage at all, it was a mortgage due from him; he had borrowed the £9017 consols from the trustees, and mortgaged £7000 (part of a £36,000 charge) to secure it: ultimately the trusts of both properties vested in the testator absolutely. He secured the money advanced by the trustees by a mortgage; ultimately the money so secured to the trustees became his own; but he could not be said to owe a sum to himself. In fact, the £7000 positively disappears; he secured it to the trustees, who in return were bound to pay it to his estate. Therefore, with respect to the £7000, I do not think any question arises.

As to the other two sums, there is some question about them. [His Lordship stated the circumstances relating to them.] I think that the words of the will do not include these charges. The first observation, which occurs on it, is this:—that the words of the will do not strictly and technically include charges. The words are, money “due or owing to me on mortgage from any person.” It is clear that this was not money due to the testator from any person on mortgage, and that there was no personal liability of anyone. It was argued that someone must be liable, because no one could get the estate without paying the charge; but that is not so; the charge is, in truth, a beneficial interest in the land itself.

It is, I think, important to consider the difference between the rights of a mortgagee and a person having a [240] charge. I suggested the case of a testator who left legacies, which he charged on his real estate, and the Attorney-General added the case of a charge of debts. I asked, “Would everyone of the legatees or creditors be called mortgagees on the property, or could it with propriety be said that money was due to them on mortgage?” They have, it is true, a charge on the estate, and nobody can take it from them without paying them the charge; but the effect merely is that a portion of the property is made a security for their charges.

If a perpetual annual rent-charge were payable out of the property, as in *Western v. Macdermot* (post, p. 243), could anyone say that the person entitled to the rent was a mortgagee of the property, or that, if he had bequeathed all money due to him on mortgage, this rent-charge would have passed? It would be impossible so to hold, and I find it impossible to distinguish between such an annual rent-charge and a gross charge of £10,000, except that one is payable annually, and the other at one fixed period.

A charge has none of the qualities of a mortgage; it is not subject to redemption or foreclosure; and if you fail in paying it, the estate would not become absolute. A charge must, first of all, be converted into a mortgage, by the institution of a suit, in

which it is raised by mortgage, and you thus substitute a mortgage for a charge. That shews that a charge is not a mortgage.

I thought it important to consider whether there was, in fact, any property of the testator to which the term "mortgage" applied, because in *Phillips v. Eastwood* (Lloyd & G. 270), where Lord St. Leonards held a policy to be a debenture, he laid stress on the circumstance of there [241] not being any other articles or things belonging to the testator in existence which would satisfy the words of the will. Here I find the testator had a mortgage due to him at the time of his death, and which therefore satisfies the words of the will; and although I do not think that that alone should determine the case, still I think that it is an ingredient, because it destroys this argument:—that the words would be unmeaning if not applied to a charge.

The only other argument is derived from the nature and scope of the will; but that argument tells both ways, and I think that there is nothing in the will to shew the necessity of doing any violence to the words used, which naturally import and are confined to a mortgage, and do not extend beyond it.

I do not mean to give any opinion upon the construction of the word "mortgage" as used in Locke King's Act (17 & 18 Vict. c. 115).

I am of opinion that the £7000, £7000 and £10,000 did not pass under the word "mortgage," but under the residuary clause.

Another question arose in this case under the following circumstances:—

The testator, John Earl Poulett, was merely tenant for life of the family estates, which, upon his death, in 1864, descended on his nephew the Plaintiff William Henry Earl Poulett as tenant for life, by virtue of a resettlement of the estates made in 1853, to which the testator was a party.

The testator, by his will, desired the trustee to pay [242] legacies and annuities "and the legacy and succession duty payable for the same or in consequence of his death," and all just debts, &c.

The Plaintiff insisted that the trust for payment of the legacy and succession duty payable upon his pecuniary legacies and annuities, or in consequence of his death, out of the funds therein mentioned, extended to the payment of the succession duty chargeable against the Plaintiff, as well in respect of his life interest in the estates comprised in the said settlement of 1853, to which the Plaintiff succeeded under the limitations of that settlement upon the death of the testator, as in respect of the estates for life and in fee in the hereditaments and premises devised to him by the will of the testator.

Sir R. Palmer and Mr. Faber, for the Plaintiff. The testator has exonerated the family settled estates from paying the succession duty; the words are distinct, and the succession duty became payable in consequence of his death.

Mr. Hobhouse and Mr. Pearson, *contra*. The expression, payable in consequence of his death, must have some limit. If the estate had gone over to a stranger, instead of to the testator's nephew, could he possibly have intended the succession duty to fall on his own estate? It is not reasonable to impute to the testator an intention of paying the duty on anything but what he disposed of by his will.

Sir R. Palmer, in reply. The case of a stranger is imaginary; here the testator himself created the succession by the settlement and he therefore knew of it.

[243] Jan. 17. THE MASTER OF THE ROLLS [Lord Romilly]. As to the succession duty, I think it is payable out of the fund, for if I did not so hold, I must strike the words "in consequence of my death" out of the will. Why must I strike out these words? The testator directs the succession duty payable for the legacies and annuities. If he intended that only, why did he not stop there; he need not go further? But he proceeds "or in consequence of my death." It involves the whole of the property under the will or otherwise on succeeding to the estates.

The words are perfectly plain and distinct and must have their natural meaning, and I must hold that all the legacy and succession duty is payable out of the fund.

[243] WESTERN v. MACDERMOT. Dec. 6, 7, 1865, Jan. 12, 1866.

[S. C. L. R. 1 Eq. 499; 35 L. J. Ch. 190; 12 Jur. (N. S.) 366; affirmed on appeal, L. R. 2 Ch. 72; 36 L. J. Ch. 76; 15 L. T. 641; 15 W. R. 265. See *Keates v. Lyon*, 1869, L. R. 4 Ch. 224; *Leech v. Schweder*, 1874, L. R. 9 Ch. 465, n.; *Lord Manners v. Johnson*, 1875, 1 Ch. D. 679; *Renals v. Cowlishaw*, 1878, 9 Ch. D. 129; *Fairclough v. Marshall*, 1878, 4 Ex. D. 48; *Chitty v. Bray*, 1883, 48 L. T. 862; *Nottingham Patent Brick and Tile Company v. Butler*, 1885, 15 Q. B. D. 269; *Austerberry v. Corporation of Oldham*, 1885, 29 Ch. D. 777; *Sheppard v. Gilmore*, 1887, 57 L. J. Ch. 9.]

If the owner of one of several houses throws out a bow in the rear, of the depth of eight feet (the whole space opposite being open), his next-door neighbour cannot, on the ground of an interference with his ancient lights, prevent it. But it would be a sufficient injury, if contrary to an express covenant, to induce the Court to interfere.

A. conveys a plot of land to B. in fee, and remains owner in fee of an adjoining plot. A. and B. for themselves, their heirs and assigns enter into reciprocal covenants against building on their respective plots. Held, that whether these covenants run with the land or not, all persons claiming under A. or B. are bound by the covenants. This Court will not interfere in the case of a mere nominal breach of covenant. Acquiescence in one breach of covenant, not considered material, will not prevent the covenantee complaining of another breach which affects the value of his property.

The Plaintiff and Defendant were respectively the owners of two houses, numbered 10 and 9, fronting towards Brock Street, in the City of Bath, and with gardens at the back or south side. They both overlooked, on the garden side and towards the south, Victoria Park, formerly called King's Mead Furlong.

[244] In July 1864 the Defendant Macdermot commenced erecting, at the back of his house, No. 9, a circular bow or projection, which extended towards the garden about eighteen feet from the back walls of the line of houses, and which was intended to be raised from the basement to the attics. The Plaintiff, his next-door neighbour, conceiving this to be an infringement on his rights, instituted this suit, in August 1864, to prevent his proceeding in the alteration of the back of his house. The Plaintiff insisted that the proposed building would obstruct the access of light and air to his house; and he also insisted that such a building would be a violation of contracts entered into by previous owners, and by which the Defendant was bound. The title both of the Plaintiff and Defendant was derived from one common source, in the following manner:—

By indentures of the 20th of December 1866, Sir Benet Garrard conveyed to John Wood, in fee, a plot of ground on which Brock Street was afterwards built, reserving a perpetual rent-charge of £220. Wood covenanted to erect the houses, and Sir Benet Garrard, for himself, his heirs and assigns, covenanted with Wood, his heirs and assigns, not to erect any building on King's Mead Furlong, or to allow any trees thereon exceeding eight feet high.

By indenture of the 15th and 16th of May 1867, John Wood and Sir Benet Garrard granted the house No. 9, and the garden, &c., to John Freeman, in fee, subject to an apportioned ground-rent of £8, 8s. payable to Sir Benet Garrard. And Freeman, for himself, his heirs and assigns (amongst other things), covenanted with Sir Benet and Wood, and each of them, their and each of their heirs and assigns, that the garden wall, on the south, should not exceed the level of the parlour floor, "and that there should be no trees nor any [245] buildings whatever in the garden that should exceed that height." Sir Benet, on his part, covenanted not to allow any building on the King's Mead Furlong.

By mesne conveyances, No. 9 became vested in the Defendant Macdermot.

By an indenture of the 23d of May 1767, Sir Benet Garrard and Wood conveyed to Rodburn, in fee, the adjoining house, No. 10, *mutatis mutandis*, in the same form,

and they and Rodburn entered into covenants with each other in the same form as those in the conveyance to Freeman.

By mesne conveyances, No. 10 became vested in the Plaintiff Western.

The rent-charge of £8, 8s. payable in respect of No. 9 was now vested in the Defendant Tite, he, however, did not object to the Defendant's proceeding, and was made a Defendant.

It is necessary to state another circumstance, which was relied on by the Defendant Macdermot, which was that, in the Plaintiff's garden, there were trees above the prescribed height, but they had all (except a mulberry tree) been reduced, from time to time, within the prescribed height. [See this stated more fully in the judgment, *post*, p. 254.]

The cause now came on for hearing.

Mr. Hobhouse and Mr. Haddon, for the Plaintiff. The Plaintiff is entitled to relief, first, on the ground that the building which the Defendant is erecting will [246] interfere with the Plaintiff's easement and obstruct his ancient lights and the air.

Secondly, on the ground of contract, for the covenant of Freeman runs with the land and binds all those claiming under him. Freeman covenanted with Wood and his assigns, and the Plaintiff is, as the assignee of Wood, entitled to the benefit of the covenant. The covenantee has, with the house, assigned the benefit of the covenant; *Child v. Douglas* (1 Kay, 560). Even if the covenant does not run with the land, and if there be no privity between the parties, still the Plaintiff is entitled to relief; *Tulk v. Moxhay* (11 Beav. 571, and 2 Phil. 774); *The Duke of Bedford v. The Trustees of the British Museum* (2 Myl. & K. 552); *Kemp v. Sober* (1 Sim. (N. S.) 517).

Mr. Selwyn and Mr. C. Hall, for the Defendant. There must be some substantial damage to induce the Court to interfere; *Elmhurst v. Spencer* (2 Mac. & G. 45); *Attorney-General v. Sheffield Gas Consumers' Company* (3 De G. M. & G. 304); and none has been proved. The effect of a bay-window to the next house is too trivial to speak of; it may slightly interfere with the view, and enable persons to overlook their neighbours' gardens, or slightly obstruct the side view, but these are matters as to which this Court has never, as yet, interfered; *Clarke v. Clarke* (1 Law Rep. (Ap.) 16); *Durrell v. Pritchard* (13 L. T. 545).

Secondly. There is no contract or privity between the parties to this suit. To entitle the Plaintiff to relief he must claim under some covenant running with the land, and he must represent the covenantor. Here there is no reversion, and Mr. Tite represents Sir Benet [247] Garrard, and assents to the alteration. Again, there was on reversion upon the conveyance in fee, and (as was said in a recent case in the Exchequer) you cannot subject a fee-simple with new burthens not known to the law.

The Plaintiff has constantly infringed the opposite covenant, by permitting trees of too great a height to grow in his garden. He, therefore, cannot now complain, having acquiesced in a deviation from the original plan; *Roper v. Williams* (Turn. & R. 18); *Child v. Douglas* (1 Kay, 560, and 5 De G. M. & G. 739); and he must be taken to have acquiesced in a waiver of the obligations.

Lastly, all the other owners of houses in the street are interested in this question, and the suit ought, therefore, to have been instituted on behalf of them all, *Thompson v. Hakevill* (11 Jur. 732), in order that the question might be effectually settled in one suit.

They also referred to *Eastwood v. Lever* (33 Law. J. (Ch.) 355).

Mr. Haddon, in reply, cited *Whatman v. Gibson* (9 Sim. 196), and argued that the covenants were reciprocal.

Jan. 12, 1866. THE MASTER OF THE ROLLS [Lord Romilly]. This suit was instituted in August 1864, to restrain the Defendant from proceeding with a building in the rear of his house in Brock Street, in the City of Bath. The Plaintiff is the owner of No. 10 in Brock Street, and the Defendant is owner of No. 9. The building complained of is a bow or circular projection, extending [248] from the basement to the attic of No. 9, the extreme depth of which is eight feet. It is made on the rear of the house No. 9, the aspect of which is south, and it extends into the space or garden at the rear.

No time was lost by the Plaintiff in endeavouring to stop this erection; the excavation for the building was begun in July 1864, when the Plaintiff was in Wales;

he returned on the 27th of that month, on the 1st of August following, he obtained from the Defendant's clerk of the works information of what he intended to do. On the 4th of August 1864 the Plaintiff caused a proper notice to desist to be served upon the Defendant, and, on the 10th of August 1864, the Plaintiff filed this bill and applied for an injunction. This was heard before the Vice-Chancellor Sir Richard T. Kindersley on the 18th of August, when an arrangement was effected, by which the Defendant was allowed to continue his building, upon his entering into an undertaking with the Court to pull down the whole, or as much as the Court should direct, in case it should be of opinion that the Defendant was not justified in making the building in question.

On the undertaking being given, the building was permitted to go on, and has accordingly been completed. The case, being brought to a hearing, was fully argued before me on the 6th of last month, with very full evidence on both sides. The case, however, depends but little on the evidence; nor is the evidence, though it varies in some respect, what can be called contradictory, and even, in such parts as are not quite in unison, the evidence is illustrated and controlled or connected by several admirable photographic delineations, which have enabled me accurately to understand the extent of the inconvenience occasioned by the present erection, and [249] also the extent of the previous violations by the Plaintiff himself of the covenant which he now seeks to enforce, and on which disregarded violation the Defendant partly relies, and to which I shall presently advert in greater detail.

This remark however may properly be made at once, in order to clear the ground for the consideration of the real question, viz., that this suit could not, in my opinion, have been maintained on the ground of obscuring ancient lights. If the owner of one of several houses in a row should throw out a bow at the rear, the extreme depth of which at the centre of the circumference is eight feet, where the whole space was open, I am of opinion that the next-door neighbour could not complain of this being such an injury to him as he was entitled to stop. But, at the same time, I am of opinion, upon the evidence that, notwithstanding this, the injury done to the two adjoining houses is substantial. In the case of the Plaintiff it intercepts the early rays of the sun, and it also partially obstructs the view from his window, and I have no doubt that it would make his house, and the house on the other side, less preferable than the others in the row, and lower their value in the market, to an appreciable, though probably not a very considerable extent.

The case does not therefore depend upon the doctrine of this Court relative to obscuring of ancient lights, nor indeed is it so put by the Plaintiff; his case is that, with the house he bought the benefit of a covenant, which prevented the owner of the piece of ground on which No. 9 and also all the other houses in the row are built, from making any such building as that now complained of. The original existence of such a covenant is established, and indeed is not denied; but the Defendant contends, that the Plaintiff is not entitled to [250] claim the benefit of that covenant on several grounds, which I shall presently mention.

The history of the title is this:—In December 1766 Sir Benet Garrard sold to John Wood, in fee, in consideration of a perpetual rent-charge of £225, various parcels of land in the City of Bath, whereon have since been built the Royal Crescent, Church Street, Mill Street, the south side of Brock Street (in which the houses of the Plaintiff and Defendant are situated), and the gardens at the back of these houses, and also a piece of land adjoining thereto, which now is a portion of Victoria Park, with powers of distress and entry to Sir Benet Garrard to secure the payment of the rent-charge, and Mr. Wood covenanted, for himself, his heirs and assigns, with Sir Benet Garrard, his heirs and assigns, to pay the rent-charge, and also, within ten years, to build houses according to the description therein contained. The indenture then provided for the apportionment of the rent-charge at four shillings per foot frontage, and the indenture also contained a covenant by Sir Benet Garrard to this effect. [See *ante*, p. 244.] On the 22d and 23d May 1767 certain other indentures of lease and release were duly executed between John Wood and Thomas Brock (who was a party to the first-mentioned indenture as John Wood's trustee to bar dower) of the first part, Sir Benet Garrard of the second part, and Charles Redburn and John Fielder (a trustee for Charles Redburn) of the third part. By it John Wood and his trustee

Thomas Brock conveyed to Charles Redburn and his trustee John Fielder all that plot of ground now claimed by the Plaintiff.

The Plaintiff has proved his title from Redburn, and is now owner of the house No. 10 in Brock Street, subject to the covenants and provisoes I have stated, provided these covenants are now in force.

[251] By indentures of 15th and 16th May in the same year (1767), a similar conveyance was made by Mr. Wood and Sir Benet Garrard to a person of the name of Freeman, of the messuage and land on which the house of the Defendant stands, now known as No. 9 Brock Street. The Defendant claims through Freeman and holds the house No. 9 Brock Street, subject to the same provisoes and covenants as are contained in the indentures of 22d and 23d May 1767, provided that these covenants are now in force.

The first question raised by the Defendant is, assuming the covenant to be now in force and assuming also that the Plaintiff is entitled to the benefit of it, whether what the Defendant has done is any breach of the covenant, and accordingly he adduces some evidence to shew that the projection in question is not built on the garden in the rear of the house, but upon an area, which, from the earliest time that we have any trace of the construction of this house, existed between the house as originally built and the garden in the rear of it. I am of opinion this contention fails. I think that the plain meaning of the covenant contained in the deed is, that no building shall be raised on the land lying to the south side or to the rear thereof of the houses, above the level of the parlour floor, whether this space was used as a garden or whether it was all paved and called an area or a courtyard or by any other designation. The depth of the houses seems to have been fixed at forty feet, and they are all made uniform in this respect, and the covenant applies to all alike.

The next most important matter urged in defence is, that this is no personal covenant entered into by the Defendant, and that if it be a covenant running with the land, then that the Defendant has, for the building he [252] has half made, the consent of the covenantee Mr. Tite, who is the person in whom the perpetual rent-charge issuing out of the house No. 9 is now vested.

It was principally for the purpose of considering this question that I reserved my judgment in this case; but I am of opinion that this defence also fails. I think it unnecessary to determine whether this is, technically speaking, a covenant that runs with the land, but I am of opinion that it is a subsisting covenant, and that the Plaintiff has a right to the benefit of this covenant, and that the owner of the rent-charge for the time being issuing out of the land has no power to release or to discharge it. The owner of every adjoining tenement is also bound by the same covenant, and is subject to the obligation to perform it. The covenant by which the Defendant is bound is a covenant entered into by Freeman, under whom the Defendant claims the messuage he holds, by which Freeman bound himself, his heirs and assigns, by covenant entered into with Sir Benet Garrard and John Wood and each of their heirs and assigns, that no building whatever in the garden attached to the house No. 9 should exceed the level of the parlour floor. The Defendant is the assignee Freeman, and the Plaintiff is the assignee of Sir Benet Garrard and of John Wood.

I am of opinion that neither Sir Benet Garrard nor John Wood, after assigning the messuage No. 10 to the Plaintiff, or to those who have since assigned to the Plaintiff subject to these covenants, or who have transferred the benefit of them to the Plaintiff, could, as against the adjoining owners, release the covenant or discharge the Defendant from his liability to perform it. Some technical arguments may be, and have been, raised upon the form in which the covenant is entered into with the covenantees; but, in my opinion, they do [253] not affect the substance of the question. I consider it clear, that if immediately after the conveyance of the 15th and 16th of May 1716, to Freeman, Mr. Wood had attempted, with or without the consent of Sir Benet Garrard, to build over the whole of the garden of the messuage No. 10, Mr. Freeman could have prevented that act, and next that this Court would have granted an injunction for that purpose. I am also of opinion that the same right belonged to Mr. Rodham, *e converso*, after the indenture of the 22d and 23d of May 1767, and that this reciprocal right and obligation is handed down from

successor to successor indefinitely, so that every one that receives a substantial injury by the breach thereof is entitled to the assistance of this Court for redress.

I use the words "substantial injury," because it is, I think, clear that a mere nominal breach of the covenant, which inflicted no injury at all, would not justify this Court in interfering, which would, in that case, leave the parties to their remedy at law to obtain such compensation as they might be entitled to. But I have already observed that the conclusion which I have arrived at upon the evidence is, that the circular projection of No. 9, to the extent of eight feet in the centre, is a substantial injury to the owner of the house No. 10, affecting to an appreciable extent his comfort, and also the value of his property.

This immediately introduces the consideration of another ground of defence, which is prominently brought forward by the Defendant in answer to the Plaintiff's case, which is, that this covenant has, by common consent, been wholly disregarded by the parties entitled to the benefit of it, including the Plaintiff himself. This defence consists principally in [254] the fact, that trees from eight to forty feet in height have, for many years, been growing and are now standing on the lands formerly called King's Mead Furlong, and that, along the southern and western boundary of King's Mead Furlong, cottages have been built and are now standing, and that this has been acquiesced in by the Plaintiff, and by his predecessors. That besides this, trees and shrubs from eight to forty feet have been growing and are now standing in the garden of other houses, forming the south side of Brock Street, and that, in particular, the Plaintiff himself had a fig tree, a thorn and a mulberry tree in his garden which towered above the level prescribed by the covenant, and that though the fig tree and the thorn have been lopped down to the prescribed level, since the institution of this suit, the mulberry tree still continues to lift its head above the level to which it is limited by the covenant. In my opinion, this defence is also ineffectual. I am by no means satisfied that these trees are an injury at all to any of the houses in Brock Street, or that this Court would have granted an injunction to compel their being lopped to the prescribed limit; but, assuming such to be the fact, I am of opinion that the Plaintiff, because he has not complained of a breach of the covenant which, in his opinion, inflicted no injury, upon him, has not thereby debarred himself from complaining of a breach which does affect the value of his property. If this were the law, then, because the owner of the house No. 10 enjoyed the sight of trees and shrubs in King's Mead Furlong, and encouraged their being planted, he would have rendered himself liable to have a row of houses built at the bottom of each of the gardens to the south of Brock Street, wholly shutting out a striking prospect from the back rooms of his house, and diminishing, to some extent, the free transmission of light and cir-[255]-culation of air. I am of opinion that the Plaintiff has not, by these means, lost the right to stop such an injury to his property; but if the contention of the Defendant be correct, it would necessarily follow that the garden to the south of these houses might be built over by placing thereon an opposite row of houses so as to exclude the views and prospects which might have mainly induced the Plaintiff to buy his house, and this might be done to any extent that would not amount to what the law would consider an interference with the ancient lights of the Plaintiff, while, unquestionably, a very serious diminution of value may be inflicted on a man's property, which could not be considered as any legal interference with his ancient lights.

It was suggested that this suit ought to have been on behalf of all the other owners of houses in Brock Street. But I am of opinion that one alone, who is injured, is entitled to ask for redress, although the others should decline doing so, or disregard the act complained of. It may also well be, that the injury is principally, if not entirely, felt by one or two of the owners, and that those who are further off sustain no inconvenience, in which case they could not be required to concur in or support the application. In my opinion the questions at issue in this case resolve themselves simply into these two: first, is the covenant entered into by those under whom the Defendant takes his property now in force, and is one by which he is bound? secondly, if this question is answered in the affirmative, has there been a substantial breach of it, in other words, is the Plaintiff's property substantially injured by the erection constructed by the Defendant? I am of opinion that both these questions must be

answered in the affirmative, and that the Plaintiff is entitled to a decree, and that, in pursuance with the undertaking entered into with the [256] Plaintiff and the Court at the hearing of the motion for an injunction, the Defendant must remove the projection he has erected.

The costs must follow the event.

NOTE.—Affirmed by Lord Chelmsford, L. C., December 4, 1866. [L. R. 2 Ch. 73.]

[256] ENGLAND v. LORD TREDEGAR. Jan. 22, 1866.

[S. C. L. R. 1 Eq. 344 ; 35 L. J. Ch. 386.]

Where the title to a lost policy is clear, the insurance company is entitled to no indemnity where they pay the money into Court.

A policy in the Equitable Assurance Company effected in 1803 on the life of Francis Dancer had been made the subject of a settlement ; but the policy had been lost many years ago. This was a suit by the trustees of the settlement against the officers of the assurance company to obtain payment.

Francis Dancer died in 1864.

The Plaintiffs were the present trustees, and their title was not disputed ; but the company, according to their practice, required a bond of indemnity from the Plaintiffs with two sureties. The Plaintiffs, being mere trustees, were unable to comply with the demand.

Mr. Selwyn and Mr. Druce, for the Plaintiffs, asked that the amount which had been paid into Court in this cause might be transferred to a suit of *England v. Lewis*, instituted to administer the trusts of the settlement. They said it had been held by Vice-Chancellor Stuart in *Crookatt v. Ford* (25 L. J. (Ch.) 552), under similar circumstances, that an insurance company were not entitled to any indemnity, and that that case had been followed by Vice-Chancellor Wood in *Field v. Barnwell* (unreported).

Mr. Southgate and Mr. Dickinson, for the Defendant [257]—ants, insisted on the company's right to be indemnified, and they cited *Bushman v. Morgan* (5 Sim. 635).

THE MASTER OF THE ROLLS [Lord Romilly]. The payment into Court in the administration suit will be a sufficient indemnity to the Defendants, and so it has been held in the cases cited.

[257] DICKINSON v. BURRELL. Jan. 22, 25, 1866.

[S. C. L. R. 1 Eq. 337 ; 35 L. J. Ch. 371 ; 12 Jur. (N. S.) 199 ; 14 W. R. 412.]

Distinction between selling a mere right to set aside a fraudulent conveyance, and selling the property itself after such a conveyance. In the first case, the purchaser cannot sue to set aside the conveyance, but in the latter he can.

In 1860 A. B. sold and conveyed some property to C. D. Afterwards, in 1864, A. B., by a deed reciting that the deed of 1860 was invalid, voluntarily conveyed the same property to trustees for himself for life, with remainder to his children. Held, that the infant children of A. B. could maintain a suit, as sole Plaintiffs, to set aside the deed of 1860 ; the right to sue being incidental to the property conveyed. The construction of and the rights and incidents under a voluntary deed, if *bonâ fide* and valid, are the same as of a deed for value.

This was a demurrer, on the ground that the Plaintiffs had no right to institute this suit. The case made by the bill was shortly this :—James Dickinson was entitled to an undivided share (five-eighths) in the estate of John Whitehead, deceased. (1) In

(1) Some of the facts relating to the title will be found stated in *Ibbott v. Bell*, 34 Beav. 396, and *Dickinson v. Stidolph*, 11 C. B. Rep. (N. S.) 341.

December 1860 he sold and conveyed one-half of his share (five-sixteenths) to the Defendant John Edens, in consideration of £100.

Afterwards, by a decree, pronounced on the 22d of March 1862, which declared the rights of the parties to the fund in Court, five-sixteenths were declared to belong to Edens.

[258] In April 1864 James Dickinson, by a voluntary deed executed by him, reciting the conveyance to Edens and disputing its validity, conveyed his share, so sold to Edens, to two trustees, Slatford and Fischer, in trust to sell and stand possessed of the produce upon trust—first, to pay the costs; secondly, to pay £200 to James Dickinson; and, thirdly, to invest the residue and pay the interest of it to James Dickinson for life, and after his death, to divide it amongst his children as he should appoint, and in default equally.

James Dickinson had eight children, and five of them, who were infants, filed this bill against Burrell (who had been their father's solicitor), Edens (the purchaser), their father James Dickinson, his three adult children, and the trustees of the voluntary settlement of 1864. In it they alleged that the sale and conveyance of December 1860 to Edens was obtained by fraud; that, in truth, it was a purchase by Mr. Burrell, who then acted as the solicitor of James Dickinson, for himself, of James Dickinson's share; that the purchase was made in the name of Edens merely as a cover to conceal the real transaction, and that Burrell, by these means and taking advantage of the ignorance and necessities of his client, obtained from him, at a grossly inadequate value, his share in Whitehead's estate. Such was the substance of the allegation of fraud.

The bill, amongst other things, sought to set aside the conveyance to Edens and the order declaring his rights, and it prayed for a declaration of the rights of the parties under the voluntary conveyance.

In this bill Edens demurred for want of equity.

Mr. Selwyn, Mr. Jessel and Mr. Hemings, in support [259] of the demurrer. The Plaintiffs have no right to sue; they claim under a settlement which could only convey a bare right to take legal proceedings to set aside a prior deed on the ground of fraud, and to which they were no parties, and by which they were not affected. This is contrary to public policy, and is open to the objection of champerty and maintenance; *Prosser v. Edmonds* (1 Y. & Col. (Exch.) 481); *Cockell v. Taylor* (15 Beav. 103); *Anderson v. Radcliffe* (Ell. B. & E. 806, 819). This objection would apply, even if the Plaintiffs had been purchasers for valuable consideration; but here it applies more forcibly, for they are mere volunteers, whose interests are contingent; *Davis v. Lord Dysart* (20 Beav. 405); *Pennell v. Lord Dysart* (27 Beav. 542); and may be destroyed by a sale to a purchaser for valuable consideration under the 27 Eliz. c. 4.

It is obvious that this settlement was executed for the express purpose of enabling these infants to sue: to release adults from all liability to costs in case of failure, and to place the Defendants in a difficulty in defending themselves. They also referred to *Doe d. Newman v. Rusham* (17 Q. B. Rep. 723); *Lewis v. Rees* (3 K. & J. 132).

Mr. Southgate and Mr. F. Webb, in support of the bill. The doctrine of champerty and maintenance is not to be extended, and it has no application to this case. The conveyance is of the property itself, to which the right to sue is incident. The existence of a dispute or fraud does not prevent a man selling or settling his property, and even the mere assignment to a purchaser of the subject of a suit is not maintenance, unless the purchaser indemnifies the vendor against the costs incurred by him in the prosecution of the suit; *Harrington* [260] *v. Long* (2 Myl. & K. 590); *Harley v. Russell* (2 Sim. & Stu. 244); *Knight v. Bowyer* (23 Beav. 609, and 2 De G. & J. 421); *Gresley v. Mousley* (4 De G. & J. 78). In regard to this objection, there can be no difference between a voluntary deed and one for valuable consideration. They also referred to *Uppington v. Bullen* (2 Dru. & War. 184); *Stump v. Gaby* (2 De G. M. & G. 623).

Mr. Selwyn, in reply.

Jan. 25. THE MASTER OF THE ROLLS [Lord Romilly] [after stating the circumstances]. James Dickinson does not join as Co-plaintiff, neither do his three adult children, whose interests are the same as the Plaintiffs. They are necessary parties to the suit, and it is suggested that they are not parties: but it appears that four

persons of the name of Dickinson are Defendants, and though the allegation is not precise that these are the persons in question, I think that it is a fair presumption, from the whole of the allegation, taken together, that the first James Dickinson is the father, the James Dickinson the younger, Charlotte and Henry Dickinson are the three other children, besides the Plaintiffs, of James Dickinson the father. This would not materially affect the question I have to decide, as, if the Defendants' contention were valid, I should give leave to amend or reserve the objection to the hearing, where it might prevail, if it were then shewn that the father and his remaining children were not parties to the suit.

Upon the allegation contained in the bill, the substance [261] of which I have just stated, I am of opinion that a case is alleged on which this Court would give relief at the instance of the proper persons.

The only question that I have to determine on this demurrer, therefore, is whether, by reason of the deed of April 1864, the Plaintiffs have a right to ask for that relief which their father, the settlor, and the trustees of the settlement, have refused or declined to concur in asking?

The demurrer is mainly supported on the case of *Prosser v. Edmonds* (1 Y. & Coll. (Exch.) 481), decided after long deliberation by Lord Abinger, but I am of opinion that the case before me does not fall within the rule established by that decision. In the first place, I will consider this case as if the indenture of April 1864 had been executed for a valuable consideration; and then I will consider the difference arising from the circumstance that the deed was voluntary. Assuming the deed of April 1864 to have been executed for value, then the right of suing is incidental to the conveyance of the property and passes with it. If James Dickinson had thought fit, after the sale to Edens in December 1860, to sell the property to A. B., saying that the sale to Edens was fraudulent; that he would not take any step to set it aside, but that, if A. B. thought fit so to do, he would sell all his interest in the property to him for a sum of money, which they *bond fide* agreed upon; in such a case, in my opinion, A. B. could have maintained this suit.

The distinction is this:—If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December 1860, without selling the property, or rather [262] his interest in the property, which is the subject of the indenture of December 1860, that would not have enabled A. B. to maintain this bill; but if A. B. had bought the absolute interest of James Dickinson in the property then it would. It is a right incidental to the property conveyed, nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but it is incidental to each interest carved out of it: *e.g.*, if the property had been conveyed by James Dickinson to three persons as tenants in common, each one might have instituted the suit, making the other tenants in common parties if they refused to concur; but provided the case were brought before the Court so that the whole matter might be determined in one suit, so as to bind all parties to the transaction, and so that the Defendant Edens would have had only to contest the question once, then, in my opinion, the suit might be brought by a person having only a share in the property conveyed. Neither could it, in my opinion, be material whether the share was an absolute undivided share in fee-simple, or whether it was merely a life interest or an interest in reversion. In truth, in all the cases in which, if there had been no previous circumstances to raise a contest as to the invalidity of any previous deed, the interest which would have been sufficient to enable a person interested in the fund to be produced by the sale of the estate to ask this Court to secure it for the benefit of the persons interested therein, would, in my opinion, enable that person to ask this Court to set aside a deed obtained by fraud, which, if valid, would have prejudiced or destroyed his interest in the property purported to be conveyed to him.

I think that this distinction between conveying the property itself and of a mere right to sue is taken by Lord Abinger in *Prosser v. Edmonds* (*Ibid.*). It is taken [263] in *Cockell v. Taylor* (15 Beav. 103), and it is taken in *Anderson v. Radcliffe* (Ell. B. & El. 806, 819), and has been adopted and approved in many other cases; and it is, I think, founded on reason and good sense.

I am therefore of opinion that if the present Plaintiffs had given a valuable consideration for the execution of the indenture of April 1864, they would have been entitled to maintain this suit.

I have next to consider whether the fact of the conveyance being voluntary alters or affects their right, and I am of opinion that it does not.

There are, no doubt, various circumstances which may be connected with a voluntary deed, which, when they are so connected, will induce this Court either to set the deed aside, or to refuse to execute the trusts contained in it. There are also statutory enactments which may defeat such a deed, which would be otherwise valid; but, assuming the voluntary deed to be complete, *bona fide* and valid, and to be unaffected by any statutory disability, I know of no distinction between such a deed and one executed for valuable consideration. The estates and limitations created in such a deed have the same operation and effect as if executed for value, and it must be construed in the same manner; and it carries with it all the same incidents and rights attached to property conveyed as are carried by a deed for value; and the grantee in this respect stands exactly in the same situation as if he had paid value for the property conveyed.

In a case of the description before me, the fact that [264] the conveyance is voluntary suggests the possibility of some secret understanding, or some subordinate agreement, by which the property, when recovered, is to be reconveyed or discharged of the trusts, and that, in fact, the voluntary conveyance is made solely for the purpose of instituting and maintaining such a suit as the present. This may possibly be shewn hereafter in the progress of the suit; but on this demurrer I cannot entertain any such suspicion. I am bound by the allegations in the bill, which I must assume to be true, and, so regarding it, the right to sue is, in my opinion, incidental to the interest conveyed to the Plaintiff, and the demurrer must be overruled.

NOTE.—See Chitty's Statutes, 483 (3d edit.) tit. "Champerty."

[264] BOVILL v. GOODIER. Nov. 21, 1865.

[S. C. L. R. 1 Eq. 35; 35 L. J. Ch. 174; 13 L. T. 489; 11 Jur. (N. S.) 900; 14 W. R. 91. For subsequent proceedings, see S. C. L. R. 2 Eq. 195.]

A patentee is not entitled, after replication, to an order, under 15 & 16 Vict. c. 85, s. 41, for the delivery of particulars of the objections to the patent which the Defendant intends to rely on.

This was a patent suit, in which the Defendant, by his answer, disputed, in general terms, the validity of the Plaintiff's patent, on the usual grounds, viz., want of novelty, non-infringement, that the invention was not the subject of a patent, and the insufficiency of the specification. The Plaintiff had applied for an issue, but his application had been refused with costs, and on the 24th of June 1865 he filed a replication. The Plaintiff applied by summons in Chambers for an order on the Defendant to furnish the particulars of the objections to the patent which he intended to rely on.

At common law such particulars are required to be delivered with the pleas (15 & 16 Vict. c. 83, s. 41), and orders for such particulars have also been made in equity, in cases where issues of fact have been ordered [265] to be tried under Sir Hugh Cairns' Act (25 & 26 Vict. c. 42); but there appeared to be no authority for such an order under the circumstances of the present suit. In the absence of such authority, the Chief Clerk declined to make the order, and the point was, at the request of the parties, adjourned into Court.

Mr. Bagallay and Mr. Druce, for the Plaintiff. "The Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 85, s. 41), requires a Defendant to deliver, with his pleas, particulars of any objection on which he means to rely at the trial," and the places at which the prior user is alleged to have taken place. The object of this was to prevent a patentee being taken by surprise.

[THE MASTER OF THE ROLLS. That section only applies to actions at law; but in equity you may obtain all the information you require by the answer.]

R. VIII.—29

The Defendant would object that it would be evidence of the Defendant's and not of the Plaintiff's title.

The Court, under Mr. Rolt's Act (25 & 26 Vict. c. 42), is now bound to determine questions of law; it ought, therefore, to adopt the same course of proceeding as at law. It will be impossible for the Plaintiff to prepare and meet every case of alleged user, without having them specified beforehand. The Defendant may bring forward any number of instances of alleged prior user, in remote parts of the country, which it will be impossible for the Plaintiff to meet. If the Court should direct an issue, the particulars must necessarily be then specified, and, whether tried here or at law, it will save considerable expense to limit the evidence to the particular instances specified. It is but just that [266] the Plaintiff should know on what case the Defendant relies, in order that he may be prepared to contest it by evidence.

Mr. Selwyn and Mr. Little were not called on.

THE MASTER OF THE ROLLS [Sir John Romilly]. If I had had any doubt upon the matter, the last argument would have convinced me that it was unfit for me to grant this application. The argument is this:—that, according to the course and the principles upon which discovery is granted in a Court of Equity, this particular information could not be now obtained, and therefore, by reason of its being given in actions of law, the Plaintiff is entitled to ask for that which, according to the ordinary principles of discovery in equity, he is not entitled to obtain. The additional reason is still more singular: it is that, because if this be not done, the Plaintiff will be compelled to go to the expense of getting up all his evidence and shewing to the Defendant exactly what it is that he relies on. That is the very thing which the Plaintiff is calling upon the Defendant to do, and it is clear that, if in equity the Defendant is required to do it, the Plaintiff would be required to do it also.

It is true that an issue is not, in all cases, a matter *ex debito justitiæ*, to which the party has a positive right. When a cause comes on for hearing, the Court, having before it the evidence on both sides, determines what particular issue, if any, shall be tried. The Plaintiff might undoubtedly have done this:—he might have given notice of motion for a decree, and then he would have known, from the affidavits of the Defendant, the exact case which he (the Plaintiff) had to meet, and [267] what the Defendant intended to rely upon, and if the Defendant in his affidavit in answer was unable to rebut the instances alleged of prior user, then the Plaintiff would have rested his case on that simply, and he would have known the whole of the Defendant's case. But it being at the Plaintiff's option either to give notice of motion for a decree or to file a replication, he has thought fit to do the latter, and to leave the whole matter in obscurity until the publication of the evidence. He then endeavours to engraft on the Chancery proceedings that which the statute has confined to common law, and which it does not extend to cases in equity; and he thereby endeavours to obtain, according to his counsel's own statement, a discovery to which, by the ordinary principles and doctrines of a Court of Equity, he is not entitled. I express no opinion as to whether he is or is not so entitled, but that is the argument before me. When the case comes on to be heard after the publication of the evidence, then a different state of things arises. Then, when I have directed issues at law, I have followed the practice of common law, and have directed the particulars of the objections to the patent to be given. I remember a patent case respecting a silk throwing machine, in which I directed an issue to be tried before myself, and I there ordered that the particulars of objections should be delivered beforehand, and at the hearing I confined the Defendant to those particulars. But here I should be acting unfairly if I were to compel it to be done in this stage of the cause. This application must be refused with costs; but I do not thereby intimate that, if I direct an issue, the Plaintiff will not be entitled to what he now asks.

[268] THE ATTORNEY-GENERAL, on behalf of Her Majesty, v. THE SITTINGBOURNE, &C., RAILWAY COMPANY. Feb. 10, 12, 1866.

[S. C. L. R. 1 Eq. 636; 35 L. J. Ch. 318; 14 L. T. 92; 14 W. R. 414.]

In a suit by an unpaid vendor, the Court decreed a specific performance, and the payment of the purchase-money and damages. The purchasers were unable to pay, and the property was in the possession of a receiver in another suit instituted by persons claiming charges under the purchasers. A petition by the vendor, served upon the purchaser and the Plaintiffs in the other suit to enforce his lien and obtain a sale of the property, was dismissed with costs, the proper remedy being by bill.

By an indenture, dated in 1858, and made between the Queen (1), the Commissioners of Woods and Forests (2), the lessee (3), and this company (4), the company agreed to pay to the Queen £2000 for the Crown's interest in a piece of land taken for the railway. The company entered into possession and constructed their railway on part of this land.

This information was filed to compel the specific performance of the contract, and, by the decree made in January 1864, the Court directed a specific performance, and declared that the company ought to pay the £2000 and interest. The Court also directed certain inquiries as to damages, and ordered the company, within six months from the date of the Chief Clerk's certificate, to pay to the Commissioners what should be certified to be due.

The Chief Clerk, in November 1864, certified that £3482 was due. The six months had expired and no payment had been made. The company admitted that they were not in a position to pay, as all the property of the company was in the hands of a receiver appointed in November 1863, in another suit of *Skinner v. The Sittingbourne, &c., Railway Company*, which had been instituted by mortgage creditors on behalf of themselves and all other like creditors. In June 1864 a decree had been made in that suit, declaring the rights of the [269] mortgage creditors to a charge, and after directing accounts and inquiries, it continued the receiver. This decree had been made without prejudice to the rights, if any, of prior encumbrancers.

The Attorney-General presented this petition in his own suit alone, alleging that it was not practicable, by sequestration, to compel the company to obey the decree in this cause, and, on behalf of Her Majesty, he submitted that he was entitled to a lien on the piece of land, and that it ought to be sold in satisfaction of the decree.

The petition prayed that the company might be ordered to pay the aggregate of the monies due within two months, and that, in default, the land might be sold, and the produce applied in payment of the amount due to the Crown.

The petition was served on the company, the Plaintiffs in the other suit, and the London, Chatham and Dover Railway Company, who were in possession of the line under an agreement dated in 1863.

Mr. W. M. James and Mr. Pemberton, in support of the petition, argued that the Crown had a lien for the purchase-money, and that if the company would not pay, a sale ought to be directed.

They cited *Walker v. The Ware, &c., Railway Company* (35 Beav. 52); and see *Foligno v. Martin* (16 Beav. 586); *Simpson v. Terry* (34 Beav. 423); *Sweet v. Meredith* (4 Giff. 207).

Mr. F. H. Colt, for the Plaintiffs in the suit of [270] *Skinner v. The Sittingbourne, &c., Railway Company*. The decree in this suit contains no declaration of the lien of the Crown, and that cannot be obtained upon petition. The other incumbrancers on this property have a right to be heard in a suit properly constituted, and to insist that the Crown has no lien at all, or that it has no priority, or that the amount claimed is not due. This cannot be done upon a petition in a suit to which they are not parties.

Mr. Bevir, for the Sittingbourne, &c., Railway Company.

Mr. Baggallay and Mr. Kekewich, for the London, Chatham and Dover Railway Company. No order can be made on this petition. The order, if made, must neces-

sarily affect the rights of the Respondents and will be binding on them if made in their presence. The London, Chatham and Dover Railway Company will, at the proper time, contend that the Crown has no priority over them; but they decline to go into the merits or dispute the priorities except in a suit properly constituted.

Mr. W. M. James, in reply. I do not ask any declaration of the Crown's lien, that is not necessary, neither do I ask to affect the rights of the incumbrancers, who can take nothing on this piece of land except through the Defendant company, that is the purchasers who have not paid the purchase-money; but I ask a sale.

Feb. 12. THE MASTER OF THE ROLLS [Lord Romilly]. I think that this petition is misconceived. It is, in fact, presented for the purpose of enforcing a lien which [271] has not hitherto been declared by the decree of the Court. It is true that a purchaser has a lien for his unpaid purchase-money, but he cannot, if he requires the aid of this Court, act differently from any other mortgagee or other person claiming a lien. He must institute a suit and get that lien declared against all the persons interested in the estate; or, at least, all those who are subsequent in date to him and who are to be foreclosed by him. But, if I made the order permitting or directing a sale of this property, I should not only be giving the Petitioner, on behalf of the Crown, the benefit of a lien which has not been established in any proceeding in this Court, but I should be doing so against Respondents who have not, hitherto, had any opportunity of contesting the case of the Petitioner or the amount of the debt he insists on being due. In this case, the decree simply directs specific performance and payment, three months after the certificate of the Chief Clerk, of various sums to be ascertained; but not only has the Court not declared that this amount is a charge on the property sold, but a portion of that amount, for instance, that which consists of compensation for damage due from the railway company, for the non-execution of certain works, would appear to me not to be a charge on any of the property sold. I mention this only for the purpose of shewing the difficulty I should have, if I were to enter into this question now, without proper materials, and with Respondents not properly instructed to meet the case. If the Petitioner, on behalf of the Crown, claimed a lien on this piece of land so sold, it would be necessary, before I could direct a sale of it, to have a decree ascertaining the amount of that lien, made in the presence of those persons who claimed subsequent charges on the property and the property itself. Now, assuming that the decree obtained has established that the Petitioner, in right [272] of the Crown, is entitled to a charge on this property, the amount has been ascertained when the Plaintiffs, for whom Mr. Colt appears, were not present, and when the London, Chatham and Dover Railway Company were not present, both being parties materially interested in disputing the amount claimed.

If I directed a sale, I should, in fact, without suit or decree for that purpose, give priority to that charge over the two others and foreclose them, by paying the purchase-money to the Petitioner, on behalf of the Crown, without their having had any opportunity of being heard or of contesting the right of Petitioner.

Whatever remedies are open to Petitioner to enforce his decree by sequestration, he may adopt them, but he does not want the assistance of the Court for that purpose. If he goes beyond that, he must file a bill in the usual way against the proper Defendants to enforce his lien and get the benefit of it. I must dismiss the petition with the usual costs as against the Crown.

Mr. W. M. James. There is a settled form in such cases. (*Attorney-General v. Hammer*, 4 De G. & Jones, 205, and 18 & 19 Vict. c. 90.)

[273] *Re THE HOP AND MALT EXCHANGE AND WAREHOUSE COMPANY (LIMITED).*
BRIGGS' CASE. *Feb. 8, 13, 1866.*

[S. C. L. R. 1 Eq. 483; 35 L. J. Ch. 320; 12 Jur. (N. S.) 322; 14 L. T. 39. See *Directors of Central Railway Company of Venezuela v. Kisch*, 1867, L. R. 2 H. L. 112; *In re Murray*, 1887, 57 L. T. 224.]

Though the articles of association of a company materially extend the objects of the company beyond those stated in the prospectus, still, if the prospectus refers to

the articles, a person taking shares upon the faith of the prospectus is bound by the articles, unless they are wholly incompatible with the prospectus.

A shareholder, who had taken shares on the faith of a prospectus, afterwards discovered that by the articles of association the objects of the company materially differed from those stated in the prospectus. He subsequently dealt with the shares as owner, by attempting to sell them. Held, that he had acquiesced and could not afterwards repudiate them on the ground of the misrepresentation.

This was an application by Mr. Briggs, under "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 35), to remove his name from the list of shareholders, on the ground of a misrepresentation in the prospectus of the company, upon the faith of which prospectus Mr. Briggs had taken some shares in the company.

The prospectus stated the object of the company to be, to provide a hop and malt exchange and a warehouse for stowage and other purposes; but nothing was said as to making loans of money. It, however, stated that the company had been registered, and that the memorandum of association might be seen either at the offices of the company or at the solicitor's.

After taking the shares, Mr. Briggs discovered that, in the memorandum of association, and in addition to the objects stated in the prospectus, this further object was stated: "For advancing money to growers, merchants or factors, upon the security of their crops and produce, whether growing or stored in the company's warehouses, or in bond, or upon the security of dock or other warrants, or property of a like description, and otherwise for the accommodation of hop and other merchants, maltsters, factors, brewers and others connected with the hop and malt trades."

[274] He also discovered that the 69th article of the association authorized the directors to make advances of money upon hops, &c., to growers, &c., "and to such other persons as they should think fit, and upon such security, negotiable or otherwise, as they should deem expedient."

After making this discovery, Mr. Briggs instructed his brokers to sell his shares for the account, and the broker sold them accordingly at fifty shillings a share premium. But the committee of the Stock Exchange having refused to fix a settling day for the account of shares in this company, the effect was to annul the conditional sale. Mr. Briggs thereupon repudiated his shares, required them to be cancelled, and now applied to rectify the register of members by omitting his name.

Mr. Southgate and Mr. Brooksbank, in support of the motion. The company is bound by the statements contained in the prospectus. Mr. Briggs took these shares on the faith of that prospectus and in the belief that the company was formed solely for the objects therein stated. But the objects of the company, as shewn by the memorandum and articles, are quite different from those set forth in the prospectus. According to the prospectus, the objects are to make a hop and malt exchange and a warehouse, but one of the real objects appears to have been to become a discount company. This is a material misrepresentation, which entitles the applicant to be discharged from his contract to take the shares; *Bell's case* (22 Beav. 35); *Ship's case* (13 W. R. 631); *Kisch v. The Venezuela Railway Company* (34 L. J. (Ch.) 545); *Hutton v. [275] The Scarborough Hotel Company* (34 L. J. (Ch.) 643); *Rawlins v. Wickham* (3 De G. & J. 304); *Holt's case* (22 Beav. 48).

Mr. Selwyn and Mr. Roxburgh, for the company. Mr. Briggs had, from the first, notice of the contents of the memorandum and articles of association; they are distinctly referred to in the prospectus, in which it is stated at what places they may be seen. A prospectus does not purport to contain all that is in the articles and memorandum of association—it gives a mere outline of them—and it would be a dangerous doctrine to hold that a person who takes shares is discharged, if there should be an accidental omission from the prospectus of something contained in the memorandum or articles. Here the additional objects are only in extension of those in the prospectus, for it is the custom of the trade to lend money on the security of hops and of produce deposited in a warehouse.

Secondly. Mr. Briggs had notice of the articles before he directed the sale of these shares; he therefore adopted them as his own after full notice, and is now bound by his acquiescence. It was some time between the 28th of July and the 24th of

August that the Stock Exchange refused to appoint a settling day, and it was not until the 29th of August that Mr. Briggs repudiated the shares. He was bound to repudiate them immediately on his alleged discovery, and was not entitled to take the chance of obtaining £2, 15s. premium per share and repudiate them if he failed in getting it. They cited *Bell's case* (22 Beav. 35); *Holt's case* (*Ib.* 48); *Ayre's case* (25 Beav. 513); *Parbury's case* (3 De G. & Sm. 43).

Mr. Southgate, in reply. Lindley on Partnership (p. 1170).

[276] Feb. 13. THE MASTER OF THE ROLLS [Lord Romilly]. This is an application under the 35th section of "The Companies Act, 1862," to correct the register of shareholders by omitting the name of Mr. Briggs, on the ground that he was induced to become a shareholder by false representations contained in the prospectus issued. The memorandum of association contains this clause—[see *ante*, p. 373]—and the articles of association contain this clause—[see *ante*, p. 374]. Most certainly, under these clauses, the society might become a mere bill discounting society, and it is also, in my opinion, equally certain that there is nothing in the prospectus to lead to any such expectation. The prospectus, however, contained these words. [See *ante*, p. 373.]

The strong inclination of my opinion is that after this intimation any person applying for shares must be held to have notice of the contents of the articles of association. He is informed of their existence, and where they are; he is, in fact, thereby invited to examine them, in order thereby to test the truth of the prospectus. I admit the correctness of the argument founded on these cases, which lay down that a man cannot complain that his solemn assertion has been believed and acted upon, and if the prospectus had contained a clause negating the power contained in the 69th clause of the articles, I should not have held that any person taking shares could have been held liable for the knowledge of that, which was in reality diametrically opposed to, or contradicted by, the prospectus. But as to all those matters which are not contradictory to the prospectus, but are compatible with it, I think that the applicant for shares cannot plead ignorance of the [277] clauses of the articles of association, which profess to execute the objects of the prospectus, even if they go beyond it, unless they are wholly incompatible with it. I cannot but admit that the articles of association go much further than the prospectus, and indeed contain powers which the prospectus could not induce anyone to expect; but I am not sure, if it turned on that alone, that I could say that they are so inconsistent with it, or at variance with it, to such an extent as to amount to fraudulent misrepresentation, and thus enable the applicant to get rid of his shares.

But I think, in the circumstances of this case and upon the evidence, it is not necessary to decide that question, for I think that it is established, by the evidence given on the cross-examination of Mr. Briggs, that after he was acquainted with the provisions of the articles of association, he continued to keep these shares and exercised acts of ownership over them wholly inconsistent with the repudiation of them. He gave instructions to his broker to sell, for the account, the shares he had taken, and a contract was actually entered into by the broker for that purpose, at a premium of 50s. per share, in accordance with such instruction, and all this was done after Mr. Briggs had obtained such knowledge of the articles of association as I have stated. In truth, I think, on the evidence, that it was the refusal of the committee of the Stock Exchange to fix a settling day for the account of sales of shares of the company, the effect of which was to annul the conditional contract for the sale of Mr. Briggs' shares, that opened his eyes to the injurious effect of the articles and induced him to repudiate his shares and to require that they should be cancelled. The dates, I think, shew this. As the broker, upon the instructions given [278] to him, sold the shares for the account, it must have been before the decision of the committee of the Stock Exchange, and Mr. Briggs expressly states that he had seen the articles of association before he gave instructions to the brokers to sell the shares. It is, therefore, I think, clear that it was the determination of the committee of the Stock Exchange, and not the contents of the articles that induced Mr. Briggs to require his shares to be taken back. I consider his acting as owner of the shares, by endeavouring to sell them after a knowledge of the articles, is an acquiescence therein, and that he cannot now complain and ask to have his name omitted.

[278] MORGAN v. MIDDLEMISS. Feb. 9, 1866.

A testator, by his will, bequeathed £500 to his widow, and by a codicil he bequeathed her "a further sum, not exceeding £300, making altogether a legacy of £1000 given to her by my will and this codicil." Held, that there was a mere miscalculation and that, under the codicil, the widow was only entitled to £300.

The testator, by his will, bequeathed to his widow Dinah Simmons a legacy of £500.

By a codicil the testator directed as follows:—

"In case my wife shall require a larger principal sum than I have left her in my will, I direct the trustees or trustee, for the time being, to pay to her, out of unappropriated surplus money, for her absolute use, such further sum, *not exceeding £300, making altogether a legacy of £1000 given to her by my will and this codicil.*"

The question was whether the Defendant Dinah Simmons was entitled, under the codicil, to a legacy of £500, or to any and what other sum, in addition to the legacy of £500 bequeathed to her by the will.

Mr. Southgate and Mr. Everitt, for the Plaintiff, the [279] assignee of the residuary legatee, argued that the widow was entitled in the whole to £800.

Mr. J. Pearson, for the widow, insisted that she was entitled, under the codicil, to such a sum as would "make altogether a legacy of £1000."

He cited *Milner v. Milner* (1 Ves. sen. 106); *Jordan v. Fortescue* (10 Beav. 259); *Ottley v. Gilby* (8 Beav. 602).

THE MASTER OF THE ROLLS [Lord Romilly]. I think that, under the codicil, the widow is only entitled to £300. She is to have a sum not exceeding £300, but the testator says, "making altogether a legacy of £1000 given to her by my will and this codicil." The sentence is singular, but I am of opinion, that the codicil simply gives £300, and that what follows is a mere matter of miscalculation. I cannot read the words as if he had said, "I intend, by giving her a legacy not exceeding £300, to make up, together with what I have given by my will, a legacy of £1000. I cannot turn "not exceeding £300" into £500.

[280] THE PENINSULAR, &C., BANKING COMPANY. Feb. 15, 1866.

During a voluntary winding up, an action having been brought against the company on bills of exchange, the Court stayed execution only, and directed the costs to be added to the debt.

This company, incorporated in 1864, was being wound up voluntarily. In January 1866, and after the commencement of the winding up, an action had been brought by a creditor against the company on twelve bills of exchange, and on the 16th of February the Plaintiffs would be entitled to sign judgment.

Mr. Cottrel now moved, under "The Companies Act, 1862" (25 & 26 Vict. c. 129), to stay all further proceedings in the action.

He cited *In re Keynsham Company* (33 Beav. 123); *Re Life Association of England, Limited* (12 W. Rep. 1069).

Mr. Southgate and Mr. Druce, *contrà*, argued that the power to grant injunctions did not apply to a voluntary winding up.

THE MASTER OF THE ROLLS [Lord Romilly]. I will stay execution only, and the creditor can go in under the winding up. He must add his costs to his debt, I cannot make him pay costs.

[281] BUCKLAND v. PAPILLON. Jan. 17, 18, Feb. 8, 1866.

[S. C. L. R. 1 Eq. 477; 35 L. J. Ch. 387; 13 L. T. 736; 12 Jur. (N. S.) 155; affirmed on appeal, L. R. 2 Ch. 67; 36 L. J. Ch. 81; 15 L. T. 378; 12 Jur. (N. S.) 992; 15 W. R. 92.]

Under an agreement for a lease for three years, with an option to the lessee to have an extension of the term, the option, on the bankruptcy of the lessee, passes, with the interest, to the assignees, under the 141st section of the 12 & 13 Vict. c. 106, and *semble* not as a power under the 147th section.

In 1856 the Defendant agreed with G. F. B. to grant him a lease of some property for three years, and, when called on by G. F. B., to grant him a lease for three years, or for the whole of his, the Defendant's term. In 1864 G. F. B. became bankrupt, and his assignee sold his interest to the Plaintiff, who called on the Defendant to grant the extended term. Held, on demurrer, that the Plaintiff was entitled to relief.

A proviso that a lessee shall not assign without the consent or the licence of the lessor, is not an usual covenant, and is not implied by the words, "the lease to contain all the usual covenants for protecting the interest of the lessor."

The case came on for argument on general demurrer to the Plaintiff's bills, which in effect stated as follows:—

On the 27th September 1856 the Defendant agreed to grant a lease of the offices and cellars in the basement floor of No. 5 Waterloo Place, Pall Mall, to Mr. Bloxam, who afterwards became bankrupt.

A memorandum of agreement of that date was duly signed by both parties, whereby the Defendant agreed to let, and Bloxam agreed to take, the offices and cellars of No. 5 for three years, at a rental of £60 per annum, free from all taxes, from the 29th of September then next ensuing. The memorandum contained the following clause:—"It is further agreed that Papillon shall, whenever called upon so to do by Bloxam, grant a lease to him, at his Bloxam's expense, of the before-mentioned offices and cellars at the rent of £60 per annum, for a period either of three years, seven years, or the remainder of the term, from this date, that the said John Papillon has at present in his power to grant; such lease to contain *all the usual covenants* for protecting the interest of the said John Papillon." Then followed a proviso against carrying on offensive trades, and that Bloxam would give six months' notice of his intention of leaving or [282] giving up the premises previous to the expiration of the term of three or seven years, or any other term that might be granted to him, and to deliver them up in as good a condition as then existing, reasonable wear and tear excepted.

Mr. Bloxam entered into possession, and he remained in possession until October 1864, without giving any notice or applying for an extended lease.

On the 13th October 1864 Mr. Bloxam became bankrupt; and on the 5th of December 1864 the assignee put up the bankrupt's interest in the premises for sale by auction. The Plaintiff bought it for £60, which he duly paid, and thereupon the assignee duly executed a memorandum of agreement, whereby, after reciting the previous agreement and the contract for sale, the assignee, Pooley, in consideration of £60, agreed with the Plaintiff that he would, when required by the Plaintiff, his executors, administrators and assigns (at his and their proper costs and charges), do and execute all proper acts and deeds for the purpose of assigning and assuring the estate and interest of him, Pooley, as such assignee, in the premises comprised in the before-mentioned agreement, and also in and under the same agreement, as the Plaintiff, his executors, administrators and assigns, should be advised might be necessary for carrying into effect the thereinbefore-recited contract for sale.

The Plaintiff thereupon applied to the Defendant to grant him a lease of the offices and cellars in question. The Defendant refused, and gave the Plaintiff notice to quit, and thereupon the Plaintiff filed this bill for the specific performance of the agreement of the 27th of September 1856.

[283] To this bill the Defendant demurred, contending that there was nothing to

be found in the Bankruptcy Act, which enabled the assignee to assign an option of this character. The section which relates to this matter is the 141st section of the 12 & 13 Vict. c. 106 (which is not repealed or affected by the subsequent Act of 24 & 25 Vict. c. 134).

By the 141st section, "all his (the bankrupt's) personal estate and effects," &c., "and all debts due or to be due to him," &c., become absolutely vested in the assignees, by virtue of their appointment. And by the 142d section, "all lands, tenements and hereditaments" (except copyhold, &c.), and "all interest to which such bankrupt is entitled in any of such lands, tenements or hereditaments," &c., "shall become absolutely vested in the assignees," &c., "by virtue of their appointment, without any deed of conveyance for that purpose."

By the 147th section, which relates to powers, it is enacted, "That all powers vested in any bankruptcy, which he might legally execute for his own benefit (except the right of nomination to any ecclesiastical benefice), may be executed by the assignees, for the benefit of the creditors, in such manner as the bankrupt might have executed the same."

Mr. Jessel and Mr. R. Willan, in support of the demurrer. Under the words "whenever called upon so to do" some limit of time must be placed, within which the option must be exercised. It must be restricted either to the three years or to the time during which Bloxam remained in possession of the property; here that possession ceased on his bankruptcy in October 1864. This distinguishes the case from *Moss v. Barton* (35 Beav. 197), [234] where the tenant had remained in possession of the property until he required the lessor to grant the extended term. Again, this is a mere option which was personal to Bloxam; his "assignees" are not mentioned, and therefore he alone could exercise it. In this respect an option differs from an estate or an interest in an estate.

Under the 141st, 142d and 147th sections of the 12 & 13 Vict. c. 106, which are not repealed by "The Bankruptcy Act, 1861" (24 & 25 Vict. c. 134), the Plaintiff has no title; for this option did not pass as "personal estate and effects" under the 141st section, or as "lands, tenements and hereditaments under the 142d section, nor is it a power within the 147th section. As property, the leasehold interest never vested in the assignees until they had elected under the 13 & 14 Vict. c. 106, s. 145; until then Bloxam remained the tenant, and he has executed no assignment to the Plaintiff. Even if the right of option comes within the 147th section as a power, still the assignees could not assign or delegate it to the Plaintiff; all they are empowered to do is to execute it as the bankrupt might have executed the same.

The words "such lease to contain all the usual covenants for protecting the interest of the said John Papillon," would imply a proviso against assignment without the licence of the lessor, which has now become not only necessary but usual. If that be the case, it is clear, from the decisions, that the Plaintiff, who has no such licence, has no title to relief.

Lastly, the bill is defective for want of parties. Bloxam, to whom the lease must, in the first instance, be granted, in order that the Defendant may have the [235] benefit of his covenants, *Dowell v. Dew* (1 Y. & Col. (C. C.) 345), is a necessary party, so likewise is his assignee, Mr. Pooley.

Mr. Hobhouse and Mr. W. W. Cooper, in support of the bill. The case of *Moss v. Barton* (ante, p. 197) is decisive on the point that a tenant's right of exercising the option of extending his term continues until the tenancy has terminated. Where a tenant holds over, the original terms of his tenancy continue the same as before, and this right of option was one of them. This doctrine has been acted on in the case of an option to purchase under a partnership deed after the term had expired; *Essex v. Essex* (20 Beav. 442). The insertion of the word "assigns" was perfectly unnecessary, for the right of assignment is incident to the estate of a lessee, unless it be expressly restrained; *Church v. Brown* (15 Ves. 264); and here the right of option is part of the estate.

The bankruptcy of Bloxam creates no objection to the right to specific performance, for it does not discharge the contract entered into for valuable consideration; *Crosbie v. Tooke* (1 Myl. & K. 431); *Morgan v. Rhodes* (Ib. 435); *Brooke v. Hewitt* (3 Ves. 253, and p. 255, note).

The right in question passed, under the Bankruptcy Act, with the property, it is similar to a right to determine a lease on notice, or to a condition to extend the interest on A.'s coming from Rome. In that view, it is not a discretion which cannot be delegated, it is like the lease itself, if the lease be not personal the option is not personal. But it may pass, under the [286] 147th section, as a power conferring on the bankrupt an interest in the property, which he would not otherwise possess, and which the assignee is ready to execute. If an election on the part of the assignee were necessary, he has elected; and as to the clause against alienation without the leave of the landlord, it has never been considered an usual covenant, for it is inconsistent with the estate granted.

Lastly, neither Bloxam nor the assignee could be made parties, they have parted with all their interest.

Mr. Jessel, in reply.

Feb. 8. THE MASTER OF THE ROLLS [Lord Romilly]. The question to be determined on this demurrer is, whether an option to take a renewed lease of certain premises passed to the assignees in bankruptcy of the lessee, and have by them been assigned to the Plaintiff.

[His Lordship stated the circumstances of the case and proceeded :]—

I think that the original lessee, who became bankrupt, did nothing to disentitle himself of the right to exercise the option he had of calling on the Defendant to grant him such a lease as is stated in the agreement. I had recently, on this point, to consider a case of *Moss v. Burton* (35 Beav. 197), very nearly approaching this, where I held that the lessee, by holding over with the assent of [287] the lessor, did not destroy the original agreement, or enable the lessor successfully to contend that it had been waived.

I think the only question on this demurrer is whether this option, which belonged to the bankrupt, passed to his assignees. The proviso to grant a new lease at the option of the lessee forms part of the agreement of 27th September 1856, which was entered into for a valuable consideration; it is, therefore, in my opinion, a contract made with Bloxam by the Defendant, the performance of which Bloxam might have enforced at any time before his bankruptcy, unless he had waived or abandoned it, which, as I have already stated on the facts stated in this bill, in my opinion he did not. I am of opinion that the whole of his interest in this contract must be included in the words "personal estate and effects present and future" of the 141st section of the Act of 1849. I should have considerable doubt whether the bankrupt's option to take a lease could be held to be a power within the 147th section of that Act; but I think that the option is part of the interest contained in the agreement, and that the whole of the interest of the bankrupt in that agreement is part of the personal estate of the bankrupt.

The agreement of 27th September 1856 is not one which requires any skill or discretion for its performance by Bloxam, and it could, therefore, be assigned by him, unless an intention to the contrary can be collected from the contents of the agreement itself. If the agreement had contained a proviso that the lease should not be assigned, then I think that the option to take a new lease would not have passed to the assignee, unless with the consent of the Defendant.

[288] In *Weatherall v. Geering* (12 Ves. 504), Sir William Grant refused to order the intended lessors to execute such a lease, where there was a proviso against assignment without licence of the lessor, and the intended lessee had assigned his interest under the agreement, and had also taken the benefit of an Act for the relief of insolvent debtors; and in his judgment Sir William Grant appears to have doubted whether the specific performance of any agreement for a lease not containing such a proviso could be enforced in favor of the assigns of the intended lessees. But, if that was his opinion, it is, in that respect, overruled by the Lord Chancellor in the case of *Crosbie v. Tooke* (1 Myl. & K. 431), where he enforced specific performance of such an agreement in favor of the assignee of the intended lessee who had become bankrupt, and, at the same time, he distinguished that case from the case of *Weatherall v. Geering*, by the circumstance that, in that latter case, the lease to be granted was to contain a covenant not to assign without the licence of the lessor.

The next case, in the same volume, of *Morgan v. Rhodes* (1 Myl. & K. 435) is to

the same effect; and this also seems to have been the principle which governed the case of *Dowell v. Dew* (1 Y. & C. (C. C.) 345), on which the Defendant relied. In that case, a lease for fourteen years had been granted to William Dowell, which contained a proviso that the same should be forfeited, if the lessee, his executors, administrators or assigns should alien, &c., without the consent of the lessor. A short time before the determination of the lease, an agreement was entered into by the lessor with John Dowell, in whom the lease was then vested, to grant to him another lease for fourteen [289] years "on the same terms as the last." On a suit for specific performance brought by Thomas Dowell, the brother and alienee of John Dowell, the Lord Justice Knight Bruce, then Vice-Chancellor, held, that the Plaintiff was not entitled to have a lease granted to him without giving to the lessors the personal liability of John Dowell for the due performance of the covenants. This case was brought by appeal before Lord Lyndhurst, as Chancellor, who affirmed the decree of the Vice-Chancellor, but (as appears by the report of it in the Law Journal (vol. 12 (Ch.), 164)) expressly on the ground that a clause against alienation had been inserted in the first lease, which governed the agreement with John Dowell. His Lordship is represented to have said:—

"The next objection is founded on the assignment without licence of John Dowell, the tenant, to his brother Thomas. If a lease had been granted in pursuance of the agreement and that lease had been assigned, it would have been a forfeiture, but such forfeiture might have been waived. The question, however, remains to be decided, whether, with reference to the object of the present suit, the same principle would apply to the agreement. It is clear that if it were not for this clause against assigning without leave, the agreement would be binding, and might be enforced by Thomas Dowell the assignee. The same consequence would follow notwithstanding the renewal, if leave had been previously obtained. The restraint is introduced for the benefit of the owner of the estate, and he may dispense with it if he thinks proper, either before or after the assignment; and if he does so, the tenant is in the same situation as if there was no such stipulation."

In the agreement in the case before me of the 27th [290] September 1856, there is no intimation that the lease to be granted is to contain any clause against assignment, unless it be in the proviso that the lease shall contain the usual covenants for the protection of the lessor, and in the absence of the word "*assigns*." With regard to this point, I am of opinion that a proviso, that the lessee shall not assign without the consent or licence of the lessor, is not a usual covenant; and as to the absence of the word "*assigns*" from the agreement, having regard to the case of *Church v. Brown* (15 Ves. 258), I am of opinion that the absence of this word from an agreement for a lease (which is not, I apprehend, very unusual) cannot have the effect of preventing the agreement and interests under it from vesting in the assignees in bankruptcy of the intended lessee; and if it vests in the assignees in bankruptcy, it is clear that it may be assigned by them.

I am also of opinion that the instrument which purports to assign this interest from the assignees in bankruptcy to the Plaintiff is sufficient for that purpose, and that the right to enforce this option is, upon the statements contained in the bill, vested in the Plaintiff.

I am of opinion, therefore, that this demurrer must be overruled.

NOTE.—Affirmed by Lord Chelmsford, L. C., 23 Nov. 1866; 36 L. J. Ch. 81. [L. R. 2 Ch. 67.]

[291] SCOTT v. KEY. July 11, 12, 1865.

[S. C. 6 N. R. 349; 11 Jur. (N. S.) 819; 13 W. R. 1030. See *Wilkins v. Jodrell*, 1879, 13 Ch. D. 573.]

Bequest to widow of two-thirds of the residue, "to be at her sole and entire disposal, for the maintenance of herself and such child or children as I may leave by her."
Held, that the widow had an uncontrolled power over the income so long as the

children were maintained, and that the right of the children to maintenance did not cease at twenty-one.

Bequest of the principal and interest of one-third of the residue to a widow, "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and children." Held, that this raised no precatory trust, and that the widow took absolutely.

The testator bequeathed two-thirds of his property "to his dear wife Margaret Scott, to be at her sole and entire disposal for the maintenance of herself and such child or children as he might leave by her." Secondly, he bequeathed the remaining one-third to three trustees, to pay £300 a year to his (the testator's) father and mother, and he proceeded as follows:—On their deaths, "the balance remaining of the principal and interest of the said one-third of my property to go to my dear wife, being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children that I may leave by her."

The testator died in 1842, leaving his widow and one child, a daughter, who married in 1862. The testator's parents were dead, and the question arose as to the interests of the mother and daughter under the will.

The Plaintiff, the widow, submitted that she was entitled to the whole of the estate of the testator, or, at all events, to one undivided third part thereof.

Mr. C. T. Simpson, for the widow, argued that there was an absolute gift of the two-thirds to the widow, subject to a discretionary trust to support the daughter, which had ceased on her marriage. Secondly, that the [292] widow was absolutely entitled to the remaining one-third, there being no precatory trust created by the expression that she would manage the property given to her "with prudence and care."

He cited *Carr v. Living* (28 Beav. 644, and 33 Beav. 474); *Camden v. Benson* (4 L. J. (Ch.) 256).

Mr. Edward Smith, and Mr. Rendall, for the daughter, argued that there was a trust affecting the whole for the maintenance of the daughter.

They cited *Woods v. Woods* (1 Myl. & Craig, 401); *Crockett v. Crockett* (2 Phillips, 553); *Gully v. Cregoe* (24 Beav. 185); *Hart v. Tribe* (32 Beav. 279, and 1 De G. J. & S. 418); *Raikes v. Ward* (1 Hare, 445).

[THE MASTER OF THE ROLLS. I think the widow is entitled to one-third, and I wish to hear the Plaintiff as to whether she is not entitled to the two-thirds for life.]

Mr. Simpson, in reply, referred to *Robinson v. Tickell* (8 Ves. 142); *Hamley v. Gilbert* (Jacob, 354).

THE MASTER OF THE ROLLS [Sir John Romilly]. My present impression is that, as to the two-thirds, all that the widow takes is an absolute interest in the income of that fund during her life.

With respect to the one-third, I am satisfied she takes an absolute interest, for it is to go to her, the testator [293] being assured that she will husband it with care and prudence for the sake of herself and the children.

I do not think that the trust of the two-thirds terminates with the infancy or marriage of the children, i.e., it is given to the widow at her sole and entire disposal for the maintenance of herself and children. She is to judge how much of it is necessary to maintain them. But can that be effected if the two-thirds are given to her absolutely? She might then dispose of the whole fund, and there would be nothing remaining for the support of the children.

If a child attained twenty-one, and had no means of support, would not the widow be bound to maintain such child? If this child attained twenty-one, and had no means of support, would she not be entitled to maintenance? So if she married, and the Plaintiff was of opinion that she did not then require support, but the child afterwards became a widow and had no means of support, surely she would be entitled to some means of support. I do not know how to give effect to this, except by saying that Margaret Scott has an absolute life interest in the fund, subject to providing for the necessary maintenance of the children.

With respect to the one-third, it is given to her absolutely; for the expression of the testator's assurance that she will husband her means is a mere piece of advice,

and I am satisfied, without going into those cases which resemble and are cited in *Knight v. Boughton* (12 Beav. 312), that this is not a precatory trust which the Court would enforce as to the one-third. I am disposed to say that the Court is of opinion that, at all events, she takes the two-thirds for life absolutely, it being at her sole discretion how she [294] and her child are to be maintained, and then I shall give a general liberty to apply without expressing what the rights after her life may be. I will consider the case.

July 12. THE MASTER OF THE ROLLS. In this case, I have no additional observations to make. I am of opinion, after referring to all the cases, that they confirm the view I took at the conclusion of the argument with respect to the one-third, that it clearly belongs to the widow, and that the words do not create any trust at all. There is a gift of the principal and interest, and the rest are general words expressive of an assurance that she will husband her means for the sake of herself and children, but there is no trust for the children. This is borne out by a series of cases, of which *Knight v. Boughton* is one of the last.

With respect to the two-thirds, I am of opinion that she has an uncontrolled discretion over the income, and may apply it, as she thinks fit, for the maintenance of herself and children. No doubt she will maintain herself; and so long as the child is maintained the Court cannot interfere, but the interest of the child does not terminate at twenty-one, because events may occur which may make it essential that she should have a maintenance. The widow does not take an absolute interest in the fund for life, for the child must be maintained. I express no opinion of the rights after the widow's death, but I shall give liberty to apply.

DECREE.—Declare that the Plaintiff is entitled to one-third of the residuary estate of the testator, and to the income of the remaining two-thirds of the said estate, so long as the testator's child is maintained, and that the Plaintiff has uncontrolled power over the disposition of the said income so long as the said child is maintained.—Reg. Lib. 1865, B. fol. 1668.

[295] PERCY v. PERCY. Jan. 19, 1866.

A testator directed his trustees to convert the residue of his real and personal estate, and to invest so much money as would produce £200 a year, and to pay it to his wife during her life. And he gave the residue, not wanted for that purpose, to other persons. The widow survived five years, and the deficiency of the income of the residue to pay her annuity amounted to nearly £700. Held, that the deficiency was payable out of the *corpus*.

The testator died in 1847, having by his will devised the residue of his real and personal estate to his executors, upon trust, to convert and invest at interest, and stand possessed thereof upon the following trusts:—

In trust to set apart and invest so much money as would produce the clear annual sum of £200, and pay the said annual sum to his, the testator's, wife Susanna Percy during her life, for her separate use, and stand and be possessed of the residue of his real and personal estates, which should not be wanted for raising the said annual sum of £200, and also of the whole of his said real and personal estates, after the decease of his said wife (including the sum to be set apart for raising the said annual sum of £200 for her) upon trust for certain persons therein named.

Susanna Percy died in 1852.

The Chief Clerk found as follows:—

The rents, profits and income of the real and personal estate, received during the lifetime of Susanna Percy, were insufficient for the payment of the annuity in full. The executors made payments to her amounting in the whole to £708, 5s. 1d. on account of the annuity, which sum exceeded the income actually produced from the real and personal estate during her life by the sum of £395, 14s. 5d., but fell short of payment in full of the annuity by £186, 10s. 3d., which he found remained due [296] to the estate of Susanna Percy in respect of the arrears of the annuity. But he

reserved for the consideration of the Court the question whether the £186, 10s. 3d. was due and payable to her estate.

The question was whether the annuity was payable out of the *corpus*.

The case was argued by Mr. Stallard, Mr. De Gex and Mr. Hardy.

THE MASTER OF THE ROLLS [Lord Romilly] held that the legal personal representatives of Susanna Percy were entitled to have the arrears of the annuity of £200 paid out of the *corpus* of the residuary personal estate of the testator, and that if such residuary personal estate should not be sufficient, out of the produce of the real estate of the testator.

NOTE.—See the cases in the note to *Howarth v. Rothwell*, 30 Beav. 519.

[297] *Re LATHROPP'S CHARITY*. Jan. 20, 22, 1866.

[S. C. L. R. 1 Eq. 467; 13 L. T. 784; 14 W. R. 326.]

The 80th section of the 8 Vict. c. 18 (The Lands Clauses Consolidation Act) is to be construed liberally. A railway company took lands belonging to a charity, and the Court authorized the investment of the purchase-money in waterworks. Held, that the company must pay the costs of a petition for payment out of the purchase-money.

The North Staffordshire Railway Company, which was subject to the provisions of "The Lands Clauses Consolidation Act, 1845," took compulsorily some portion of the land belonging to the charity, and paid the purchase-money into Court.

After this the Court authorized the trustees to improve the supply of water to the town of Uttoxeter and to raise a sufficient sum for that purpose.

The trustees now presented a petition for the payment out of Court of this fund for the purposes sanctioned by the Court, and they asked that the company might pay the costs of the application.

Mr. Wickens, in support of the petition. The company, who have taken the land under the powers of the Act, are bound to pay the expenses of obtaining it out of Court. Substantially, what is asked is the payment to the rightful owners, and its application is a matter of no importance. The case of *Re Oxford, &c., Railway* (27 Beav. 571), which will be cited, was decided on the authority of *Re Buckinghamshire Railway Company* (14 Jur. 1065), but the point has since been before Vice-Chancellor Wood, who has decided, in *Re Incumbent of Whitfield* (1 John. & Hem. 610), that where the purchase-money for the glebe had been laid out in building the parsonage, the costs of obtaining [298] payment ought properly to be borne by the company. He cited *Hodges on Railways* (p. 456 (3d ed.)).

Mr. W. J. Bovill, for the company. This is an application for payment to the waterworks, and it is not such an investment as is authorized by the 80th section of the Act (8 Vict. c. 18), and, therefore, the costs are not payable by the company. The case is governed by *Re Buckinghamshire Railway Company* (14 Jur. 1065), followed by *Re Oxford, &c., Railway Company* (27 Beav. 571). The case of *Re The Incumbent of Whitfield* (1 John. & Hem. 610) is inapplicable, for there the application of the money was one authorized by the Act, but the Act sanctions no investment in waterworks.

Mr. Wickens, in reply. This must be treated as an investment. If a sum had been invested in a mortgage, the application for its payment would probably be payable by the company, who have rendered the application necessary. This fund is asked for for the same purpose.

Jan. 22. THE MASTER OF THE ROLLS [Lord Romilly], after examining the cases on this subject, I think that, in this case, according to the Act, the company ought to pay the costs of the petition. In the case of *The Buckingham Railway Company*, the Lord Chancellor held that a company was not bound to pay the costs of a petition for the investment of the money laid out in the erection of buildings, and I followed that decision in *Ex parte Melward* (27 Beav. 571). Since then, the matter

[299] has come before the Vice-Chancellor Wood in the case of *The Incumbent of Whilfield* (1 John. & Hem. 610), in which case he thought that, under the 80th section of the Lands Clauses Consolidation Act (8 Vict. c. 18), the company was bound to pay the costs.

I have again referred to that Act, and I think that the 80th section does apply to this case. I think the section is a remedial one and ought to be construed liberally, and though it may be true that, when much expense is occasioned by an application for leave to lay out the money in the erection of buildings, the company ought not to be called upon to pay the costs, and that there ought to be an apportionment; still, as in fact is the case here, where the petition is little more than an application to pay out the money to persons or a corporation which the Court has declared to be entitled to receive it, in such a case it must, I think, be considered as partaking of that character and be one which the company must pay for.

In truth, here it is either a payment to the charity or it is an application to have the money invested in certain waterworks. In either case, I think that the railway company must pay the costs of the petition. (Reg. Lib. 1866, B. fol. 220.)

[300] KENYON BY JONES (Next Friend) v. KENYON. KENYON BY JANE KENYON, Widow (Next Friend) v. KENYON. Feb. 8, 1866.

Two suits had been instituted on behalf of infants for the same purpose, and a decree had been obtained in the second. Upon motion to stay the first suit, the Court ordered it to be stayed, giving liberty to the next friend in the second to apply for the conduct of the first.

These two suits were instituted on behalf of infants for the same purpose. The second suit, being a friendly one, a decree had been obtained in it before the first could be brought to a hearing.

A motion was now made to stay the proceedings in the first suit.

Mr. Selwyn and Mr. C. Roupell, in support of the application.

Mr. Jessel and Mr. Sheppard, *contra*, asked that the next friend in the first suit might be substituted in the suit. *Nanney v. Wynn* (2 Jur. (O. S.) 962 (reversed by Lord Cottenham)); *Taylor v. Oldham* (Jacob, 527); *Belcher v. Belcher* (2 Drew. & Sm. 444).

THE MASTER OF THE ROLLS [Lord Romilly]. I must stop the first suit.

I accede to the argument that it is often for the benefit of an infant that a suit on his behalf should be conducted by a next friend, not friendly to the Defendant, who is an accounting party. But I should like to know more about this case, which I shall in Chambers. [301] I shall direct the costs of the first suit to be costs in the second, and give the next friend in the first suit liberty to go in and ask to be allowed the conduct of the second suit.

[301] MULLINS v. HUSSEY. Feb. 12, 1866.

[S. C. L. R. 1 Eq. 488; 35 L. J. Ch. 348.]

Where, upon a sale under the Court, the title turned out bad: Held, that the purchaser, on being discharged, was not entitled to his costs as against a Defendant to whom the conduct of the sale had been committed by the Court. But his rights, as against any fund which might come into Court, were reserved.

This was a motion to discharge John Parr, a purchaser under the Court, from his purchase (it having been determined that there was no valid title), and to have his costs paid by Mr. W. Stephens, a Defendant, to whom the Court had given the conduct of the sale.

In 1863 the property was ordered to be sold, and the Defendant Mr. Stephens, who was a mortgagee, was directed to have the conduct of the sale.

The property was sold by auction in the same year, but in 1865 the Chief Clerk certified that a good title could not be made. The Master of the Rolls was of a different opinion, but his decision was reversed in December 1865, by the Lords Justices.

Mr. Hobhouse and Mr. Surridge, for the purchaser. When a purchaser under the Court is discharged, the rule is, if there be a fund in Court, to direct payment out of such fund; *Perkins v. Ede* (16 Beav. 268). But if there be no fund in Court, the Plaintiff is ordered to pay them, without prejudice to how they are ultimately to be borne; *Smith v. Nelson* (2 Sim. & St. 557); *Berry v. Johnson* (2 Younge & C. (Exch.) 564). Here the [302] Plaintiff has not, as is usual, the conduct of the sale, and he is abroad, and Stephens, who has taken upon himself the conduct of the sale, stands in his place, and in that of an ordinary vendor. He has voluntarily made himself liable to the purchaser. He is also a mortgagee in possession, who having applied for and obtained the conduct of the sale, has sold the estate, without the ability of making a good title to it; he ought to pay the purchaser's costs.

[THE MASTER OF THE ROLLS. I do not at present see my way to making this Defendant pay the costs. I think I ought to reserve the costs as against any fund which may come into Court in this suit.]

Mr. Jessel and Mr. Rawlinson, for Stephens. Every book of practice is against this application. Seton on Decrees (p. 617 (2d ed.)); Dart on Vendors (p. 763 (3d edit.)); Sugden on Vendors (p. 107 (14th ed.)).

There is no contract by which the Defendant has rendered himself liable at law, why should the liability be extended in equity? The sale is by the Court, and not by any particular party to the suit.

Mr. Beales, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Romilly]. I must order the purchaser to be discharged from the purchase, and direct his costs, charges and expenses [303] properly incurred, occasioned by his bidding for the property, and also his costs of the reference as to title, and of all proceedings consequent thereon (but not including the costs of the appeal to the Lords Justices), and the costs of the application, to be taxed. I must reserve the payment of them, and give him liberty to apply for payment out of any funds that may be paid into Court to the credit of the case, and give him a stop-order. (Reg. Lib. 1866, B. fol. 330.)

[303] BRIGHOUSE v. MARGETSON. Feb. 8, 15, 1866.

Upon a motion for an injunction, the Defendant consented to an immediate decree, but he became bankrupt before the decree had been drawn up, and his written consent to set down the cause could not be obtained. The Court made the order for setting down the cause and dispensed with the consent.

On a motion for an injunction and receiver, the Defendant agreed that the cause should be at once heard, and that a decree should be taken for a dissolution of the partnership from a given date, and for accounts and inquiries. The Master of the Rolls, thereupon, made the decree. It being necessary to have the written consent of the Defendant's solicitor to set down the cause, the Plaintiff applied for it, but after a delay of two days the Defendant's solicitor wrote to the Plaintiff's solicitor to say that the Defendant had since become bankrupt, and that he had no longer power to sign the consent.

Mr. Jessel, for the Plaintiff, asked that the decree might, notwithstanding, be drawn up.

THE MASTER OF THE ROLLS [Lord Romilly]. The decree is that of the Court. I will add that the [304] Defendant, by his counsel, having consented that the cause should be put in paper, the Court ordered the cause to be set down for hearing. I consider that I made an order to set it down, and I will order it to be set down *sine pro tunc*.

[304] WHITE v. STEWART. Feb. 17, 1866.

A person served with the decree afterwards married. Held, that the proper way of bringing the trustees of her marriage settlement before the Court was by service of the decree.

A lady, who was not a party to the suit, but had been served with notice of the decree under the 15 & 16 Vict. c. 86, s. 42, rule 8, afterwards married. The question was, how the trustees of her marriage settlement ought to be brought before the Court, and whether by an order of revivor or supplement, under the 15 & 16 Vict. c. 86.

Mr. Eddis, for the Plaintiff.

THE MASTER OF THE ROLLS [Lord Romilly]. The proper course seems to me to be, to serve them with the decree, in the same way as was done to the lady herself, whose interest they represent.

[305] THE ATTORNEY-GENERAL v. THE MARKET-BOSWORTH SCHOOL.
Nov. 20, 1865.

Authority given by the Court to apply to Parliament to authorize a scheme admitting the children of Dissenters to the benefit of a Church of England school. And, upon application to Parliament, such authority was granted.

Some of the circumstances relating to this charity will be found reported in the case of *The Attorney-General v. Dixie* (13 Ves. 519). The subject of the charity was a Church of England school founded by Sir Wolstan Dixie at Market-Bosworth, in Leicestershire. The present state of the school requiring a new scheme of management, one was prepared under the decree of the Court, in this suit, dated March 1864. This scheme proposed (Art. 33) "that the school should be open to the children of parents of all religious tenets," and (Art. 38) that religious instruction should be given, "by instructing in the catechism and doctrines of the Church of England, to those boys whose parents should not object, in writing, to their receiving such instruction." It also provided (Art. 58) that "the subjects of instruction in the school should be in the principles of the Christian religion, according to the doctrines of the Church of England" (subject as before mentioned), &c.

This scheme could not be carried into effect except by means of an Act of Parliament, and the Attorney-General asked to be at liberty to apply to Parliament for an Act to carry into effect this scheme for the future regulation and management of the grammar school.

Sir Roundell Palmer (Attorney-General) and Mr. Hobhouse, in support of the petition.

[306] Mr. Selwyn and Mr. W. Pearson, for the patron.

Mr. Woodroffe, for the governors, resisted the application to change the religious character of the school. He cited *Re Ilminster School* (2 De G. & J. 535); *Baker v. Lee* (8 H. of L. Cas. 495); and see *Attorney-General v. Clifton* (32 Beav. 596).

THE MASTER OF THE ROLLS [Sir John Romilly]. This must be treated as a Church of England charity, and I could not by possibility sanction any scheme that admitted of any other instruction: but the object proposed has failed, and cannot now be carried into execution. Notwithstanding the statement of Lord Eldon in 1810 (13 Ves. 519), the school has gone from bad to worse, and the question now is what is to be done? The Charity Commissioners, the Attorney-General, and the heir of the founder, concur in saying that this state of things cannot continue, and that it is desirable that a fundamental alteration should be made in the charity, but this cannot be made by the Court. No reported case, therefore, has any application to the present, the question being, not whether this is a Church of England charity, but whether, being one, it is desirable to apply to Parliament for a different destination of the revenues.

I am of opinion that an application to Parliament is desirable for extending the scope of instruction, and, if possible, to admit the children of Dissenters.

NOTE.—See Reg. Lib. 1865, A. fol. 2493, and Reg. Lib. 1866, A. 248. The Act was applied for and received the Royal assent on the 6th of August 1866. The Act is intitled “An Act for the Better Regulation of the Market-Bosworth School” (29 & 30 Vict. c. viii., private).

[307] ASPINALL v. DUCKWORTH. Feb. 23, 1866.

[See *In re Featherstone's Trusts*, 1882, 22 Ch. D. 119; *Kingsbury v. Walter* [1901], A. C. 194.]

A testator bequeathed a fund to his nephew A. and the children of his late sister B., as tenants in common; but, in case any died before the testator leaving issue, his share was not to “lapse,” but go to his executors as part of his personal estate. Three of the children of B. died before the testator and left no issue. Held, that there was no lapse, but that the whole went to the other members of the class.

The testator's personal estate was insufficient for the payment of his debts, but, by his will dated in 1836, he devised his real estate to trustees, upon trust, after the death of his wife, to sell and hold the produce on the following trusts:—

“Upon trust to divide the same unto and equally amongst my nephew John Aspinall and the children of my late sister Elizabeth Bullock, or their respective executors, administrators or assigns, as tenants in common. Provided always nevertheless and I do hereby expressly direct that in case any of my nephews or nieces shall die before me and leave issue him or her surviving, the estate and interest which such nephew or niece would, respectively, if living, have taken in the produce or monies to arise from my said freehold, copyhold, customary, leasehold and personal estates, shall not thereby lapse, but, in such case, shall be held in trust for the executors or administrators of such nephew or niece, respectively, to be held and applied as part of the personal estate of such nephew or niece respectively.

The testator died in August 1863 and his wife in October following.

At the date of the testator's will there were six children of his sister Elizabeth Bullock; but they all predeceased the testator. Three of them died without issue, and the other three left children.

[308] Mr. Cadman Jones, for the Plaintiff John Aspinall, argued that no part of the fund had lapsed, the bequest being to a class, between whom the fund was to be divided. He cited *Havergal v. Harrison* (7 Beav. 49); *Hall v. Robertson* (4 De G. M. & G. 781).

Mr. Finch, for the legal personal representative.

Mr. Macnaghten, for two co-heirs. The use of the word “lapse” shews that the gift is not to a class but to the individuals, and in such a way that it would lapse by the death of the legatee in the testator's lifetime. The consequence is that three-sevenths of the fund has lapsed for the benefit of the co-heirs. He cited *Stanhope's Trusts* (27 Beav. 201); *Ackerman v. Burrows* (3 Ves. & B. 54).

THE MASTER OF THE ROLLS [Lord Romilly]. I think the case clear, and the meaning distinct. The testator, it appears, lived long after he had executed his will, for the will is dated in 1836, and he died in 1863. The result was that his nephews and nieces all died before him.

The first gift is to the Plaintiff and the children of the testator's deceased sister, “or their respective executors, administrators or assigns, as tenants in common.” If the will had stopped there, there would be no question that it was a gift to a class, and that, if one of them happened to die in the testator's lifetime, the survivors would take the whole, and if only one survived, he would take the whole fund. That being clear, the only question is, how has the testator subsequently altered it? He has added this proviso:—that in case any [309] nephew or niece should die before him and leave issue, the interest which he would have taken, if living, shall not lapse but

become part of such nephew's personal estate. I concur that the word "*lapse*," in its technical sense, is not what the testator meant, and that he probably meant "*fail*." It is quite clear that, independently of this proviso, the survivors, if any, would have taken the whole, and that the shares of those who died before the testator would have failed. But the testator adds that, if the nephew or niece who died before him left issue surviving, the executors of such nephew or niece were to be placed in exactly the same situation as if the parent had survived.

If I were to give a technical meaning to the word "*lapse*," I should hold that this was a division into sevenths, and that it was given individually, and that, as three died without issue in the testator's lifetime, there was a lapse of three-sevenths.

But I am of opinion that the testator did not intend any lapse, that the fund is divisible into fourths, and that the Plaintiff and the representatives of the sister's three children who predeceased the testator and left children each take one-fourth share.

DECREE.—Declare that the monies arising from the sale of the testator's freehold estate are divisible in fourths between the testator's nephew John Aspinall and the personal representatives of the three children of the testator's sister Elizabeth Bullock who died in the testator's lifetime leaving issue. Reg. Lib. 1866, A. fol. 477.

[310] BURMESTER v. MOXON. Feb. 14, 1866.

The Court, in making a foreclosure decree, gave liberty to any party to apply in Chambers for a sale.

This was a foreclosure suit instituted by the first mortgagee against the mortgagor and subsequent incumbrancers. The second mortgagee asked for a sale, but he objected to make a deposit in Court. This was resisted by the Plaintiff.

Mr. Baggallay, for the Plaintiff.

Mr. Selwyn and Mr. Surridge, for the Defendants. See 15 & 16 Vict. c. 86, s. 48.

THE MASTER OF THE ROLLS [Lord Romilly]. The Court has great difficulty in dealing with these questions. When the mortgage is large, the mortgagee is sometimes able to get the estate for less than its value. But, on the other hand, the first mortgagee is not to be kept out of his money during the pendency of a suit for the specific performance of a contract for selling the mortgaged premises. Even without such a suit there are various other proceedings which might considerably delay the completion of a sale. The difficulty might be met by the deposit by the subsequent incumbrancer of a sufficient sum in Court. This being declined, I think I ought to see and judge for myself in Chambers whether the title is a difficult one or not, which I shall be able to ascertain in settling the conditions of sale and reserved bidding.

I think the proper decree is to direct a common fore-[311]-closure, and give the Defendants liberty to apply in Chambers for a sale of the property, on such terms and on payment of such a sum of money into Court as the Judge shall think fit.

If I should be satisfied that there is no great difficulty in the title, and if a sum be deposited in Court sufficient to protect the first mortgagee, I should be disposed to direct a sale in Chambers.

DECREE.—After the common foreclosure and redemption decree, the decree proceeded, "And any of the parties interested are to be at liberty to apply in Chambers for a sale of the said hereditaments upon such terms as the Judge shall direct." Reg. Lib. 1830, A. fol. 351.

[311] *Re TAYLOR. DAUBNEY v. LEAKE. Feb. 9, 1866.*

[S. C. L. R. 1 Eq. 495.]

Residuary legatees, served with the decree and having liberty to attend, being very numerous, the Court declined allowing them more than one set of costs of attending the taking the accounts.

In this case the residue was divisible among the first cousins of the testatrix, twenty in number. They had all, except the Plaintiff Daubney, been served with the decree and had obtained liberty to attend. (15 & 16 Vict. c. 86, s. 42, rule 8.)

On the cause coming on for further consideration, they all asked for their costs, including those of taking the accounts. But

THE MASTER OF THE ROLLS [Lord Romilly] declined to give to each of these parties the costs of attending to take the accounts and he ordered as follows:—That the costs of Plaintiff and Defendant of this matter and suit, and of all parties [312] having liberty to attend of this matter and suit, be taxed as between solicitor and client, “except that (as to the costs of taking the accounts) the said parties having liberty to attend were to have, between them, one set of costs as between solicitor and client.” (Reg. Lib. 1866, B. fol. 529.)

[312] *COLLETT v. COLLETT. Feb. 10, 15, 1866.*

[S. C. 14 L. T. 94; 12 Jur. (N. S.) 180; 14 W. R. 446. See *Dawson v. Oliver-Massey*, 1876, 2 Ch. D. 755.]

A condition of marriage with consent: Held, subsequent and not precedent, and its performance having become impossible, by the act of God, was dispensed with.

A testator gave a share of his residuary real and personal estate to his daughter, her heirs, executors, administrators and assigns, to be paid at twenty-one or on her day of marriage, provided it should take place with the consent of his widow. There was a gift over in case of her death “without having attained twenty-one years or been so married as aforesaid.” Held, that the consent was a condition subsequent, and that the daughter, having married without such consent (her mother being dead at the time), had a vested interest, and that her share ought to be transferred to the trustees of her settlement, though she was still an infant.

The testator, by his will dated in 1854, gave his real and personal estate to trustees in trust to pay an annuity to his widow for life, and subject thereto, upon trust “as to one equal fourth part thereof to and for the benefit of his dear child, Helena Parker Collett, her heirs, executors, administrators and assigns;” and as to the other three-fourths in trust for his three other children. And he declared that such fourth part or share of each of them, his said four several above-named children, should become payable to each of them respectively as and when they should each respectively attain her, his or their respective ages of twenty-one years, or days or day of marriage, *provided such marriage should take place with the consent of his wife*, whom he thereby appointed to be guardian of each of his aforesaid four children. And he declared that in case of the death of either of them, his said four children thereinbefore named, without having attained the age of twenty-one years, or been so married as aforesaid, then the fourth share so given, [313] devised and bequeathed, to or in trust for such of them, as should so die, should be held in trust for, and belong to, the others or other, or survivors or survivor of them, his said four children, as aforesaid. And the testator declared that, in the meantime and until each of them, his said four children, should attain the age of twenty-one years or be married as aforesaid, it should be lawful for his trustees to accumulate the income. And he directed that out of the annuity given to his wife, she should maintain, keep, clothe and educate his said four children until they should so, as aforesaid, become respectively entitled to the fourth

part or share thereinbefore given and provided for them. "And in case of the death of all of them, his said children, without living to attain the age of twenty-one years or to be married," then he gave his real and personal estate to his wife.

The testator died in 1855, and his widow died in the following year (1856).

In July 1865 the testator's daughter Helena, who was still an infant, married Mr. Lloyd with the consent of her guardians and of the Court, and she, her husband and trustees executed a settlement of her real and personal property under the provisions of Sir Richard Malins' Act (18 & 19 Vict. c. 43). Her mother being dead at the time, it was impossible to obtain her consent to the marriage.

A petition was now presented by Mr. and Mrs. Lloyd and the trustees of their settlement for the transfer of one-fourth of the property to the trustees of the settlement.

Mr. Selwyn and Mr. Lewin, in support of the petition. The share is vested in the first instance, and the super-[314]-added condition is a condition subsequent, the performance of which has, by the act of God, become impossible. The legatee is therefore discharged from its performance. They cited *Graydon v. Hicks* (2 Atk. 16); *Peyton v. Bury* (2 Peere Wms. 626). The limitation over is not in the alternative, and the word "or" must be read "and;" *Grant v. Dyer* (2 Dow. 87).

Mr. Cracknall, *contra*. This condition is precedent: *Knight v. Cameron* (14 Ves. 389); *Davis v. Angel* (31 Beav. 223); Jarman on Wills (ch. xxv.). It is a gift either at twenty-one or on a marriage with consent, and therefore the Petitioner is not as yet entitled to a transfer. *Egerton v. Lord Brownlow* (4 H. of L. Cas. 1) was also referred to.

Mr. Hardy, for the trustees.

Feb. 15. THE MASTER OF THE ROLLS [Lord Romilly]. The question on this petition is, whether the share of the Petitioner Mrs. Lloyd, under her father's will, in case she should die under twenty-one, has become forfeited by reason of her marriage with her present husband, not having previously obtained the consent of her mother for that purpose, which was impossible, as her mother had previously departed this life.

I think that the question depends upon whether this condition was a condition precedent or a condition subsequent, and I think that it is a condition subsequent. I think it clear beyond controversy that this was a legacy vested in Mrs. Lloyd immediately on the death of her [315] father, liable to be divested in case she died under twenty-one without having been married with the consent of her mother.

I concur with the observations of Mr. Lewin that the word "or" in the gift over must be read "and."

This being so, it follows conclusively that the condition, on the fulfilment of which the legacy was to become absolute, and on the non-fulfilment of which the share of the Petitioner was to go over, was a condition subsequent.

This circumstance, I think, distinguishes this case from that of *Knight v. Cameron* (14 Ves. 389), which was relied upon by Mr. Cracknall, in which I think that there was not a vested legacy, and there was an insuperable direction that the condition must be performed to qualify the person to become entitled to the legacy. Here the legacy is given at once to the legatee, but it is to go over if the condition be not performed, that is, it vested at once, subject to be divested if the condition be not performed.

It is true, as Mr. Cracknall observed, that if this petition had been delayed for two or three years when, in all probability, this lady will have attained twenty-one, the question would not have arisen; but the Petitioners are entitled to have the question decided at once, and, if the Court should be of opinion that they are right, to have the money applied according to the trusts of the settlement which has been approved of by the Court.

I have therefore considered the case as carefully as I could, and I am of opinion that, this being a condition [316] subsequent, the death of the mother dispenses with the necessity of the compliance with that condition, and that the legacy does not go over because of such compulsory omission.

It is true that, occasionally, a doubt has been expressed whether, in the case of a gift over, the gift over would not take effect, if the condition, though a condition

subsequent, were not performed specifically, whatever might be the reason of the failure. But the case of *Graydon v. Hicks* (2 Atk. 16) is an authority to shew that the gift over will not take effect, if the performance of the condition has become impossible by reason of the act of God; and I think that this is the true and proper conclusion to be drawn from the cases which decide that, when the performance of the condition *in toto* has not taken place because the performance of a portion of the condition has become impossible through no act or default of the person who had to perform it, the performance of that portion of the condition will be dispensed with.

Here it is reasonably certain that the mother, if she had lived, would have given her consent to this marriage; one eligible in all respects, approved of by the friends and guardian of the lady herself, and sanctioned by the Court. She has therefore performed the condition as far as it was possible for her to do so, but the consent of the deceased mother, of course, could not be procured. I am of opinion that, as the ultimate gift over cannot take effect, inasmuch as the event on which it is to take place is the death unmarried of all the daughters, the interest of the Petitioners has become absolute, and that they are entitled to an order as prayed.

[317] *Re TICHENER. Dec. 9, 11, 13, 1865.*

[See *Semphill v. Queensland Sheep Investment Company*, 1873, 29 L. T. 742.]

Parol notice given to a trustee of an incumbrance on the trust fund is sufficient; but a statement to a trustee, in a casual conversation, is insufficient notice to him.

A mortgagee of a trust fund gave no notice to the trustee until after the mortgagor's bankruptcy; but he gave notice before the assignees had given notice to the trustee of their right. Held, that the trust fund was in the order and disposition of the bankrupt and belonged to the assignees.

The question on this petition was, whether Rhodes had given notice of his incumbrance on a trust fund to Gruggen, the trustee; and, secondly, whether the fund was in the order and disposition of the bankrupt.

Mr. Osler, for the assignees.

Mr. W. Pearson, for Rhodes.

Mr. Woodroffe, for Gruggen (the trustee) and for another incumbrancer.

Smith v. Smith (2 Crompt. & M. 231); *Browne v. Savage* (4 Drew. 640), were cited.

THE MASTER OF THE ROLLS (Sir John Romilly). There can be no question that a verbal notice is sufficient, but a statement in a casual conversation with the trustee will not be sufficient. There are various circumstances which makes one look very unfavorably on Rhodes's case. He neither mentioned the exact sum, nor did he think that any notice to the trustee was necessary. This looks very much as if no distinct notice was ever given by him to the trustee. The burthen of proof, in all these cases, lies on those who allege they gave notice, and where mere verbal notice has been given, it is always a difficult thing to prove or disprove it.

[318] *Dec. 11. THE MASTER OF THE ROLLS* [Sir John Romilly]. I am of opinion that the fact of notice having been given to the trustee is not proved, the burthen of proof lying on the person who alleges that he gave it.

The general rule unquestionably is, that the affidavit of any person, in his own favor, unsupported by the testimony of any other person or by any collateral circumstances, cannot be considered as conclusive in his favor. Unfortunately for the claimant the rule would apply here, but, beyond that, I think his own affidavit disproves it.

It is to be considered what is meant by giving notice of a charge to a trustee. This is certain:—That if a person met a trustee in society, and, in a casual conversation with him, stated that the *cestui que trust* had incumbered his interest in the trust property, this would be no notice which the trustee would be bound to recollect. There must be something bringing the incumbrance distinctly and clearly to the mind and attention of the trustee. It may be by parol (*Browne v. Savage*, 4 Drew. 640), but that is dangerous. It must amount to this:—"Mind and remember this,

and if anyone inquires of you, inform him that the trust fund is incumbered." How could the Court deal with this case?—Suppose, after a mere casual conversation, a trustee told a subsequent incumbrancer that he did not recollect any prior charge? There was a case (*Burrowes v. Lock*, 10 Ves. 470, and *Evans v. Bicknell*, 6 Ves. 182, 183) in which a trustee stated that the fund was unincumbered, but which had really been incumbered ten years before, the trustee having notice of it. The trustee alleged, as an excuse, that he forgot [319] the circumstance, yet he was held responsible for the money. To constitute a valid notice, it must be such that if another person had come to the trustee and had asked him "Is there any incumbrance," and he had answered "No," and that person, on the faith of such answer, had advanced his money and lost it, this Court could have charged the trustee with the loss. The notice must be a formal notice, which the trustee is bound to remember. Here, not only does Gruggen deny any notice, but the evidence of Rhodes himself leads to the same conclusion. Rhodes says he never told the trustee the amount of his mortgage, which he was bound to do, and he also says that he did not think it was necessary to give Gruggen any formal notice of his mortgage. In my opinion, what he stated was in a casual conversation, and nothing like going to a trustee and saying, "take notice, that A. B. has incumbered the trust fund for £100, therefore take a note of that, in order that you may inform anyone who may inquire of you on the subject."

Considering the serious consequence of giving notice to a trustee, and the importance of its being strictly done, I am of opinion that, if done by parol, it must be in the most formal manner, and also that what was done here amounts to a mere casual conversation, and that it is not sufficient to bind the trustee.

Another question afterwards arose. The bankruptcy took place on the 16th of January, and on the 23d of January the mortgagee first gave to the trustee distinct notice of his mortgage. The assignees were appointed in February following, and they afterwards gave the trustee notice of their claims.

Mr. W. Pearson now insisted that, by virtue of the [320] notice after the bankruptcy, the mortgagee had priority over the assignees. He argued, first, that the trustee had no notice of the bankruptcy and of the assignees' title until after notice to the mortgagee had been given, and that the notice of the mortgagee being the first, he was entitled to priority. Secondly, that chattels in the order and disposition of a bankrupt did not vest in the assignees until the order for sale, for the assignees took only a power of selling them. That the Bankrupt Act merely said that, when a bankrupt has in his possession goods of which he is the reputed owner, "the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." That there was no right to sue until the order to sell has been obtained.

He cited 12 & 13 Vict. c. 106, ss. 40, 125, 127 (1 Chitt. Stat. 292); 24 & 25 Vict. c. 134; *Re Atkinson* (2 De G. M. & G. 140); *Re Barr's Trust* (4 Kay & J. 219), and *Bartlett v. Bartlett* (1 De G. & J. 127), in which there was neither a notice nor stop-order.

THE MASTER OF THE ROLLS. At present I am against Mr. Pearson's client; but, if necessary, I will hear Mr. Osler.

Dec. 13. THE MASTER OF THE ROLLS. In this case I think the fund was in the order and disposition of the bankrupt, and, as the case stands, I think it belongs to the assignees.

NOTE.—See *Re Webb's Policy*, V.-C. Malins, 8 March 1867.

[321] PETTINGER v. AMBLER. Jan. 16, Feb. 13, 20, 1866.

[S. C. L. R. 1 Eq. 510; 14 L. T. 118. See *Hodsdon v. Dancer*, 1868, 16 W. R. 1102.]

By a will dated in 1858 the testator purported to execute all powers. By a subsequent settlement he settled his property, reserving to himself a power of appointment by his "last will." He afterwards made another will, which he termed his "last will," and he thereby only partially executed the power. Held, that the first will of 1858, though unrevoked, was in no way an execution of the power.

John Bunn made his will, dated the 3d of August 1858, by which he gave considerable legacies and made devises, specifically of freehold and copyhold; and he gave all other the real and personal estate, which he should, at his death, be seised or possessed of or entitled to, or over *which he had or should have any power to dispose*, unto trustees for sale, and to divide the produce between Anne Pettinger and others. And he revoked all wills and codicils theretofore made by him and declared that to be his *last will and testament*.

In July 1861 and in July 1862 he made codicils to his will which did not affect the question.

On the 10th of August 1862 John Bunn made a settlement of his property, which was to this effect: It was made and executed by and between the testator, of the one part, and the Defendant, Caroline Wightman, and the Plaintiff, Anne Pettinger, of the other part; and the testator thereby conveyed certain property and all other his freehold estates unto Caroline Wightman and Anne Pettinger and their heirs, upon trust for himself for life, with remainder to Elizabeth Jane Ambler (otherwise Elizabeth Jane Bunn) for her life, and after her decease upon such trusts, &c., as John Bunn, *by his last will* or any codicil thereto, should appoint, and in default of appointment in trust for Elizabeth Bunn, her heirs and assigns. He also assigned to the same trustees all his leasehold personal estate upon trust for himself for life, with remainder to Elizabeth Bunn for life, with re-[322]-mainder as she should appoint, and in default upon trust for her.

This settlement, in fact, disposed of the whole of the property he then had, with the exception of copyholds.

In November following (1862) John Bunn made a will, commencing thus: "This is the last will of me John Bunn," &c., and he thereby, in pursuance of the power in the deed of settlement (which he referred to), gave a life annuity of £100 to his sister Anne Pettinger out of his freehold property; but he made no further disposition of the property comprised in the settlement and subject to the power. He thereby demised his copyholds to Caroline Wightman and her heirs, and he appointed Anne Pettinger and Caroline Wightman executrices.

The testator died on the 30th of July 1863, and both wills and both codicils had been, in November 1864, duly proved in the Court of Probate by the executrices. The question was whether the will of 1858 was, in any way, an execution of the power contained in the settlement of 1862. Another question arose on the following circumstances:—In September 1861 the testator purchased a freehold property at Croydon for £850, but the contract had not been completed at his death, and a question was raised out of what fund the purchase-money was to be paid.

Mr. Selwyn and Mr. Hardy, for Anne Pettinger, and Mr. Baggallay, Mr. Renshaw, Mr. Luck, Mr. Rowcliffe and Mr. Bardswell, in the same interest. The will of 1858 operated as an execution of the power reserved by the settlement. The Wills Act, 1 Vict. c. 26, is precise; by sect. 24 a will is to speak as if executed immediately [323] before the death of the testator; and by the 27th section a general devise includes all property which the testator has power to appoint, unless a contrary intention shall appear by such will. This will, therefore, is to be construed as if executed in July 1863, and is to operate as an execution of all powers which the testator then possessed. Besides this, the will of 1858 is expressed to be made in execution of any power the testator "had or should have," and there is nothing in any of the instruments to shew a contrary intention. The will of 1862 did not operate as a revocation of the former wills, and the mere calling it "my last will" can have no such effect. The power was to be executed by the "last will," but, in truth, all the testamentary papers, taken together, formed the last will. If the testator had executed no will subsequent to the settlement, it is clear that the will of 1858 would have been an execution of the power. If so, it is only necessary to examine to what extent it is varied by the will of 1862; and the only variation, or the extent to which it is inconsistent with it, is, by the charge of the life annuity of £100.

They referred to *Miles v. Miles* (ante, p. 191); *Stellman v. Weedon* (16 Sim. 26); *Thomas v. Jones* (2 John. & H. 475, and 1 De G. J. & Sm. 63); *Williams on Executors* (p. 144 (5th edit.)); *Ford v. De Pontes* (30 Beav. 572); *Freeman v. Freeman* (5 De G. M. & G. 704); *Cofield v. Pollard* (3 Jur. (N. S.) 1203).

Mr. Jessel and Mr. Swanston, for Elizabeth Bunn. The will of 1858 was not an execution of the power contained in the subsequent settlement. That settlement operated as a complete revocation of all the prior testamentary dispositions of the property, and it created [324] a new and limited power. The grant of probate is not conclusive either in regard to real estate or as to questions arising upon powers or on the construction of instruments. Here the testator has made a marked distinction as to the will which is to govern the disposition of the property in the settlement; it is to be emphatically the "last will," as it might be the last codicil, and the testator accordingly, by calling the will of 1862 his "last will," shews that he intended this alone to affect the property, and that its operation should be confined to the bequest of the annuity. Though the statute says that the will is to speak at the death and to operate as an execution of all powers, still it means all valid testamentary instruments, and it merely shifts the *onus* of proof. Here there is a contrary intention, apparent from the words used and the disposition of the property, for it would be inconsistent to pass a mere reversion under the will of 1858, which directs an immediate sale and division. They cited *Barnes v. Vincent* (5 Moore, P. C. 201); *Stoddart v. Grant* (1 Macq. 163); *Farrar v. Earl of Winterton* (5 Beav. 1); *Gale v. Gale* (21 Beav. 349).

Mr. Joshua Williams, for Caroline Wightman.

Mr. Selwyn, in reply.

Feb. 13. THE MASTER OF THE ROLLS [Lord Romilly]. The principal question in these suits is, whether the will of the testator, which bears date the 3d August [325] 1858, is a due execution of the power contained in a settlement of 16th August 1862, under the statute of 1 Vict. c. 26, or whether a contrary intention appears by the will.

Unless a contrary intention shall appear by the will, the effect of the settlement was to revoke the whole of the disposition contained in the first will, except as regards copyholds. The settlement, however, gives a power to the testator to dispose of the freeholds after the death of Mrs. Bunn.

I think I must look at the settlement and at the testamentary instrument together, to understand properly the effect of them. I find two wills, one in August 1858 and another in November 1862, and I find a settlement which says that the freeholds shall go in a particular manner, unless they are otherwise appointed in and by my *last* will. If both these wills had professed to deal with the property and had appointed it by several and inconsistent devises, it is clear that the will which was latest in date would have governed the disposition of this property. I think that the fact of making a second will after the date of the settlement and calling that his last will, is evidence that he did not intend his first will to operate as an execution of the power contained in the settlement. If a man leave several wills, all of which are intended to operate more or less upon his property, though each is called in the instrument itself "his last will," as indeed it was when it was executed, still each former will ceases to be the last will when another is executed, and this is so, though the former wills are still operative, though they are all proved, and though they all, legally speaking, speak from the death of the testator. A testator may obviously distinguish between his first, second and last [326] will, as he may between his first, second and last codicil, yet they all speak from the death of the testator, and the only question that arises in this case is, in my opinion, whether he has made such a distinction here. Suppose this case:—That a testator settled property on A. for life, with remainder to B., and afterwards, after reciting that he had made three wills respecting various portions of his property, the settlement directed that the property, the subject of the settlement, should, after the death of B., go according to the directions contained in the first, or in the second, or in the last of his three wills, no one, I think, could doubt that this would operate as a settlement according to the directions contained in that one, in order of date, of the three wills which he so designated. Suppose again that the settlement, after reciting that he had made a will, and that he probably should make more wills, directed that the property settled should go according to the directions contained in the last of his wills, I think the same effect would be produced, and I also think that the same effect would be produced if he directed how the property should go, if he did not otherwise direct, in that will, which should be the last of the wills he left.

These are, in my opinion, only different modes of doing the same thing, viz., distinguishing between the wills he leaves, and the real question, I think is, what is done here?

One of these suits is a suit to carry into execution the trusts of the settlement, and I find that he directs that after the death of Mrs. Bunn, the property shall go as he shall appoint by his last will, and, in default of such appointment, he gives it to her absolutely. Three months afterwards he makes a will, which he calls his last will, it is, in fact, his last will, although there is [327] another will of his called his last will, but prior in date, which is still unrevoked. By this, which is the last will in fact, so far as the date of execution is concerned, he makes no appointment of the freeholds. In this state of circumstances, I think that the former will cannot be brought in as operating so far as to be an execution of the power contained in the settlement of August 1862. It is clear that, to any person not versed in the technicalities of legal language, it would seem obvious that when a man who has made one will and intends to make another, settles property so as to go in a particular manner, unless altered by his last will, he means the latest in date. He has two wills; he does not say "as appointed by my wills generally," but by "my last will." He might have made as many wills afterwards as he thought fit to vary, from time to time, the disposition of his property, merely intending that the last will should be that to govern the exercise of the power. It is true that a testator does not often make more wills than one, intending each to have operation, but he frequently does make many codicils. Would there have been any difficulty here if he had said "the last codicil" instead of "the last will," and so have reserved the power of altering the devolution of the property by the exercise of the power by the last codicil he made. If I adopted the other view, I should decide that the words "last will" are to be converted into "the will I have already made," or "any of the wills I may leave," the more so, as, in fact, the settlement is virtually a revocation of everything contained in the first will, with the exception of the disposition of the copyholds which he possessed.

It is also to be observed that there might have been a very good reason, operating in the testator's mind, for allowing the will of 1858 to stand, and for not, by his will of 1862, revoking the will of August 1858, [328] because if the testator had acquired any freehold property after the date of the settlement, it would have passed by the first will and not by the settlement.

I am therefore of opinion that the will of August 1858 did not operate as an execution of the power contained in the settlement of August 1862.

With respect to the contract for the property at Croydon, as this contract was entered into previously to the execution of the settlement of August 1862, it is subject to the trusts of that settlement, as freehold estate purchased by the settlor, who was the owner thereof, in equity, subject to the payment of the purchase-money.

If the testator had not made a will subsequent to the settlement, I should have held that the first will was an execution of the power, but as it is I declare the will of 1858 and the two codicils were not a due execution of the power contained in the settlement of 1862, and that Mrs. Bunn is entitled to the freeholds and leaseholds comprised in the settlement.

Feb. 20. THE MASTER OF THE ROLLS referred to a case of *Harwood v. Goodright* (Cowp. 87).

[329] PROCTOR v. ROBINSON. Jan. 23, Feb. 14, 1866.

[Affirmed, 15 L. T. 431; 15 W. R. 138.]

Deed between husband and wife improperly obtained from the husband, through the wife's solicitor, who took a benefit under it, set aside, with costs, to be paid by such solicitor.

Deed by which a husband makes a provision for his wife in case of a future separation is radically defective.

A delay of nine years in seeking to set aside a deed: Held, under the circumstances, accounted for.

The facts of this case are fully stated in the judgment of the Court.

Mr. Selwyn and Mr. Kay, for the Plaintiff, argued that the provision as to future separation was contrary to the policy of the law, and invalidated the whole deed, for being voluntary, it could not be altered or reformed. Secondly, that the deed had been improperly obtained by Mr. Robinson and ought to be set aside.

They referred to *H— v. W—* (3 Kay & J. 382); *Egerton v. Lord Brownlow* (1 H. of L. Cas. 4); *Cartwright v. Cartwright* (3 De G. M. & G. 982); *Westmeath v. Westmeath* (Jacob, 126, and 1 Dow. & C. 519); *Hope v. Hope* (8 De G. M. & G. 731); *Vansittart v. Vansittart* (2 De G. & J. 249); *Hinley v. Westmeath* (6 Barn. & Cres. 200); *Simpson v. Lord Howden* (3 Myl. & Cr. 97); *Durant v. Titley* (7 Price, 577); *Cocksedge v. Cocksedge* (14 Sim. 244).

Mr. Southgate and Mr. Villiers, for the Defendant, cited *Frampton v. Frampton* (4 Beav. 287).

Mr. Selwyn, in reply.

Feb. 14. THE MASTER OF THE ROLLS [Lord Romilly]. This is a suit to set aside a deed executed by the Plaintiff, on the ground of inadequate consideration, [330] surprise and want of proper legal assistance on the part of the settlor, and also as being in contemplation of the future separation of husband and wife.

The Plaintiff was possessed of a small property of the value of about £180 per annum, when, in the month of November 1846, he intermarried with his present wife, who was also possessed of a small separate property. The marriage was not a happy one, and they soon separated and lived apart for some time. But, in March 1854, steps were taken by the wife for a renewal of intercourse; some meetings and correspondence took place between their respective solicitors, and in June 1854 the Defendant, Mrs. Proctor, issued a citation against the Plaintiff for the restitution of conjugal rights. The Defendant, Mr. Robinson, was her solicitor in this transaction, and Mr. Sharp was the solicitor of the Plaintiff. In July 1854 the Plaintiff and his wife returned to live together in the house of the wife at a place called Austwick, but they had not entirely settled their differences, and, apparently desirous that this should be done, on the 15th July 1854 the husband and wife went together to Mr. Sharp, and requested him to draw up an agreement which should regulate the terms on which they were in future to live together. This he declined to do in the absence of Mr. Robinson, the solicitor for Mrs. Proctor.

On the 8th August 1854 Mrs. Proctor wrote to Mr. Robinson, requesting him to come over to their house to make some arrangement. Accordingly, Mr. Robinson went over to Austwick and prepared an agreement, which Mr. Proctor signed. No persons were present, except the Plaintiff, his wife and Mr. Robinson. The [331] agreement was made between Mr. and Mrs. Proctor, and was in these terms:—

1st. That an action which had been brought by Robinson for goods supplied to the wife should be stayed. 2d. That the rents of Mrs. Proctor's property should be received by herself to her separate use till a certain period. 3d. That the subsequent rents should be received by Mr. Proctor. 4th. Mr. Proctor to settle an annuity of £60 upon Mrs. Proctor payable during her life, to commence on death of Mr. Proctor. If it should unfortunately happen that Mrs. Proctor should determine again to live separate and apart from Mr. Proctor, then she was to have an annuity of £40 during her life, but if Mr. Proctor should die before Mrs. Proctor the said annuity of £60 was to be paid to her in lieu of the annuity of £40 from his death. 5th. That Mr. Proctor should pay Mr. Robinson the costs of business transacted by him for and on the instructions of Mrs. Proctor, the amount to be ascertained as soon as might be and to be paid by annual instalments of £40, and interest in the meantime at £4 per cent. 6th. That Mr. Proctor should pay his wife's debts and liabilities as soon as he could. 7th. That Mr. Proctor should settle the furniture in their house on his wife, and that proper deeds and assurances to carry into effect the agreement should be forthwith prepared and executed. 8th. If Mr. and Mrs. Proctor should unfortunately again separate before Mr. Proctor received rents belonging to Mrs. Proctor sufficient to reimburse the payments made in the sixth item of the agreement, he was to receive the rents until he should be repaid the balance, but the annuity was to become payable.

Certainly a more one-sided agreement, even if legal, could scarcely be produced.

It is difficult to see what benefit the Plaintiff could get from it; he agreed to pay [332] Mr. Robinson's professional charges for his employment by Mrs. Proctor, for which he, the Plaintiff, was not liable; he agreed to pay her debts generally, whether incurred for necessities supplied to her or not; he agreed to settle his furniture on her for her separate use, and agreed to give her an annuity of £40 per annum if they should ever live separate again; in other words, if she should think fit to leave him. At this time, as it is shewn by the letters 21 and 22, the Plaintiff owed little or nothing to Mr. Robinson, and no claim was made against him for costs incurred for Mrs. Proctor. The Plaintiff was also wholly ignorant of the nature and amount of costs incurred by his wife. The Plaintiff had no professional advice; Mr. Robinson knew that Mr. Sharp was the Plaintiff's solicitor, and did not communicate with him, unfortunately not following therein the course adopted by Mr. Sharp towards Mr. Robinson.

It is obvious that if the matter had rested there, this was an agreement, the performance of which could never have been enforced in any Court of Equity.

Mr. Robinson returned home the same day and sent a copy of the agreement to the Plaintiff, and also wrote to Mr. Sharp to inform him of the fact, but he sent him no copy of the agreement. To this Mr. Sharp sent an answer, complaining of Mr. Robinson so acting in his absence, and referring to his own opposite course of proceeding, and to which Mr. Robinson sent a reply, stating and excusing his intention of persisting in his course. With the exception of these letters, I cannot find that anything occurred between this 8th of August 1854 and the 16th May 1855.

On the 16th of May 1855 and, as it seems, without any previous warning, notice or appointment, the [333] Defendant, Mr. Robinson and his clerk Mr. Green, called on the Plaintiff and his wife, who were still inhabiting the same house together at Austwick. When they arrived there, they found Mr. Robert Brown, who had married a niece of Mrs. Proctor, present as a guest. Mr. Brown did not leave till past ten at night; during his presence nothing was said, but, on his departure, the deed impeached was produced, ready engrossed. No copy of it had been sent beforehand to the Plaintiff or his wife, no written instructions had been given to Mr. Robinson, and if any had been prepared by Mr. Robinson, they were never seen by the Plaintiff or his wife, and are not now produced. Even the agreement of August previous was not produced and compared with the deed. The deed itself, which is a long one, was discussed for about two hours, and was then duly executed by the parties to it at about half an hour after midnight. After the execution of it, the company, consisting of the Plaintiff and his wife, and the solicitor and his clerk, continued to discourse for about three hours, and left between three and four o'clock, early in the morning of the 17th of May 1855.

The deed does not entirely follow the agreement; some additions were made, one of which, though much relied upon by the Plaintiff's counsel, has made but little impression upon me; it is, that the furniture, which is settled for the separate use of Mrs. Proctor, with power to her to appoint it by will, is given, in default of appointment, to the daughters of Mr. Robinson. Judging from the schedule to the deed, the furniture does not appear to be much, and the prospect of obtaining it is remote, as it depends on the contingency of Mrs. Proctor not otherwise disposing of it.

The deed itself, however, is radically defective in [334] various other respects. In the first place, it is made, as I observed of the agreement, in contemplation of the future separation of Mr. and Mrs. Proctor, and the effect of this clause is, to give her £40 per annum, by way of premium, if she chose to leave her husband. It is, as it appears to me and as I observed of the agreement, without sufficient consideration as regards the husband. The suits in the Divorce Court had, in fact, been terminated, except as to costs, by the cohabitation of Mr. and Mrs. Proctor beginning in July 1854, and continued since that time—a period of ten months. By this deed Mr. Proctor agrees to pay £417 costs of Mrs. Proctor, for which he was not liable, the propriety of which claim, even as against Mrs. Proctor, he was wholly incapable of judging of, and respecting which he could consult no one, for the bill of costs and cash account were then produced to the Plaintiff for the first time and were not left with him; he had never seen a copy of the deed before; he had no independent

advice, and he executed the deed on the unexpected application at midnight, after dinner and subsequent libations; not that I mean to insinuate, by that observation, that there is the least evidence that Mr. Proctor was in the slightest degree intoxicated. But how is it possible that a deed can stand, executed at such a time and accompanied by such circumstances? The husband alone is the party who gains nothing and gives up all, his wife gets her debts paid, she gets an annuity of £60 per annum after the husband's death, and £40 per annum during his life if she thinks fit to cast him off, and she gets the settlement of her property to her separate use. Her solicitor gets the payment of his costs secured on ample security, without taxation and without examination, he gets the wife to use her influence to obtain the execution of the deed from her husband (for such, I think, is the fair inference to be drawn from the evidence), on the assumption [335] that she will be provided for for life, whether she leaves her husband or not, and yet he never tells her that such a stipulation is wholly void and cannot be enforced, and all this, I repeat, done at midnight, without either the one or the other having had any independent advice.

If this provision about future separation had been the only thing contained in the deed, the rule of Lord Cottenham in *Simpson v. Lord Howden* (3 Myl. & Cr. 97), might have been applied, but this deed is open to the many other objections which I have stated, and which this Court cannot but disapprove of. The more it is examined the more faulty it appears.

Unless the Plaintiff is barred by acquiescence the decree appears to me to be of course. The transaction, however, took place in May 1855, and this bill is not filed till 24th June 1864, upwards of nine years after the transaction took place. The Plaintiff alleges that he never discovered what the real contents of the documents were until the middle of the year 1863, when Mr. Robinson, under the powers contained in the deed, having contracted to sell a property called Bents (a part of the estate comprised in the deed in question of May 1853), the purchaser required the concurrence of the Plaintiff in the conveyance, who referred the matter to his solicitor, who thereupon discovered the whole affair and duly explained it to the Plaintiff and his wife.

I have examined the evidence carefully, to see if I could discover anything to discredit this statement. The only thing I have observed is that Mr. Robinson received the rents of the property which had originally belonged to Mrs. Proctor and which was included in the indenture [336] of May 1855, and had made payments thereout to them, which struck me at first as acquiescence on the part of the Plaintiff. But, on further examining the matter, I am of opinion that this is not any evidence of knowledge on the part of the Plaintiff of the contents of the deed, for the receipt of rents by Mr. Robinson was not in accordance with the provisions of the deed, and must, therefore, have depended on some arrangement distinct from it, and cannot therefore be treated as an acquiescence to the deed.

It is next to be observed that no copy of the deed was ever sent to the Plaintiff, nor do I find that any accounts were sent or communications made to him, which were inexplicable, except by reference to the deed, or that the provisions of the deed were ever referred to for the purpose of explaining such accounts or such communications. It is true that shortly before the bill was filed, and since the Plaintiff was made acquainted with the matter by his solicitors in 1863, Mr. Robinson has sent in an account to the Plaintiff, containing an account of his receipts and payments and of his professional costs. This, beginning with the £417 mentioned in the deed, and adding to it the costs of the transaction itself, together with interest and the subsequent accounts down to the time of the delivery of the accounts, amount in the whole to the sum of £1059, 19s. But this is the first direct notice to the Plaintiff, proceeding on the footing of the indenture, which I have been able to find in the evidence which would disclose to the Plaintiff the real nature of the transaction he had entered into in May 1855.

I think, notwithstanding the elaborate statement of Mr. Robinson and his clerk that the deed was explained to the Plaintiff clause by clause, beginning at half-[337]-past ten o'clock at night and continuing during the two succeeding hours, during which time, however, it is proved that though Mr. Robinson and his clerk drank nothing, the opposite was the case with the Plaintiff and his wife.

Notwithstanding this evidence, I have been unable to come to the conclusion that the Plaintiff did understand this explanation, and I have come to the conclusion that it was not till the middle of 1863 that he did really know what he had been asked to do, and what he had done in May 1855. Having come to this conclusion, I am of opinion that no *laches* can tell against the Plaintiff in this case, and that the deed and preliminary agreement must both be delivered up to be cancelled. Such being my opinion, it follows, as a matter of course, that Mr. Robinson must pay the costs of this suit. Mr. Ellis I understood did not appear and had not acted in the trusts, and has not therefore incurred any costs; if this be erroneous, the Plaintiff must pay his costs and add them to his own, and recover both against Mr. Robinson. The other Defendants can have no costs. They are Mrs. Proctor and the two daughters of Mr. Robinson, they will neither have to pay nor receive costs.

NOTE.—Affirmed, in substance, by the Lords Justices (15 L. T. 431).

[338] *Re USTICKE. Feb. 23, 26, 1866.*

[S. C. 14 W. R. 447. See *In re Arnold's Trusts*, 1870, L. R. 10 Eq. 258.]

The words "survivors and survivor" of parents construed strictly, although the children of some of them took an interest in remainder.

The testator, by his will (1844), bequeathed his personal estate in trust for all the children of his niece, Georgiana Beauchant, who should attain twenty-one, equally.

By a codicil (1848), the testator, in reference to the above bequest, directed that the share of each daughter of his niece should be paid to her for her separate use without power of anticipation, and that after the decease of each such daughter, the securities, the dividends and interest whereof were so payable during her lifetime to such daughter, should go to and be divided equally between her children and the issue of her children, to be vested and payable at the times and in manner therein mentioned; and if there should be no such child of such party so dying, then that the trustees should stand possessed of the said trust monies and securities in trust for the *survivors or survivor of all the children of his niece*, and the same should go to and be enjoyed by them, and their, his and her children, subject to the same trusts and the same restrictions in all things, so far as the same were applicable thereto, as were thereinbefore declared of the original share of each of the daughters of his said niece. There was no gift over if they all died without issue.

The testator died in 1851. His niece had seven children, all of whom attained twenty-one.

Theophilus, one of the niece's children, died in July [339] 1864, leaving children, and Ann, another of such children, died in December 1864.

The one-seventh share of Ann had been paid into Court by the trustees, and a petition was now presented to have the rights of the parties to it declared, and to have the fund transferred.

Mr. Baggallay and Mr. C. Hall, for some of the children of the niece, argued that the children of Theophilus took no interest in Ann's share, inasmuch as Theophilus did not survive Ann.

Mr. Selwyn and Mr. Rowcliffe, for the children of Theophilus, argued that the words "survivors or survivor" were to be construed "others or other;" that it was impossible to suppose that the interest in remainder of the children of Theophilus who survived Ann could depend on the father surviving her.

Mr. E. Romilly, for the trustees.

The following authorities were referred to:—*Re Keep's Will* (32 Beav. 122); *Re Corbett's Trusts* (Johns. 591); *Eyre v. Marsden* (4 Myl. & Cr. 231); *Jarman on Wills* (vol. 2, p. 751 (3d edit.)).

THE MASTER OF THE ROLLS [Lord Romilly]. My opinion is that the words "survivors or survivor" must be read as they stand, and that it would be impossible to hold otherwise, unless I made a new will for the testator. None of the other

clauses require the words "survivors or survivor" to be read "others or other," [340] and it is admitted that there is no gift over. I think that the tendency of all modern authorities is, to hold that the word "survivor" must have its ordinary plain meaning.

I will look at the cases; but those in which there is a gift over, if the whole class die without issue, are quite distinct, for there would be an intestacy, unless the words were construed "others or other."

Feb. 23. THE MASTER OF THE ROLLS. I have looked at the cases, and I am clearly of opinion that the words "survivors or survivor," in this will, must be construed literally, and that I cannot change them into "others or other." They mean surviving in the proper sense of the term.

[340] *BRETT v. CARMICHAEL. March 10, 1866.*

[S. C. 35 L. J. Ch. 369; 14 L. T. 247; 14 W. R. 507.]

After a decree in an administration suit for payment of the debts and of the remaining assets to the parties entitled, persons in France, claiming as creditors, and who had not come in under the decree, took proceedings there against the executors: on the petition of the executors the order for payment to the beneficiaries was stayed.

Under the decree, made in 1864 in an administration suit, the usual accounts had been taken and the creditors who had come in had been found by the certificate of the Chief Clerk. These debts had been paid, and, by an order made in July 1865, a compromise between the parties was confirmed, and the distribution of the funds had been directed.

After this, certain alleged creditors of the testator, resident in France, had commenced proceedings there [341] against the executors in respect of their alleged claims. The testator's assets were all in England and still remained undistributed, and there was no personal representative of the testator in France.

Under these circumstances, the executors presented a petition to stay the distribution of the assets until the determination of the proceedings in France, and for proper inquiries and directions.

Mr. Hemming, in support of the petition, argued that both the rights of the creditors in France and of the executors here ought to be protected.

Mr. Baggallay and Mr. Holmes, for the Plaintiff, and Mr. Kay, Mr. Osborne, Mr. Morgan and Mr. Macnaghten, for other parties, resisted the application. They argued that the decree of this Court ought not to be stayed by parties in France, who had neglected to come in, especially as their claim was of a very doubtful description, and that it would be unjust to keep the parties out of their money until the legal proceedings in France had terminated.

THE MASTER OF THE ROLLS [Lord Romilly]. It is constantly the practice to allow creditors to come in before the final distribution of the assets. (1)

What I shall do is this:—I shall stay, for the present, the order for distribution. The claimants abroad (the executors know who they are) must be informed, that unless they come in on or before the first day of next term, I shall distribute the fund as it stands. Advertisements of that fact must be inserted in the *Moniteur*, and the rest of the petition must stand over.

[342] *BEDFORD v. BEDFORD. March 24, 1866.*

A sole Plaintiff having died after decree, an order to revive against his devisees was made, under the 15 & 16 Vict. c. 86, s. 52.

This was a suit for the administration of the real and personal estate of a testator. After the decree had been made the sole Plaintiff died.

(1) *Lashley v. Hogg*, 11 Ves. 602; *Gillespie v. Alexander*, 3 Russ. 130.

Mr. C. Browne now asked for an order to revive under the 15 & 16 Vict. c. 86, s. 52. He referred to *Dendy v. Dendy* (5 W. Rep. 221); *Williams v. Williams* (9 W. Rep. 296); *Jackson v. Ward* (1 Giff. 30); and *Laurie v. Crush* (32 Beav. 117); see also *Eyre v. Brett* (34 Beav. 441); and *Earl Durham v. Legard* (*Ibid.* 442); and observed that a decree having been made, the order now asked would not, as it would before decree, be open to the objection, that it would be obtaining a supplemental decree before a decree had been made in the original cause.

THE MASTER OF THE ROLLS [Lord Romilly]. I think that does make a distinction. Take the order.

[343] HALE v. BUSHILL. March 2, 1866.

[S. C. 35 L. J. Ch. 381; 14 L. T. 246; 12 Jur. (N. S.) 243; 14 W. R. 495.]

A testator had granted to the Plaintiff the right of pre-emption of an estate which he had previously devised to an infant. The Plaintiff exercised his option after the testator's death and filed his bill against the infant and executor for specific performance. The Court gave no costs against the Defendants.

In 1859 the testator, Mr. Mallalue, granted to the Plaintiff, Hale, a lease of a farm for seven years, with the option of purchasing it within that period. The testator had, in the previous year (1838), devised the farm to the infant Defendant.

The testator died in 1861, and in 1864 the Plaintiff exercised his option of purchasing the farm; but, it being vested in an infant, he was compelled to institute this suit to obtain a specific performance and conveyance.

Mr. H. Humphreys, for the Plaintiff, argued that the testator's estate was liable to pay the costs of this suit which had been occasioned by his act. He cited *Purser v. Darby* (4 Kay & J. 1); *The Eastern Counties Railway Company v. Tuffnell* (3 Railw. Ca. 133); *The Midland Railway Company v. Westcomb* (11 Sim. 57); *In re Weeding's Estate* (4 Jur. (N. S.) 707).

Mr. Baggallay, for the infant. This was not an absolute contract for sale, but a mere option to become purchaser. There was no contract to purchase until after the testator's death, when the option was exercised, and the difficulty is accidental and attributable to no one. There should be no costs given on either side. He relied on *Bannerman v. Clarke* (3 Drew. 632).

[344] Mr. Dickinson, for the executor, contended that no costs were payable, there being no real default.

Mr. Humphreys, in reply.

THE MASTER OF THE ROLLS [Lord Romilly]. When I find conflicting decisions, I must necessarily follow the one which appears to me to be that most consonant with reason and equity. I shall follow *Bannerman v. Clark*, which appears to be more reasonable and which was not cited before the Vice-Chancellor when he decided *Purser v. Darby*.

If, after a contract for the sale of an estate, the vendor intentionally did some act to embarrass the title, this Court would make him or his estate pay the costs of it. But the fact of the death of the vendor or his not having made his will or of his not having disposed of the property, would not appear to me to be such a case.

I express no opinion of how the case would stand, if, immediately after a contract for sale, a testator made a will and devised the legal estate to an infant. But the difficulty here arose from the act of God, and the will was made prior to the contract, which merely gave an option and which the Plaintiff never exercised in the testator's lifetime.

I am of opinion that no costs ought to be given in this case.

[345] *Ex parte* THE TRUSTEES OF THE BIRMINGHAM BLUE-COAT SCHOOL.
March 10, 12, 1866.

[S. C. L. R. 1 Eq. 632; 35 L. J. Ch. 837. See *In re Adams's Will*, 1868, 17 L. T. 641; *In re Wilkinson's Estate*, 1870, L. R. 9 Eq. 344.]

By an Act of Parliament, funds in Court were, by way of *interim* investment, to be laid out in "Navy, victualling or Exchequer bills." But, under the 23 & 24 Vict. c. 38, and the General Orders of the 1st of February 1861, the Court allowed them to be invested in consols.

By a Private Act of Parliament, 8 & 9 Vict. c. xxvii. confirming a scheme for the management of the charity, the trustees were empowered to sell all trees, stone, coal, ironstone, brickearth, clay, loose sand and gravel. The produce was to be paid into Court, and applied in the purchase of freeholds near Birmingham. By the 15th section, the money, until applied, was "from time to time to be laid out, under the direction of the Court, in the purchase of *Navy, victualling or Exchequer bills*."

A sum of £2895, arising from the sale of clay, sand and gravel, had been paid into Court, and the trustees, by this petition, asked that it might be invested in consols.

Mr. Speed, in support of the petition, referred to the 23 & 24 Vict. c. 38, and to the General Orders of the 1st of February 1861 (30 Beav. 651), and he argued that, notwithstanding the terms of the Special Act, the fund, being "cash under the control of the Court," might be invested in consols.

He also referred to Morgan's Pr. (pp. 301, 684).

THE MASTER OF THE ROLLS [Lord Romilly] doubted whether such an order could be properly made.

[346] March 12. Mr. Speed produced an order in *Re Mitford's Estate*, in which Vice-Chancellor Wood had authorized a fund, directed to be laid out in Exchequer bills, to be invested in consols.

THE MASTER OF THE ROLLS. I will follow that authority.

[346] *Re* THE HUMBER IRON WORKS COMPANY. March 12, 13, 1866.

[S. C. L. R. 2 Eq. 15; 14 L. T. 216; 12 Jur. (N. S.) 265. Not followed, *In re European Banking Company*, 1866, L. R. 2 Eq. 521. Considered, *In re Anglo-Egyptian Navigation Company*, 1869, L. R. 8 Eq. 660; *In re Times Life Assurance and Guarantee Company*, 1869, L. R. 9 Eq. 385.]

Rules as to costs upon petitions to wind up public companies.

When the Court makes no order on a petition to wind up, the shareholders supporting it get no costs, and the shareholders resisting it get no costs unless personally assailed. But when the Court makes the winding-up order, the shareholders or creditors supporting it get one set of costs between them.

On the 20th of February 1866 the shareholders of this company confirmed a resolution for winding it up voluntarily, and for appointing Mr. Child, the liquidator, at a considerable salary.

On the 27th of February 1866 Messrs. Lathan and Smith, creditors of the company, presented a petition, through the company's solicitors, for winding it up under the supervision of the Court, and for continuing Mr. Child as the liquidator.

Upon this, Mr. Witham, a large judgment creditor of the company, presented a second petition for winding it up compulsorily. He suggested that the first petition had been presented in collusion with the company, in order to continue the voluntary winding up and to retain Mr. Child in the management, contrary to the interests of the creditors. This second petition could not be heard until the 17th of March.

Mr. Selwyn and Mr. Marten now (12th March) appeared on behalf of Messrs.

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Latham and Smith, and agreed to take an order for winding up the company compulsorily.

[347] Mr. Roxburgh, for Mr. Witham, said that, in that case, it would be unnecessary to bring on his petition on the 17th of March. He asked to withdraw it, and for his costs. He cited *In re Marlborough Club Company* (1 L. R. (Eq.) 216).

Mr. Baggallay and Mr. Druce, for the company.

Mr. Jessel, Mr. Southgate, Mr. Bagshawe and Mr. F. Harrison appeared for other large creditors to insist on a compulsory winding up. They asked for their costs.

March 13. THE MASTER OF THE ROLLS [Lord Romilly]. I have considered the question of costs in this case, and I shall presently state the rule which I have adopted and expressed, and which I intend to follow. But the case of Mr. Witham is an exception, and does not come within the ordinary rule; for I think that he is entitled to the costs of his petition, presented by him under peculiar circumstances. The other petition was really the petition of the company, asking the continuance of this official liquidator. Mr. Witham was, therefore, justified in presenting his petition, which was a proper one for the purpose, and I shall allow him his costs out of the estate.

With respect to the other creditors, two cases are to be considered in determining the proper rule; one where the Court refuses to make any order, and the other where it makes the order to wind up the company. The rules as to costs are separate and distinct in these two cases.

[348] I will take the first case, where the Court refuses to make the order. In that case, I shall adopt the rule which I stated yesterday in the *Anglo-Greek case* (35 Beav. 399), namely, that where the Court refuses to make the order, the company opposing the order will have their costs from the Petitioner. But contributors, shareholders or creditors, who appear and support the petition, cannot have their costs, for as they come to support the Petitioner they cannot have their costs from him. As to those who appear to oppose the petition, I shall give them no costs, except where a personal charge is made against them of such a character as to justify them in appearing and opposing the petition. If they be free from blame, and if the charges against them are disproved, I shall give them their costs, to be paid by the Petitioner.

In the other case, where the Court grants the prayer of the petition, it gives no costs to those who appear to oppose it, for the Court makes the order against them. The Court, however, gives costs to the company out of the estate. Where shareholders or creditors appear for and support the petition which asks that the company may be wound up, and the Court makes the order, it allows them one set of costs.

I have written down the rule thus:—

“Where the Court refuses to make any order, the shareholders supporting the petition get no costs, and the shareholders resisting the petition get no costs from the Petitioner, unless personally assailed. Where the Court makes the order to wind up, and shareholders or creditors appear, together or separately, to support it, one set of costs is given amongst them out of the estate.”

[349] In this case there are four creditors who appear, and they must arrange how the one set of costs is to be distributed amongst them.

[349] *Re THE CONSTANTINOPLE AND ALEXANDRA HOTEL COMPANY.*

March 12, 1866.

Under a winding up of a company, a party claiming as a creditor must either submit to produce all documents in his possession relating to his claim, or it will be disallowed.

An order had been made to wind up this company, and Messrs. Smith & Eldborough claimed to be creditors of the company for £8000. The official liquidator took out a summons calling on Messrs. Smith & Eldborough to make the usual affidavit of documents in their possession and to produce them. The Chief Clerk proposed

making the usual order, but the claimants disputed his jurisdiction and asked for an adjournment into Court, which was granted.

Mr. Bevir, in support of the application. The practice under the Winding-up Act is similar to that in a creditors' suit. It is the ordinary course in creditors' suits to make the claimant produce all documents relating to his claim. He referred to the 15 & 16 Vict. c. 86, s. 18.

Mr. Locock Webb, for the claimants. This is the first application of this sort, and the statute referred to only applies to suits. The case of a creditor is very different, for creditors are, after decree, as it were, parties to the suit.

THE MASTER OF THE ROLLS [Lord Romilly]. In creditors' suits it is my practice, if a claimant does not bring forward his papers, to disallow his debt, and I follow the same course when winding up companies. [350] I cannot make the order on these claimants compulsorily, but I must disallow their claim unless they bring in all the documents. No one can properly prove his debt without producing all the documents relating to it. The Respondents must pay the costs. (NOTE.—See 25 & 26 Vict. c. 89, s. 115, 117.)

[350] GEORGE v. GEORGE (No. 1). *March 24, 1865.*

Distinction between a decree to administer the estate of A. B. and a decree directing his legal personal representative either to admit assets or to account.

When, after a decree directing a legal personal representative to admit assets or account, he pays debts, he will be allowed them, though the estate should prove deficient. But when such a payment is made after a decree for the administration of the estate the rule is otherwise.

A testator, W. W., died in 1841, and Greaves and Wright were his executors and trustees. Greaves died intestate in 1859, and Bagshawe was his representative. In 1861 the usual decree was made for the administration of the estate of W. W. the testator. The decree also "ordered that what should be coming from Greaves should be answered by the Defendant Bagshawe, his administrator, out of his estate come to his hands in a due course of administration. And in case Bagshawe should not admit assets of Greaves sufficient for the purpose aforesaid, then it was ordered that an account should be taken of the personal estate of Greaves received by Bagshawe, or by any other person or persons by his order or for his use."

In taking the accounts a sum of £1201, 3s. 5d. was found due from Greaves's estate to the estate of the testator W. W., and Bagshawe declined to admit assets to pay it. An account was thereupon taken of Greaves's estate.

The Chief Clerk found that Bagshawe had received assets of Greaves to the amount of £16,616, and that [351] he had paid or was entitled to be allowed £22,052, leaving a balance of £5436 due to him. But it appeared that Bagshawe had, since the decree of 1861, paid debts of Greaves to the extent of £6670. There was still some outstanding estate of Greaves, which had not been ascertained under the decree.

The Plaintiff contended this sum of £6670 ought to be disallowed, on the ground that it had been paid after the decree, to the exclusion of the debt due from Greaves to the estate of the testator. The Chief Clerk reserved the question for the future decision of the Court. The cause now came on for further consideration.

Mr. Selwyn and Mr. Woodhouse, for the Plaintiff.

Mr. Eddis, Mr. Elderton, Mr. Cole and Mr. Bagshawe, for the other parties.

THE MASTER OF THE ROLLS [Sir John Romilly]. The Defendant Bagshawe has, since the decree was made in this cause, paid simple contract debts for which the personal estate of his intestate was liable, and I am of opinion that these payments must be allowed.

I must point out a distinction between what I call a decree for the direct administration and a decree for the collateral administration of an estate. It is true that, in a suit for the administration of an estate, if payments are made by the executor or administrator after a decree has been made for the administration of an estate, that is, if the executor or administrator, knowing that there is a deficiency of assets, thinks

fit to pay a simple contract debt in full, all that he can do is, to stand in the place of the creditor whom he pays, and he must bear the loss [352] if the estate should prove insufficient to pay all the debts.(1)

Here a debt is due to the estate of a testator from his executor Greaves who is dead, and the administrator of Greaves is called on to admit assets or to account for the personal estate of Greaves received by him. This is not a simple decree for the administration of the estate of Greaves; it is a decree for the administration of the estate of W. W. Under it the representative of a deceased debtor to the estate of W. W. is required to make good the debt; if assets are not admitted by him, you must take the account against him, and if a balance is found in his hands, you are entitled to be paid out of it what is due to the estate administered under the decree: but this is all; if you seek any other relief, it can only be had by means of a suit for the administration of the estate of the deceased executor. If it were otherwise, you might have a cluster of administrations of different estates in one suit.

Where a Defendant, being a legal personal representative, is directed either to admit assets or to account for the estate which he holds in trust, it is a sort of collateral order, made for the purpose of ascertaining whether a personal order can be made against him for payment of the debt due from the estate he represents. If he does not admit assets, an account is taken and the debt is paid out of the assets in his hands.

If you want to go further, you must take such proceedings as you may be advised against Bagshawe to administer the estate of Greaves.

[353] THE CRENVER, &C., MINING COMPANY (LIMITED) v. WILLYAMS.
Jan. 19, Feb. 9, 1866.

[S. C. 14 L. T. 93; 14 W. R. 444. See S. C. 14 W. R. 1003. See *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Company*, 1879, 4 App. Cas. 400.]

A bill prayed that a mortgage might be cancelled and for further relief, but it proved to be valid to some extent. The Court refused the relief asked, or to make a decree for redemption on payment of what was properly due, and dismissed the bill with costs.

A mining company, empowered to raise money, gave a security to bankers for monies due and to become due from the contractor, to whom they were indebted. Held, that though the company could not guarantee the debt of a stranger, still, that the advances to the contractor might be valid if he were the agent of the company, and *semble*, that the security would be valid to the extent of the money properly expended by the contractor on the works of the company.

Mr. Jessel and Mr. Prendergast, for the Plaintiffs.

Mr. Baggallay and Mr. Rowcliffe, for Willyams.

In re Strand Music Hall Company (Limited) (35 Beav. 153) was cited.

Mr. Beavan, for the assignee of Griffin.

Mr. Jessel, in reply.

THE MASTER OF THE ROLLS [Lord Romilly]. This is a suit instituted by the company, praying that a deed of the 23d of January 1865, executed by the company, may be declared void as against the company, and that it may be decreed to be delivered up to be cancelled. The bill also prays for an injunction to restrain the Defendants (who are bankers carrying on business at Truro in Cornwall under the name of "The Miners' Bank") from taking possession of the property or effects of the mining company by virtue of this deed, and from exercising any powers contained in it against the company.

[354] This suit is a striking instance of the advantage derived from the impersonal

(1) *Jones v. Jukes*, 2 Ves. jun. 518; *Shewen v. Vanderhorst*, 1 R. & Myl. 347; 2 R. & Myl. 75; *Bugden v. Sage*, 3 Myl. & Car. 683, 687; *Mitchelson v. Piper*, 8 Sim. 66.

character of a duly registered joint stock company, and it also conveys a warning to all persons how they deal with companies of this description. On the 23d January in last year (1865), the directors of the company, knowing perfectly what they were doing, and having full power to bind all the shareholders within the legitimate exercise of the powers conferred upon them, executed a deed of mortgage to the Defendants, who, relying upon the validity of that deed, advanced large sums of money. A change of directors takes place, and in the month of November following the new directors file the present bill, contending that the Act of the previous board was wholly *ultra vires*, and that the whole transaction must be set aside.

I am of opinion that two questions arise which I must consider; first, whether the deed of January 1865 was authorized by the constitution of the company to any, and, if any, to what extent, and secondly, if it was not, whether the moneys advanced by the Defendants were applied for the benefit of the company, either in payment of previously existing liabilities of the company, or in defraying the expense of the works of the company.

The company was incorporated in November 1863 for the purpose of acquiring and working certain mines in the county of Cornwall. The nominal capital was £150,000 in 30,000 shares of £5 each. The articles of association, to which I shall have presently to refer, were duly registered, and the company took five mines. Afterwards, and about two months after their incorporation (28th January 1864), they entered into a written contract with Mr. Griffin, an engineer, who was to undertake to supply materials and construct and erect certain [355] buildings, machinery, engines and plant necessary for the proper working of the mines they had taken, the sum of £85,000 to be paid in the following manner, viz. :—One-half (being £42,500) in 17,000 shares paid up to the extent of one-half, that is, 50s. per share, and the remainder in money. Mr. Griffin contracted that he would, before the 1st August 1865, complete the buildings and machinery, in all respects, according to the requirements of the engineer of the company, in a state fit for the immediate working of the company. The payments under the contract were to be made to the contractor every month, on the certificate of the engineer of the company, less twenty per cent., half in cash and half in shares, and the twenty per cent. was to be retained by the directors until the completion of the works as a security for the fulfilment of the contract.

On the 30th June 1864, a supplemental contract was entered into between Mr. Griffin and the company, making certain arrangements respecting calls on shares, to which I do not think it material more fully to refer. Considerable sums of money were advanced by the bankers to Mr. Griffin to enable him to go on with the works, and in the beginning of January 1865 he owed the Defendants upwards of £14,000 for moneys advanced to him. The company also owed the bankers £1272, and the company were also liable for £5000 on bills not then at maturity discounted by the banking company, and which formed part of the £14,000 due from the contractor.

In this state of things, the indenture in question was executed, it bears date the 23d January 1865, and is made and executed by Mr. Griffin of the first part, the Plaintiffs, the company of the second part, and the Defendants, the bankers of the third part, it recited the [356] contract with Griffin, and that he had since constructed divers of the works contracted for, and had erected divers buildings, machinery, &c., and had supplied materials for the same in pursuance of the contract; and it further recited (as the facts were) that Griffin had received £19,578 from the company in part payment, and 6266 shares £2, 10s. paid up, and 1423 shares £2, 15s. paid up, and that a large sum still remained due to him from the company under the contract. That Griffin was possessed of machinery and timber, and that he was indebted to Messrs. Willyams in £14,239, for moneys advanced for the purpose of the said contract, and that the company was indebted to Messrs. Willyams in the sum of £1272 for moneys advanced, and that Griffin had applied to Messrs. Willyams to make further advances to enable the contract to be carried out, which they had agreed to do on having the repayment of the £14,289 and £1272 and any other sum advanced by them to Griffin secured as after appearing. *The indenture then witnessed*, that Griffin and the company covenanted to pay to Messrs. Willyams the £14,239 and £1272 with all further sums advanced to Griffin with interest. And Griffin assigned to Messrs.

Willyams all moneys due or to become due under the contract, and all engines and timber, &c., and the company assigned to Messrs. Willyams all tin, copper, &c., to be raised out of the mine. This was made subject to redemption on payment of the moneys covenanted to be paid, and the deed contained a power of sale in default of payment.

The first question is, whether, having regard to the articles of association, this was a valid instrument to any and if any to what extent. The clauses of the articles which relate to this subject are as follows :—

By the 81st section of the articles, it is provided, that no purchase, sale, contract or agreement, made or [357] entered into by the promoters or directors, or act done by the directors, to which the assent of the company in general meeting should have been given, should be afterwards impeached as *ultra vires*.

By the 83d section, the directors are empowered to raise any sums, by mortgage of all or any part of the company's estates or otherwise as therein mentioned.

By the 84th section it is provided, that all securities made on behalf of the company, may be made in such form and may contain such powers, &c., including powers of sale, as the directors shall think fit, and shall be sealed with the seal of the company and countersigned by the secretary, and when so signed, sealed and countersigned, shall be valid and conclusive and enforceable against the company without the necessity of proving any other matters than their having been executed in the manner aforesaid.

It certainly is very difficult to say that a mortgage of the property of the company to secure a debt due from their contractor to the bankers of the company falls within the scope of the powers of the directors or within the contemplation of the 83d clause of the articles. But, on the other hand, it is very difficult to say that the indenture of mortgage of January 1865 is wholly void, and that it ought not to stand as a security for anything.

At the date of the indenture, as I have already stated, the Defendants had discounted acceptances of the company for £5002, which bills had not then arrived at maturity, but were still running and about to become due from the company. There was also a further sum [358] of £1272, 1s. 7d., due from the company to the Defendants, and, in truth, the Plaintiffs, by their counsel at the Bar, offer to pay these two sums to the Defendants, not, they say, as the price to be paid for cancelling the indenture, but out of their bounty, because they really owe the money which they are willing to repay. But I am of opinion, that to give security for these two sums of money was within the scope and authority of the directors, and that they are properly secured by the deed. I am not acquainted with any case where a Court has ordered a deed to be delivered up to be cancelled where it was a valid security for any sum of money. In truth, in all those cases in which the Court has, by its decision, partially affected the validity of a deed (as for instance where it has set aside the sale of reversions for the ground of inadequate consideration), it has not directed the deed to be cancelled, but has declared that it should stand as a security for the money actually paid for the purchase of the reversion and for interest upon that amount. The bill here does not contain any prayer or offer to that effect. It states, no doubt, in paragraph twenty-three, that endeavours were made for a compromise on that footing, but, as the bill stands, it simply asks for an injunction to restrain the Defendants from acting upon the powers contained in that deed and for the delivery up and cancellation of the deed itself.

It is also difficult to say that the right of the Defendants under that deed would be confined to making the mortgage a security only for these two sums. The company expressly covenant that they will pay any sum of money to be advanced after the date of the deed to the contractor, Mr. Griffin. Now it is unquestionably true, that it would not be within the scope of the authority of the directors to guarantee the payment of a debt [359] to be contracted thereafter between a stranger and his banker, in which the company had no concern; but if the directors think fit to constitute a person their agent or servant for a particular purpose, and undertake to repay the money to be advanced to that servant or agent, as if it were advanced to them, I am not aware of any principle or authority which, in that view of the case, would enable the principal to repudiate the payment made to his agent by his authority.

If so, it requires this deed to be examined, to see whether the true scope and construction of it is not, in effect, to make Mr. Griffin their agent for the receipt of the moneys, to be applied by him for the purpose of the buildings and works which he was directed to construct and perform for the use of the company. If this be taken as the true construction of the mortgage deed, then upwards of £9000 have, since the execution of the deed, been advanced by the Defendants to Mr. Griffin on behalf of the Plaintiffs. If he was the Plaintiffs' agent, it was not necessary for the bankers to see how the money was applied. But even if this construction could not be put on the indenture of January 1865; still, in my opinion, it would be difficult to hold that the Defendants, the bankers, would not be entitled, under the covenant I have referred to, to claim against the Plaintiffs, the company, all such sums of money as were paid by the Defendants to Mr. Griffin, and were by him properly expended on the works performed by him for the company. This, as I understand it, amounts to the sum of £7485, which has been certified by the engineer of the company to have been properly expended.

To this it is urged, that an action has been brought for this amount, and that only £2294 or thereabouts [360] has been recovered, and this must, therefore, be taken to be the full amount which could be recovered under the covenant. If that question has been so decided at law, it would unquestionably govern my decision here, where the same points arise, but I do not so understand what took place in the action, nor do I see anything in the deed itself, or in the acts of the parties, which limits the security of the Defendants for the repayment of the sums advanced by them to two-fifths of the value of the works actually completed by Griffin, although the Defendants may have been cognizant of a former arrangement between the Plaintiffs and Griffin, by which they were to make payment to him of two-fifths of what was due to him in shares of the company, and the retention of the remaining one-fifth for the security of the completion of the works, which arrangement is not referred to in the indenture in question. If I came to the conclusion that nothing whatever was due on the deed itself, and that it would stand as a security for no sum of money at all, there would still arise a question, which, in my opinion, is one of considerable nicety, viz., whether the 84th clause of the articles makes the mortgage valid. It is argued, no doubt very plausibly, that this clause only applied to the form of the indenture, and that it cannot extend to rendering valid a mortgage which is confessedly otherwise void, as being wholly unauthorized by the articles of the association. At the same time, it may reasonably be argued that if the directors think fit to raise money at exorbitant interest, far exceeding the market rate, or to give an extravagant premium for loans, this is a matter of contract between the parties; and if a mortgage is made to secure the payment of such a sum, this clause would render it valid, however extravagant it might be, provided it was not tainted with fraud. It is obvious that some meaning [361] would be given to it, if it were confined to the form of the deed. It is obvious that it could not alter the construction of any deed, nor make that a mortgage which did not purport to be one; and it is to be observed, that the words are quite general, and refer to all deeds, mortgages and the like, made and executed on behalf of the company; and it was obviously intended to relieve any person dealing with the company from any apprehension as to the validity of their security on which they had *bona fide* advanced money, when once that security had been duly executed, in the form specified in that article. And it is also to be observed, that if I am right, this deed was a good mortgage, to the extent at least of the moneys then actually due from the company to the banker.

I am of opinion, however, that it is not necessary for me to decide that point on the facts established before me. I am of opinion that the indenture of January 1865 is a valid security for something due from the Plaintiffs to the Defendants, and being of that opinion, it is impossible that I should decree its cancellation. Neither, in my opinion, could I permit the Plaintiffs to alter the frame of this suit and turn it into a bill for the redemption of the property, on payment of so much only as was or could be properly secured by the instrument itself. The bill contests the validity of the deed *in toto*; it alleges that in part it was obtained by fraud and undue influence, in which allegation it signally fails. It is also an attempt to get out of a contract and arrangement deliberately entered into by the company, the defects of which they,

above all others, must be taken to have been cognizant of at the time of its execution, and by reason of which they obtained large sums of money to be laid out on their works.

[362] The bill must, therefore, in my opinion, be dismissed with costs, without prejudice to their filing any other bill they may be advised for the redemption of the property.

[362] WALMESLEY v. PILKINGTON. *March 1, 2, 6, 1866.*

Premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should "lose a life and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised" the lessor "would put in a new life." Held, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life.

The question in this case was as to the construction of a covenant for renewal contained in a lease.

By an indenture, dated the 5th of February 1765, Mr. Cotham demised the hereditaments in question to William Traverse, to hold the same from the date thereof, "for and during the term of the natural and several life and lives of him William Traverse, about twenty-seven years, Elizabeth Traverse his daughter, about five years, and Henry Sale, aged about eleven years, and for the life of the survivor and longest liver of them; and also for and during the term of twenty-one years, to be completed from the time of the death and decease of the survivor of them the said William Traverse, Elizabeth Traverse and Henry Sale, and from thenceforth to be completed and ended," at a rent of 14s.

The lease contained the following covenant by Cotham with Traverse:—

"And further, if the said William Traverse, his heirs, executors, administrators or assigns shall happen to lose a life, and he or they think proper to have a new life put in, then, within six calendar months after the death of the first life, and so on continuing the term and estate [363] hereby demised, he the said William Cotham, his heirs and assigns, and them, their and every of their heirs and assigns shall and will put in a new life, after the rate and value of three years' value of the ground-rent to the front, he the said William Traverse paying for the new lease."

One of the three lives dropped in 1811, and the trustees of the will of the lessor granted a new lease to William Bonney in whom the old lease was then vested. By this lease, dated the 30th of January 1811, the trustees "in pursuance of and in conformity to the covenant," in the lease of 1765, demised the premises (except the minerals) to William Bonney, to hold for and during the term of the natural lives of Elizabeth Traverse, daughter of the said William Traverse deceased, now of the age of fifty years, and Henry Sale of Wigan in the said county, yeoman, now of the age of fifty-six years or thereabouts, the now surviving lives in the said recited lease named, and of William Bonney (son of the before-named William Bonney) now of the age of four years or thereabouts, and for and during the lives and life of the survivors and survivor of them, and from and immediately after the death of such survivor to hold the same unto the said William Bonney, his executors, administrators and assigns for and during the further term of twenty-one years thence next ensuing.

Elizabeth Traverse, the last of the three original lives, died on the 13th of November 1839, and if no new life had been introduced, the lease would have expired on 13th November 1860. William Bonney, the last life, introduced in 1811, died on the 30th of January 1861.

This suit was instituted, in June 1864, by the parties representing the lessors, against those representing the [364] lessees. The Plaintiffs submitted that the granting of the lease of 1811 by the trustees was, as to the therein superadded term of twenty-one years, a breach of trust, of which the lessee, and every person deriving title through or under him, had all along full notice; that such lessee acquired under

the lease of 1811 no new estate or interest, effectual in equity, except for the new life, and that a term of twenty-one years, computed from the decease of the survivor of the three lives named in the said original lease of 1765, having run out when William Bonney died, the legal term of twenty-one years vested in the Defendant as a trustee for the Plaintiffs, as deriving title under Cotham, the lessor.

The bill prayed a declaration that the premises were vested in the Defendant in trust for the Plaintiffs, and for a surrender.

The Defendant insisted that under the lease of 1811 he was entitled to hold the demised premises for the term of twenty-one years from the death of William Bonney, and that such lease was valid.

Mr. Selwyn and Mr. C. Hall, for the Plaintiffs.

Mr. Baggallay and Mr. Little, for the Defendant.

March 6. THE MASTER OF THE ROLLS [Lord Romilly]. The question is, whether the lease of 1811 was valid, in so far as it added a term for twenty-one years to the putting in of the last of the three lives constituted by the lease of 1811.

It is argued very strenuously that the original lease [365] is distinct on this point, and that the twenty-one years are to be added to the life of the last survivor of William Traverse, Elizabeth Traverse and Henry Sale, and that it would be a complete alteration of the lease to introduce twenty-one years after the decease of the survivor of Elizabeth Traverse, Henry Sale and William Bonney. I have felt considerable hesitation on the construction of this covenant, but, on the whole, my opinion is that the meaning of the words expressed in the covenants is, that the lessee is to be at liberty to introduce a new life in the place of the first life that dropped, and no more, and that thereupon all the provisions and directions that applied to the life that dropped should be substituted for the life introduced. That, in other words, the lease should be read as if dated in 1811, with the name of William Bonney in the place of the name William Traverse as regards the duration of the lease.

It is necessary to look very closely at the words, if William Traverse "shall happen to lose a life, and think proper to put in a new life within six calendar months after the death of the first life." Up to this point it is, in express words, confined to one new life, and that, on the occasion of the putting in of the first life that drops. What is there to extend this? The next words are, "and so on continuing the term and estate hereby demised."

On the one hand, this is argued to mean that the lessee is to be at liberty to put in three lives, one for each of the three mentioned in the original lease, as they respectively drop. On the other side, it is argued that this means that the new lease is to contain this same covenant, and that this amounts to a perpetual renewal.

[366] I dissent from both arguments; I think that the words of the covenant mean that the lessee is entitled to put one new life into the lease, and one only, and that one in the place of the first that drops, and within six months after the falling in of it, leaving all other the same, changing what ought to be changed for the purpose of making the whole of the rest of the lease homogeneous to such alteration, and that the words "so on continuing the term and estate hereby demised" mean that the rest of the renewed lease shall give to the lessee the same term and estate as he had by the original lease, but without the power of adding a second life. That term and estate was for three lives, and the life of the survivor and twenty-one years afterwards. The words "hereby demised" do not, as I understand them, mean the lives of William Traverse, Elizabeth Traverse and Henry Sale, and the life of the survivor of these three persons, but the three lives generally, on which the duration of the lease was to depend, whoever they might be who were put into the lease, and the life of the survivor. In other words that the expression refers generally to three *cestuis que vie* and the survivor, and not to the particular *cestuis que vie* specified in the original lease. Were it not so, this covenant would give the lessees no benefit. One of the three original lives was twenty-two years older than one, and sixteen years older than the other of the lives; it might reasonably be expected that this life would drop first, and accordingly it did so drop. If the twenty-one years were only to be added to the survivor of the two younger and remaining lives, it was probable that the addition of a new life would give the lessee no benefit, and that the twenty-two

years by which the elder life exceeded that of the youngest life would, if the duration of all the lives were the same relatively, be an equivalent, or nearly so, to the duration of the new life added. [367] And, accordingly, so it turned out; the new life only survived the youngest of the three original lives by twenty-one years and two months. But this covenant points to a benefit to the lessee; the lessee is to pay the costs of it, and also to give "three years' value of the ground-rent to the front." My opinion is that the best and most rational construction which can be given to the words of this covenant is, that the renewed lease is, in all respects, to be the same as the original lease, except that the name of one *cestui qui vie* is to be substituted for the name of one that had died, and that no new life is afterwards to be added.

Having come to this conclusion, it is unnecessary for me to go into various of the contentions which were argued before me. I may, however, state that there is only one that appeared to me to require any notice, which was, whether as the renewed lease reserved the minerals under the property demised, the fact that William Penkett Cotham, who was owner in fee of the income of the property demised, did, since the renewed lease was granted, viz., on 14th January 1842, and with the knowledge of its contents, grant a lease of the minerals under the demised land; this, if the fact be so, constituted such an acquiescence in the renewed lease so granted, as to bind him and to bind all persons claiming under him. On this, the fact not being ascertained, I express no opinion, as, on the construction, I think, the covenant becomes under it superfluous. A lease to a similar effect was made by the trustees, who are the present Plaintiffs, in August 1853, but this is immaterial, as they could not bind their *cestui que trust*, and if the renewed lease was invalid, they could not, by any acquiescence of theirs, render it valid.

It is proper, however, to observe, and this confirms [368] the view I have expressed of the covenant that a renewed lease was, in any view of the case, absolutely necessary; and that no alteration could have been made in the original lease. The question is the contents of such renewed lease. I think that it was to be the exact counterpart of the original lease, changing simply the name of William Traverse for that of William Bonney, in all cases where the name of William Traverse was used as one of the *cestuis qui vie*, and omitting the covenant for a renewed life. The renewed lease, did not, in fact, do this exactly, but the variations are not material; probably as much was given up on one side as was given up on the other, but this does not amount to a valuable consideration for buying or relinquishing anything on either side, nor was this the moving cause for granting the lease, the parties dealt on this footing:—they believed the lessees were entitled to have a life substituted in the place of William Traverse, with all the consequences flowing from it, and they granted and the others accepted such a lease accordingly.

The consequence of this is that, in my opinion, the case of the Plaintiffs fails, and the bill must be dismissed with costs.

[369] *Re KITTON*. Jan. 11, 1866.

In ordering the taxation of a bill claimed against two persons, the Court gave both liberty to question the retainer, and directed the Taxing Master to distinguish by and to whom each sum found due was to be paid.

Mr. Kitton, a solicitor of this Court, alleging that Mr. Cobbold and Sir Samuel Bignold had jointly employed him as their solicitor in an arbitration matter, delivered his bill of costs and commenced an action at law against them to recover the amount.

Mr. Cobbold alone (Sir Samuel Bignold declining to join) took out a summons for the taxation of the bills and to stay the proceedings at law in the meantime.

The only question was as to the form of the order.

Mr. Selwyn and Mr. Druce, in support of the petition, cited *Ex parte Hair* (10 Beav. 187); *Re Lewin* (16 Beav. 608).

Mr. Jessel, for Mr. Kitton.

Mr. Wickens, for Sir Samuel Bignold.

THE MASTER OF THE ROLLS [Lord Romilly] directed the action to be stayed, and,

in addition to the usual order for taxation of the bill, he ordered that Mr. Cobbold and Sir Samuel Bignold should be at liberty to question the retainer by them or either of them. He also directed the Taxing Master to distinguish by and to whom each sum by him found due was to be paid. (Reg. Lib. 1866, A. fol. 193.)

[370] EARL HOWE v. EARL OF LICHFIELD. Feb. 28, March 13, 1866.

[S. C. L. R. 1 Eq. 641; 14 W. R. 468; affirmed on appeal, L. R. 2 Ch. 155; 36 L. J. Ch. 313; 16 L. T. 436; 15 W. R. 323.]

Legacy and not succession duty held payable on the produce of an estate of a testator sold by trustees.

A testator devised real estate to trustees in trust by sale or mortgage to raise £20,000, and subject thereto he devised the estate to his son. The trustees sold part of the estate, but, before the contract had been completed, the trustees were paid, and the estate was conveyed to the son, who adopted the contract. Held, that legacy and not succession duty was payable on the purchase-money.

All that the purchaser of devised real estates can require in respect of succession duty is, distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments sold by reason of the death of the testator. If the Inland Revenue Office distinctly state this, it is sufficient, and the office cannot be compelled to give a certificate in any particular form.

This was nominally a suit for specific performance, but the real question was, whether the Plaintiffs had produced to the Defendant the proper evidence, that no claim was or could be made from the Inland Revenue Office for succession duty or legacy duty in respect of the hereditaments contracted to be bought by the Defendant.

The testator, the Honorable Robert Curzon, made his will dated the 3d of October 1862, by which he left all his freehold and copyhold hereditaments to the Plaintiffs (Earl Howe and Mr. Dugdale) in trust, by sale or mortgage, to raise £20,000 together with the costs for the purposes mentioned in his will, and subject to these trusts and subject to any mortgage affecting the same, he demised the estates in trust for his son, the Plaintiff Robert Curzon, his heirs and assigns for ever, and he appointed him sole executor of his will.

The testator died in May 1863, and the will was proved in August 1863 by his son, the Plaintiff Robert Curzon.

On the 14th of October 1863 the trustees, in exercise of the trusts reposed in them by the will, caused the Hagley estate, being part of the estate so devised, and [371] which was subject to a mortgage of £12,500 created in 1855, to be put up for sale by auction, and lots two and fifteen were knocked down to the agent of the Defendant on his behalf, the contract was duly signed, and the deposit money paid. The title had been accepted, subject to the question already stated as to succession or legacy duty payable on the purchase-money.

On the 14th of July 1864 the mortgagees of the property had been paid off, and the £20,000 paid to the trustees out of the purchase-money of the other lots of the Hagley estate. By an indenture, dated the 15th of July 1864, the mortgagees, with the concurrence and by the direction of the Plaintiffs, the trustees, conveyed the hereditaments in question to the Plaintiff, Robert Curzon, in fee, discharged of the mortgage. The Defendant's counsel thereupon stated that, as Mr. Curzon was then to be considered as the vendor, it must be shewn that succession duty had been paid. The legacy duty, which exceeded in amount the succession duty, had been paid, but the Defendant contended that succession duty was properly payable, and that he was entitled to the usual certificate, under the statute that all succession duty has been discharged. After much correspondence, the parties agreed on a case to be submitted to the Inland Revenue Office, and in answer to this statement, Mr. Trevor (the comptroller of legacy and succession duties) wrote a letter, dated the 29th of May 1865, in the words following:—

"I beg to acknowledge the receipt of your letter of the 17th inst., and to observe that legacy duty appears to have been properly paid, under the 4th and 5th sections of the 45 Geo. 3, c. 28, for the proceeds of the sale of the real estate sold under the directions contained in the will of the late Honorable Robert Curzon, and [372] being so paid, there is no charge on the property so sold under the 16 & 17 Vict. c. 51."

The advisers of the Defendant were still unsatisfied, and made a visit to the authorities at the office of the Inland Revenue, when, upon their statement, the officer of that department expressed an opinion that succession and not legacy duty was payable. Thereupon Messrs. White & Co. (the Defendant's solicitors) wrote a letter to Mr. Trevor on the 20th of June 1865, suggesting the form of a certificate to be signed by him, certifying that all duty in respect to the land purchased [specifying it] had been paid and discharged, and "that the Inland Revenue Office had no further claim for legacy or succession duty in respect thereof."

In answer to that application, Mr. Trevor wrote a letter, bearing date the 21st of June 1865, as follows:—

"Inland Revenue Office, London, E.C.—Legacy and Succession Duty Department.—21 June 1865.—Gentn,—In reply to your letter of the 20th inst., I beg to state that the duty at the rate of £1 per cent. amounting to £51, 19s. 8d. appears to have been paid on the 24 April 1865, upon a sum of £5198, 11s. 6d. (£4823, 5s. 3d. principal and £373, 6s. 3d. interest thereon), described to be the proceeds of the sale of the following property, viz., a close of land called Burnt Hill containing 4a. 3r. 28p., and certain other closes of land called Bullock's Moor and Flaxley Green Piece containing 43a. 4r. 0p., being part of the Staffordshire estates of the late Honble. Robt. Curzon (who died on the 14th May 1863), and which are devised to his son Robt. Curzon.—Yours, &c., "CH. TREVOR."

"Messrs. White, Broughton & White."

[373] The Defendant's advisers being still dissatisfied with this answer refused to complete, and threatened to bring an action for the deposit money, and thereupon this bill was filed, praying for the specific performance of the contract.

Mr. Selwyn and Mr. G. O. Morgan, for the Plaintiffs, referred to "The Succession Duty Act, 1853," 16 & 17 Vict. c. 51, ss. 18, 44, 52; and see the Stamp Act, 45 Geo. 3, c. 28, ss. 4, 5, and 55 Geo. 3, c. 184, Schedule, Part 3, tit. Legacies.

Mr. Hobhouse and Mr. Cecil Russell, for the Defendant, cited *Hobson v. Neale* (17 Beav. 178).

March 13. THE MASTER OF THE ROLLS [Lord Romilly], after stating the sale by the trustees to the Plaintiff, said:—

If the matter had rested there, no question could have arisen but that legacy duty and not succession duty was properly payable in respect of the purchase-money to be produced by this sale.

What took place subsequently was this:—[The Master of the Rolls stated the subsequent facts down to the filing of the bill and proceeded:]—

A suit founded on a more unfortunate contention can scarcely be conceived. I have considered the matter as carefully as I could, and, in my opinion, the Defendant has been ill-advised and must submit to a decree. In the first place, all that the purchaser can require is distinct evidence that no claim will be made by the Inland Revenue Office for any duty on the hereditaments mentioned by reason of the death of the testator.

[374] I am of opinion that if the Inland Revenue distinctly stated this, the vendor is not compellable to institute proceedings against the Inland Revenue to compel them to give a certificate in a particular form, although it be that specified in the statute.

I am also further of opinion that the case was fairly stated to Mr. Trevor and that his answer was decisive, that the proper duty had been paid.

I am also further of opinion that his second answer to the solicitors of the Defendant was decisive, that no more duty could be claimed, and I am of opinion that after these two letters (assuming the rest of the title to be unobjectionable) no purchaser could resist the performance of his contract in future, on the ground that any claim for duty could be made by the Inland Revenue Office. I think the case

was fairly stated, and also that the Defendant is not entitled to compel the Inland Revenue to give a certificate in a particular form.

I am therefore of opinion that it is immaterial whether legacy duty or succession duty was payable originally.

I have, however, thought it necessary, in consequence of the contention, to go into that question, and I am of opinion that legacy duty was payable and not succession duty. On this point, the sole question is, whether the sale was made under the power given to the trustees, or whether the sale was made by Mr. Robert Curzon as owner in fee-simple, and I think that the sale was made under the powers given to the trustees, the original Plaintiffs, by the will of the testator.

The original sale was obviously so, the contract was with them and solely with them, there was no contract [375] with Robert Curzon. It is true that, by means of subsequent conveyances, the whole of the property in fee-simple was vested in him and that he alone became the necessary party to convey; but this circumstance did not alter the original contract or make him the seller. The proof of this is, that if the Defendant had filed a bill for the specific performance of this contract and had made Robert Curzon a Defendant to such suit and a demurrer had been put in by him, that demurrer would have been allowed. The parties to the contract were the trustees on one side, and the Defendant on the other, and they also were the necessary and proper parties to this suit, and Robert Curzon was, in my opinion, properly omitted in the first instance, for being a Co-plaintiff he need not, notwithstanding the contention of the Defendant, have been made a party to this suit.

If the original contract had been cancelled by consent of both parties and a fresh contract entered into with Robert Curzon, the matter would have been different; but this is not so, there is no trace of anything to this effect in the evidence or pleadings. It is simply a case of this description:—

The original vendors have, by subsequent proceedings and deeds which they have sanctioned, vested the whole of the legal estate and equitable interest in the hereditaments, free from all charges, in Robert Curzon. But this does not affect the original contract, which was perfectly valid when they entered into it, and which they are bound to perform, either personally or by procuring the conveyance of the property from the person in whom they have vested it or allowed it to become vested.

The error of the Defendant is, in supposing that the transactions which have taken place since the sale in October 1863 have substituted a new contract for the [376] old one. But this is not so; it is the old contract which constitutes the sale, and which alone can be enforced, although the powers to convey are altered by the subsequent acts of the parties. In equity, assuming the contract to be executed, all the interests in equity were complete the moment the contract was signed; from that moment the Defendant was the owner of the estate in equity, and although, if he had taken a conveyance the next day, the trustees would have been the parties to convey, and because a year elapsed, the son and devisee of the testator became the party to convey, it does not affect the real sale, which was under the powers of the will, to which the final conveyance of the legal estate is a mere accessory, and which completes at law, in 1866, what was complete in equity in 1863.

I am, therefore, of opinion that the Plaintiff is in the right, and that he is entitled to a decree, and that the Defendant must pay the costs of the suit.

[376] FRENCH v. SEMPLE. *March 8, 1866.*

A Defendant having died before answer, an order to revive and also to answer was made against his personal representative under the 15 & 16 Vict. c. 86, s. 52.

In this case, one of the Defendants had died before he had answered the interrogatories to the bill which had been filed.

Mr. Beavan moved for an order to revive against his personal representative, and that such representative might answer the interrogatories within a limited time. He referred to the 15 & 16 Vict. c. 86, s. 52, and to the statement of Lord Redesdale (Mitford's Plead. 76, 4th edit.) where it is stated, "if [377] a Defendant to an

original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill or so much of it as the exceptions taken to the answer of the former Defendant extend to or the amendment remains unanswered." And after stating that the suit may be revived in eight days after appearance, unless cause shewn, he says: "Though the suit is revived of course in default of the Defendant's answer within eight days, he must yet put in an answer, if the bill requires it." He submitted that the order asked was "an order to the effect of the usual order to revive," authorized by the 52d section of the Act.

THE MASTER OF THE ROLLS [Lord Romilly]. I think I can make the order giving the representative the usual time to answer. It is not necessary to put the Plaintiff to the expense of filing a bill of revivor in order to obtain an answer.

NOTE.—See *Earl Beauchamp v. Winn*, 2 Law R. Eq. 302, and 14 Law T. 856.

[378] SMITH v. DRESSER. March 2, 5, 1866.

[S. C. L. R. 1 Eq. 651; 35 L. J. Ch. 385; 14 L. T. 120; 14 W. R. 469.

See *In re Holden*, 1887, 20 Q. B. D. 47.]

Trustees under a creditors' deed, in the Form D of the Bankrupt Act, realized the assets, but the deed afterwards proved invalid (the requisite number of creditors not having assented to it) and the debtor was made bankrupt. Held, that the trustees were not entitled to their costs and expenses of administering the estate, the deed under which they acted being totally void.

Hodgson, having a judgment debt entered up against him, executed a creditors' deed, dated the 25th of January 1864, in the Form D to the Bankrupt Act (24 & 25 Vict. c. 134, s. 200), by which he conveyed all his estate and effects to Dresser and Herring "absolutely, to be applied and administered for the benefit of the creditors of Hodgson, in like manner as if he had been, at the date thereof, duly adjudicated bankrupt."

On the 13th of May 1864 Hodgson was adjudicated a bankrupt, the Commissioner holding that "a majority in number, representing three-fourths in value of the creditors," had not assented to the creditors' deed. Smith was appointed his assignee.

Afterwards, by a decree made in June 1865, in a suit of *Harle v. Herring*, instituted to carry into effect the trusts of the creditors' deed, the Master of the Rolls held that the creditors' deed was void as against Smith, the assignee. The Defendant Dresser was a Defendant to that suit.

Dresser and Herring had, under the trusts of the creditors' deed, got in and converted part of the estate and effects of Hodgson, and had placed it (£700) in their joint names in a bank. After the decree, Smith required Dresser and Herring to pay over this sum to him. Herring was willing to do so, but Dresser refused to concur unless he was allowed the costs and expenses incurred by him as trustee under the deed of January 1864.

[379] Smith and Herring instituted this suit in October 1865 against Dresser, to compel Dresser to concur in enabling Smith to obtain payment of the £700.

The question was as to the right of the Defendant to the costs of administering the trusts and of this suit.

Mr. Southgate and Mr. Bush, for the Plaintiffs. The deed of January 1864 is void, not only under the Bankrupt Act, as divesting Hodgson of the whole of his property, but also under the 13 Eliz. c. 5, its object being to defeat the judgment. The deed being void, the trusts were also void, and no one can properly be said to be a trustee acting under it. The Defendant cannot be treated as a trustee or entitled to his costs or expenses in acting under such a deed; *Elsev v. Cox* (26 Beav. 95).

Mr. Cole and Mr. Freeling, for the Defendant. The deed is not altogether void;

it was valid as a conveyance of the property, which it vested in Dresser and Herring as trustees, and remained so until subsequent circumstances avoided it. The Plaintiff cannot recover the fund, without paying the costs of realising it. The circumstances were such as to justify the trustees in acting under the deed, and it would be unjust to make them bear the costs.

They cited *Symons v. George* (3 Hurl. & C. 68); *Daking v. Whimper* (26 Beav. 568); *Goldsmith v. Russell* (5 De G. M. & G. 547).

[380] *March 5.* THE MASTER OF THE ROLLS [Lord Romilly], after stating the facts, said:—Three-fourths in value of the creditors of Hodgson did not execute the deed of the 25th of January 1864, and the consequence was that it had no validity under the Act, and being a conveyance of his estate and effects to two persons, by a debtor, in order to defeat the payment of the judgment debt, the deed was void as regards all the creditors of Hodgson.

In my opinion, the Defendant has mistaken his position in this matter; he was appointed a trustee under a deed the trusts of which were all invalid; he was or ought to have been aware of this fact when he began to act in the trusts; he should have taken no steps in it until he was satisfied that three-fourths in value of the creditors had executed the deed, and a little inquiry would have set this clear, though on the form of the deed the contrary is alleged. But whether it were so or not, I cannot give the Defendant costs as a trustee, when, in fact, he was no trustee at all. I cannot allow the first trust, viz., that for payment of the charges and expenses to be paid, to be good, and yet hold all the other trusts to be void. What a trustee is entitled to have is the costs of executing his trusts, but if the trusts are invalid he has no trusts to execute.

It is said that this deed is effective for the purpose of conveying the property thereby purported to be conveyed. Assuming this to be so, the trustee has thereby incurred no costs, and, as all the trusts are void, he can have incurred no costs or expenses which could be allowed by this Court for the performance of that which is, in truth, nothing, a mere invalid and inoperative trust.

[381] In one sense, no doubt, the Defendant is a trustee, as every man is a constructive trustee who has in his possession property belonging to another, of which he did not culpably obtain possession; but this is only as every debtor is a trustee of the money he owes to the creditor. Unless adverse claims are made to the money in his hands, he cannot properly be called a trustee, even constructively, but where no such claims are made he is simply a debtor.

Such is the position of the Defendant Mr. Dresser, the trusts being void, he had no duty to perform, and he ought to have paid over the money at once to the assignee, no claim by any other person having been made, or being about to be made against the money in his hands. In truth, he was the less justified in causing this suit to be instituted, as, in the case of *Harle v. Herring*, to which he was a party, he had ascertained, by the decree of the Court, that the trusts of the deed of January 1864 were wholly void, and that he could not therefore claim any of the rights incidental to a trust which, in truth, never existed.

I must make a decree for the Plaintiff, and as Mr. Dresser has occasioned this suit, he must pay the costs of it.

[382] GEORGE v. GEORGE (No. 2). *March 24, 1866.*

A. A., who was both heir and administrator, gave to a creditor of the intestate a mortgage on the descended estate for his debt, which he covenanted to pay. The creditor thereupon gave to A. B., as administrator, a receipt for the debt, but no money passed. Held, in taking an account of the personal estate of the intestate as against A. B., that he was entitled to charge the amount of this debt as a payment out of the personal estate.

Mr. Greaves died intestate in 1841, indebted to the trustees of his marriage settlement in the sum of £3700, which he had borrowed from them in 1849.

The Defendant Bagshawe was both his heir at law and administrator.

The trustees required payment of the debt, whereupon Bagshawe, in May 1861, gave them a mortgage on the descended real estates for the amount of the debt, and he personally covenanted to pay it. The trustees, on the other hand, gave Bagshawe, as administrator, a receipt for the money. No money in fact passed and the mortgage remained unpaid.

By the decree Bagshawe, as administrator of Greaves, was ordered to admit assets of Greaves, or to account for the personal estate. In taking the accounts, he charged the £3700 as a payment out of the personal estate, and the Chief Clerk allowed it. A summons was, however, taken out to vary the certificate by disallowing the £3700, on the ground that no money had actually passed in the transaction.

Mr. Selwyn and Mr. Woodhouse, for the Plaintiff.

Mr. Cole and Mr. Bagshawe, for Bagshawe.

Mr. Eddis and Mr. Elderton, for other parties.

[383] THE MASTER OF THE ROLLS [Lord Romilly]. The trustees of the settlement were entitled to come against the personal estate of Greaves for payment of the £3700, and Bagshawe has paid them off by means of a mortgage. If this had been a mortgage on an estate which Bagshawe had bought, it would have been a perfectly good payment. But it happens to be a mortgage on the real estate of Greaves whose personal estate is liable, does that alter the character of the case? I think not.

By the mortgage the personal estate is released from the debt and the real estate became subject to a charge to the same amount.

It is true that no money was paid, but that is immaterial. I think that, under the circumstances of this case, Bagshawe is entitled to have the £3700 allowed him as a payment out of the personal estate.

[383] GRAY v. ADAMSON. *March 12, 1866.*

The rule as to the costs of a disclaiming Defendant applies to a disclaiming heir at law.

In this case the heir at law of a mortgagor had disclaimed, and was brought to the hearing.

Mr. E. Smith and Mr. Dickinson, for the Plaintiff.

Mr. Lindley, for the heir, asked for his costs, contending that there was no case in which a disclaiming heir, brought before the Court for the convenience of the parties, had been deprived of his costs.

[384] *Ford v. The Earl of Chesterfield* (16 Beav. 516) was cited; and see *Ford v. White* (16 Beav. 120); *Davis v. Whitmore* (28 Beav. 617); *Furber v. Furber* (30 Beav. 523).

THE MASTER OF THE ROLLS [Lord Romilly]. When he was served he ought to have offered to execute any deed which might be necessary. I can give him no costs.

[384] *In re ST. CUTHBERT LEAD SMELTING COMPANY.* *Feb. 27, 1866.*

Liberty to a mortgagee, pending a winding up, to institute a suit for foreclosure refused, there being no special difficulty, and it being competent to him to obtain the proper order in Chambers without the necessity of a suit.

An order having been made to wind up this company,—

Mr. Selwyn and Mr. Freeling, on behalf of a mortgagee, moved, under the 87th section of "The Companies Act, 1862" (25 & 26 Vict. c. 89), for leave to institute a foreclosure suit against the company.

The cited *Walker v. The Ware, &c., Company* (35 Beav. 52).

Mr. J. Pearson, for the official liquidator, supported the application.

THE MASTER OF THE ROLLS [Lord Romilly]. I think that this is an application I ought not to grant.

[385] If I were to grant this application, then, in every case of a mortgage of a company's property, I ought, during its winding up, to allow a mortgagee to file a

bill, and must also extend the like power to judgment creditors of the company. If I were to do so, the effect would be that I should be putting the estate of the company to a considerable amount of expense, to enable the mortgagee to obtain an order, which I can make in Chambers. It is only necessary to know what the rights of the mortgagee are, and what is proper to be done, and then, on hearing the official liquidator, I might make the order without the necessity of any suit at all. But if this application were granted, there would be a bill and answer; the case would be heard, and a decree made, directing accounts to be taken in Chambers apart from the winding up, and six months would be given to redeem, and then would come the ultimate order for foreclosure. This would probably take many months, while, if proper, I can make the order under the winding up to-morrow.

I am of opinion that the 87th clause was only intended to apply to cases where some difficult question arises, which can only be determined in a suit. But I consider that if a mortgagee comes in and asks for payment, I have full authority to deal with his rights. He may make an application in Chambers with respect to payment and the *interim* dealing with the property, on which occasion the opinion of the official liquidator will be very valuable. I can make no order.

[386] PRINCE v. PRINCE. Feb. 15, 1866.

[S. C. L. R. 1 Eq. 490; 35 L. J. Ch. 290; 14 L. T. 43; 12 Jur. (N. S.) 221;
14 W. R. 383.]

The power given to a company, by the 41st section of "The Companies Act, 1856" (19 & 20 Vict. c. 47), to contract for land by a person acting under its express or implied authority, is not, as regards a company formed under that Act, taken away by the Companies Act of 1862 (25 & 26 Vict. c. 89), although it repeals the Act of 1856; for it is a "right or privilege" preserved by the 206th section.

The question raised in this case was as to the validity of a contract entered into between an intestate and a public company.

It appeared that a company, called "The Manchester Royal Exchange Proprietors," had been incorporated and registered as a company under the provisions of the Joint Stock Companies Acts, 1856 and 1857 (19 & 20 Vict. c. 47, and 20 & 21 Vict. c. 14). By one of the rules of this company, the committee of management had power to purchase additional property for the purposes of the institution, the previous sanction of an annual or special general meeting of proprietors being obtained.

By the 41st section of the 19th & 20th Vict. c. 47, contracts on behalf of any company registered under that Act, which, by law, are required to be in writing, may be made "by any person acting under the express or implied authority of the company."

These Acts were, however, repealed by "The Companies Act, 1862" (25 & 26 Vict. c. 89, s. 205, and schedule 3). The repealing Act does not, however, re-enact the 41st section of the former Act, but enacts, by the 206th section, that "no repeal thereby enacted shall affect" (3) "any *right or privilege* acquired or liability incurred under any Act thereby repealed."

Such being the state of the law in 1864, this company [387] became desirous of purchasing a freehold property in the City of Manchester belonging to the Rev. Samuel Prince, and on the 23d of December 1864 Mr. Prince's agent wrote to the committee of the company offering to sell them this property (describing it) for £22,000, adding, "If it be accepted as to price, a formal contract will have to be prepared by Mr. Prince's solicitors and yours."

The committee, on the 29th of December 1864, "resolved that the offer of Mr. Prince's property for the sum of £22,000 be accepted, subject to the approval of a general meeting of the proprietors."

On the 11th of January 1865 a special general meeting of the company approved

(as the Court held) of the contract, and authorized the committee to carry it into effect.

On the 9th of February 1865 Mr. Heelis, the solicitor of the company, wrote to Mr. Prince's solicitor an answer to accept his offer, but Mr. Heelis had no authority, under the seal of the company, to accept the offer.

No formal contract had ever been prepared, and on the 22d of July 1865, before the contract had been completed, Mr. Prince died intestate.

Under these circumstances, the question was, whether a complete binding contract existed at the death of the intestate, so that, in equity, the purchase-money for the freehold property belonged to the next of kin and the property to the company.

The heir at law of the intestate, who was an infant, claimed the estate discharged of any contract.

[388] Mr. W. M. James, for the Plaintiffs, the widow and younger children of Mr. Prince. The offer contained in the letter of the 23d of December 1864, which was accepted unconditionally by the letter of the 9th of February 1865, constituted a perfect binding contract between the parties, for they specify all the necessary terms. The reference to the preparation of a more formal contract does not destroy or invalidate this contract; *Gibbins v. The North-Eastern, &c., District* (11 Beav. 1).

Mr. Heelis was a person acting under the "express or implied authority" of the company, and his written acceptance bound the company by virtue of the 41st section of the Act of 1856, under which this company was incorporated. Although this Act was repealed by the Act of 1862, and the 41st section was not re-enacted, still the right of the company to contract by its agent was preserved by the 205th section, it being "a right or privilege" acquired under the repealed Act.

Mr. Birley, for the company.

Mr. Little, for the infant heir at law. At the intestate's death there was no binding and subsisting contract for the sale of this freehold property, it therefore descended on his heir at law. Heelis was not appointed under the seal of the company and had no valid authority to bind the company and enter into this contract. The Act of 1856 was altogether repealed by the Act of 1862, but the Legislature did not think fit to re-enact the 41st section of the former Act. This case does not, therefore, come within the exception contained in the 205th section of the Act of 1862, for the liability to be bound by the Acts [389] of such an agent cannot be considered either a "right or privilege."

Again, the contract alleged was a mere negotiation and not final, for a further formal contract was stipulated for, and which would contain additional terms. Heelis was not the duly appointed agent of the company, and the sanction given by the general meeting was in too general terms and not sufficiently certain.

Wilson v. The West Hartlepool Railway Company (34 Beav. 187) was referred to.

Mr. W. M. James, in reply.

THE MASTER OF THE ROLLS [Lord Romilly]. In this case, I am of opinion that a case has been made out for the specific performance of the contract. The first thing to be regarded is, what the contract consists in. Mr. Prince, by his agent, offers to sell this property to the company for £22,000, and the solicitor of the company on their behalf writes to accept it. If this had been a dealing between individuals, and not with a company, I should be of opinion that this would constitute a complete and binding contract. I do not think that the statement that "a formal contract will have to be prepared," affects the question in the slightest degree; for when a contract is complete and certain in its terms it is binding, although a formal contract is intended to be prepared. I am, therefore, of opinion, in this case, that the terms are certain and that the correspondence constitutes a good contract as between individuals.

[390] The second question is, whether this is a contract which is binding upon the company. It is necessary, in the first place, to consider whether it was binding under the 41st section of the Act of 1856, under which the company was incorporated. I am of opinion that Mr. Heelis was, in fact, "a person acting under the express or implied authority of the company; that Heelis laid Mr. Prince's offer before the committee, who resolved that the offer should be accepted, subject to the approval of the general meeting; that this offer was laid before the general meeting and

that its acceptance was sanctioned by such general meeting, in compliance with the rules of the company. That being so, I am of opinion that the letter written by Mr. Heelis on the 9th of February constituted a complete contract under the Act of 1856, and that the company became bound by his acts within the scope of his authority.

The next question is, whether this power to contract by an agent, given by the Act of 1856, is taken away by the Act of 1862. Except by statute, the company had no authority to constitute a person their agent for the purpose of purchasing land, unless they constituted him their agent for that purpose under their common seal; but the Act of 1856 dispensed with this. The question therefore is, whether the Act of 1862 destroyed this power. The 176th section provides for the application of that Act to companies already formed, but it contains nothing disabling; on the contrary, it enables companies already constituted to obtain the benefit of that Act. But the 205th clause in the Act of 1862, which repeals the Act of 1856, provides that the repeal shall not affect "anything done under any Acts thereby repealed," or "any right or privilege acquired or liability incurred under any Act hereby repealed."

[391] It is clear that the latter exception does not refer to things already done, because that is already provided for by the first; it must therefore mean "any right or privilege" subsisting.

The question is, whether the "right or privilege" given by the Act of 1856, to enter into a contract by an agent, not so constituted by seal, is a "right or privilege" which the company enjoyed at the passing of the Act of 1862. I am of opinion that it is, and that it was not taken away by the Act of 1862.

A decree must therefore be made for the specific performance of this contract.

[391] *Re HAFOD LEAD MINING COMPANY. SLATER'S CASE.*

Feb. 13, 20, 1866.

[S. C. 35 L. J. Ch. 304; 14 L. T. 95; 12 Jur. (N. S.) 242; 14 W. R. 446.]

A company being in difficulties, A. B. gave C. D. £30 to take a transfer of his shares, and the transfer, which stated (falsely) that C. D. had paid A. B. £25 for the shares, was duly registered. About a year afterwards, the company was ordered to be wound up. Held, that A. B. was not a contributory.

Distinction between a transfer of shares which is fraudulent and void as against the transferee, and one which is so as regards the company.

This was an application, made by the official liquidator, to put Mr. Slater on the list of contributories for 100 shares, on the ground that the transfer of them to Mr. Casson was fraudulent and void.

The company was incorporated on the 15th of November 1861, and Mr. Slater held 100 shares in it.

On the 29th September 1863 the company was in difficulties, and information was given by the directors to the shareholders. Mr. Slater thereupon employed Mr. Casson, an accountant, and who owed him £25 on bond, to see the books of the company, and he examined them accordingly.

[392] On the 12th November 1863 Mr. Slater gave Casson £30 to take his 100 shares. Of this, £25 was paid by the debt then due from Casson to Slater, and the remainder was paid in cash. But the deed of transfer of that date falsely stated that Casson had given Slater £25 for the shares.

On the 27th November 1863 the transfer of the shares was duly registered by the company in their books.

On the 5th November 1864, being a year after this transaction, an order was made to wind up this company, and the official liquidator now applied to put Mr. Slater on the list of contributories for 100 shares, on the ground that the transfer to Casson, made when the company was in difficulties, was fraudulent and void. Mr. Casson, in his evidence, alleged that he had taken the shares under undue influence and pressure on the part of Slater, and under the fear of being sued by the latter on his bond, and

that he was a mere trustee of the shares for Slater. It was also alleged that the shares had been transferred into Casson's name, in order to enable him to inspect the books of the company. All this was, however, denied by the Respondent, who insisted that the transfer was *bonâ fide*, and that Casson was to have the profit to be derived from these shares.

Mr. Selwyn and Mr. Roxburgh, for the official liquidator, cited *Lund's case* (27 Beav. 465); *Hyam's case* (1 De G. F. & J. 75); *Costello's case* (2 *Ibid.* 302); *Bunn's case* (*Ibid.* 275); *De Pass's case* (4 De G. & J. 559).

Mr. Southgate and Mr. Crossley, for Slater, cited *Fenwick's case* (1 De G. & Sm. 557); *Jessopp's case* (2 De G. & J. 638); *Straffon's case* (1 De G. M. & G. 577); *Budd's case* (30 Beav. 143, and 3 De G. F. & J. 300).

[393] Feb. 19. THE MASTER OF THE ROLLS [Lord Romilly]. I have certainly held that, where a shareholder gets rid of shares by assigning them to a pauper, or to a servant over whom he has entire control, in order to avoid paying his share of the debts of the company and of throwing them on the other shareholders, this transaction is fraudulent and void, and I think the latter decisions tend to confirm that conclusion. But I do not consider that this precludes a shareholder from *bonâ fide* selling his shares to another person, or giving him money to take the shares, if the transaction be open and not merely colorable. Subject to an observation I am about to make, as to the statement of the consideration in the transfer, I see nothing in this transaction which, as between Mr. Slater and the company, can justify me in saying that this transaction is colorable and void.

If a person holding shares in a joint stock company induces another person to buy them by making false representations to that person, the purchaser may come here to set aside the transaction as between them. But the company have nothing to do with that matter, and, subject to any power which they may possess of rejecting any transfers, they must adopt the decisions of the Courts as to the person who is to become or to remain a shareholder. The Court in such matters cannot look into the question of the fairness of the means by which such transfer was effected. If A. says to his servant, the company is about to be wound up, take my shares, they can get nothing from you, and will not attempt it, and I will repay you for the trouble and loss you may sustain, the company may properly say, this is no transfer, and that A. is still liable. But if A., knowing that a company is on the eve of bankruptcy, says to B., "this is a thriving and valuable company," and thereby [394] induces B. to buy them, B., as regards the company, is the shareholder, until by a decree of the Court he has set aside the transaction and compelled A. to take back his shares. In the former case, the want of means of the servant or dependent of A. to pay calls is a material ingredient; in the latter case, the greater or less wealth of the transferee forms no element of consideration. The case before me, if all that is alleged against Mr. Slater be correct, and not disproved or denied by him, would make it belong to the second class of cases. Casson here puts his case upon this: that he took the shares upon undue influence and pressure on the part of Slater, and that he feared being sued by Slater on his bond. I have not been able to find any evidence to shew that Casson is not fully able to pay the calls on the shares; but with this the company have nothing to do. I assume that, if Casson pleased, he might, by bill in equity, set aside the transfer, and compel Slater to take back the shares; but until he has done so he is the shareholder, and to such a suit the company would not be proper parties. I have looked through the evidence, and I find that the case I have suggested is not really raised, and certainly not proved by the evidence. Whether Casson could maintain such a suit, when, according to a part of the evidence, he was induced to have the shares put in his name, in order to inspect the books, and whether, by so doing, he had ascertained the state of the affairs of the company, I do not stop to consider. This company has nothing to do with that case, but solely whether in this case the shares were collusively transferred to a man who could not pay calls, in order to relieve Slater, and this is not proved, and it is fit to observe that one share, instead of 100, would have been quite as efficacious for the purpose of inspecting the books.

[395] In the first place, Casson was competent to pay the calls. In the second place, the company, although in difficulties, was not wound up till nearly a year had elapsed. The mine might in that interval have proved profitable and valuable, and

the shares, in that case, could not have been got back. In the third place, no indemnity was given to Casson, but it was expressly refused, and that refusal was not objected to and no indemnity was required.

The real difficulty in the case is the false statement of the consideration, viz.: that £25 were paid for the shares by Casson, when, in fact, £30 were paid to him. This is very serious, but I observe that Casson was employed to examine the books, and this examination, it is agreed on both sides, he made, and for which he now makes a claim. If this was taken into account and made to amount to £55, it would make the consideration paid £25. But the whole matter is unexplained. This also is to be observed:—it does not appear to have been done for the purpose of deceiving the directors, for I do not find that they had any power of refusing to accept the transfer if the exact truth had been told.

I think, therefore, on the whole, that there is not such a case made out to set aside this transaction as to enable me to make any order on this summons; but the Respondent Slater does not come before the Court perfectly without taint, he did not put the real consideration in the deed as far as the evidence stands. If he did he certainly does not explain it. Therefore I must dismiss the summons without costs.

[396] STOOKE v. STOOKE. March 12, 1866.

[S. C. 14 W. R. 564. See *In re Pringle*, 1881, 17 Ch. D. 823.]

A testator gave a house and £300 "of lawful money" to his daughter, and "the remainder of all his moneys, in whatever it may be, in bonds or consols or anything else," to his wife. Held, that the wife was entitled to all the testator's residuary personal estate invested in any security, including a life policy, but not to a leasehold or furniture or chattels.

The testator, who had five children, died in 1864.

By his will, he gave to each of his three sons some house property, and to one of his daughters a house and £300, and then proceeded in the following words:—

"And I give to my daughter Elenora Stooke, the house occupied by Mr. Lucas, and if she dies without issue then to come back to my sons, to be divided equally alike between the three, and I likewise give £300 of lawful money of Great Britain to my daughter Elenora. *The remainder of all my moneys*, in whatever it may be, in bonds or consols or anything else, I give to my wife for her sole use, as long as she shall live, but not to give it away from my sons and daughters at her death, but to give it to either or divide it equally between the whole. I give to my two sons, Charles and Richard, the yard and garden what I bought of Mr. Brewer's executors, to be divided equally between them, but the part next to Mr. Miller's to be Richard's."

The testator was possessed of a leasehold called "The Ivy Cottage," held for a term if three persons should so long live, and he had effected a policy for £450 payable on the death of the survivor of the *cestuis que vie*. There were also furniture, culinary articles, china, glass, wearing apparel, plate, wine and a pony carriage in and about the Ivy Cottage, of the estimated value of £141.

The question in the cause was, whether this cottage [397] and the other articles passed under the words "the remainder of all my moneys."

Mr. Baggallay and Mr. Rowcliffe, for one of the next of kin, cited *Lowe v. Thomas* (5 De G. M. & G. 315).

Mr. Selwyn and Mr. Marten, for the widow, cited *Montagu v. The Earl of Sandwich* (33 Beav. 324); *Stocks v. Barrè* (John. 54); *Rogers v. Thomas* (2 Keen, 8); *Hinves v. Hinves* (3 Hare, 609).

Mr. Southgate, for all the Defendants except the widow.

THE MASTER OF THE ROLLS [Lord Romilly]. It is very difficult to construe one will from the words used in another will; you must judge by the will itself.

I concur in this:—That if a testator, by his will, gives matters, which are not money in the ordinary acceptation of the term, and afterwards gives all "other my moneys whatsoever and wheresoever," he applies that expression to things which

are not strictly *money* and consequently that things not of that character pass under the gift. Thus if a testator gives Whiteacre and all the rest of my money to A. B., he means all his property, for he treats Whiteacre as "*money*," although land or real estate and personal chattels are not properly speaking "*money*."

Applying that rule to this case, I think that the meaning of the testator is not ambiguous. After giving a house and "£300 of lawful money of Great [398] Britain to his daughter Elenora," he gives the "remainder of all my moneys" to his wife. I am disposed to think that if he had stopped there and had said, "the remainder of all my moneys I give to my wife," it would have carried the whole of the property. But he specifies the moneys he means by saying, "in whatever it may be, in bonds or consols or anything else." I read this as a gift of all his money on whatever security it may be, whether on bonds or consols or any other security, and all the sums secured by any species of security. If he had had a freehold farm, that would not have been money in any sense of that word as used by the testator.

This view is confirmed by the fact that, after he had done this, he directs a yard and garden to be equally divided between his two sons Charles and Richard, from which it is clear that he did not consider them as part of his money. This shews that the word is used in a restricted sense, and not in a sense which would include freeholds.

I am of opinion, therefore, that "*money*," as used in this will, includes money on any species of security.

I do not feel the difficulty as to the policy. The £450 was secured by a policy of assurance for the purpose of repaying the value of the leasehold when it fell in upon the death of the last life. I do not see why the testator should not bequeath it, if he thought fit, for I think the leasehold and policy separate and distinct properties. Suppose he owed £1000 payable by instalments, and had insured his life for £1000, would it not be moneys on security? I think the £450 was money invested in a policy.

[399] I think the widow is entitled to the policy, but not to the leaseholds or the furniture, &c., which go to the next of kin.

DECREE.—Declare that the bequest of "the remainder of all my moneys, in whatever it may be, in bonds or consols, or anything else," passed all the testator's residuary personal estate invested in any security, "including the policy of assurance," but not the leasehold premises called Ivy Cottage, nor the furniture, &c., &c., therein, which were undisposed of.

[399] *In re THE ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY, LIMITED.* March 6, 7, 8, 12, 1866.

[S. C. L. R. 2 Eq. 1; 14 L. T. 120; 12 Jur. (N. S.) 323; 14 W. R. 624.
See *In re Suburban Hotel Company*, 1867, L. R. 2 Ch. 749.]

The words "just and equitable that the company should be wound up" in the 5th rule of the 79th section of "The Companies Act, 1862," are to be considered *ejusdem generis* with the four prior rules.

If it were established that a company never had any proper foundation, and that it was a mere fraud or bubble company, the Court would order it to be wound up. Misconduct of directors and manager towards the shareholders, though a ground for relief by suit, is not, until such mismanagement has produced insolvency, a ground for winding up the company.

A large remuneration to the projector and directors of a company, if openly provided for by the articles of association, cannot afterwards be questioned by shareholders.

Observations as to the impropriety of directors receiving gifts from the projector out of the promotion moneys received by him from the company.

A benefit received by a director from persons employed by the company, or arising from the transactions of the company, cannot be supported.

It is not only the duty of directors of companies to be ready, at all times, to explain everything to shareholders, but also that they shall be engaged in no transactions connected with the company from which they can derive a profit which is not openly known to, and acquiesced in by, all the shareholders.

Every subscriber in a public company is bound to know the articles of association, and cannot complain of anything disclosed in them, which, if he does not know, he might and ought to know.

Shareholders, who appear to support or resist a petition to wind up a company, do so at their own costs, unless a personal charge is made against them; in which case, the director or member assailed is entitled to appear separately, and to his costs from the Petitioner if the case fails.

Remarks on the impropriety of making the statutory affidavit, as to belief in the statements of a petition to wind up, without inquiry as to the truth of such statement.

This was a petition by two shareholders to wind up the company, which had been registered in July 1865.

By the memorandum of association the capital was [400] stated to be £750,000, divided into 30,000 shares of £25 each. The petition represented, in substance, that the company was a bubble company got up for the benefit merely of the projector and promoters, and it contained the following personal charges:—

The company was promoted by Stefanos Xenos, with the view and objects solely as your Petitioners believe, of obtaining from the company a large sum of money for certain concessions, alleged to have been obtained by him, of the rights and goodwill of the Greek and Oriental and the Levant and Black Sea Steam Navigation Company, and a concession alleged to have been granted to him by the Greek Government, granting to his vessels important privileges in Greek ports, which concessions your Petitioners believe had no actual existence.

With a view to carrying out the said scheme, the said Stefanos Xenos made an agreement with the following persons to become directors of the proposed company, that is to say, Rear-Admiral George Elliot, Vice-Admiral Sir Henry Keppell, H. H. Fox, Francis Tothill, George Saxon and Adam Schoales, upon the terms that the said Stefanos Xenos should pay the sum of £3000 to Rear-Admiral Elliot, £500 to Mr. Fox, £300 or £350 to George Saxon, and other sums to the other directors out of the money which he should receive from the company for their assistance in carrying out his scheme.

Having made these arrangements, the said Stefanos Xenos and his co-promoters caused the articles of association of the company to be prepared and registered, and which articles contained the following among other clauses:—

“Art. 14. The following shall be the first and present directors and officers. Directors: Rear-Admiral George Elliot, Vice-Admiral Sir H. Keppell, Stefanos Xenos, Esq., [401] H. H. Fox, Esq., Francis Tothill, Esq., George Saxon, Esq., Adam Schoales, Esq.

“Art. 109. A sum of £3000 shall be set aside in each year for the remuneration of the directors, such sum to be divided amongst the directors in such proportions as they shall amongst themselves determine. Should the company pay a dividend of £25 per cent. nett in any year, then a bonus of £10,000 shall be in every such year divided amongst the directors, in such proportions as they shall amongst themselves determine.

“Art. 129. Mr. Stefanos Xenos shall for a period of three years, to be computed from the day of the date of the memorandum of association, be the managing director of the company, and his remuneration shall be £1200 a year; but should the company pay a dividend of £10 per cent., then his remuneration shall be £1500 for every such year; and if a dividend of £15 per cent. or upwards be paid, then the remuneration to be £2000 for every such year.

“Art. 130. And whereas the said Stefanos Xenos has undertaken to sell to the said company two concessions: 1st, that of the rights and goodwill of the Greek and Oriental and the Levant and Black Sea Steam Navigation Company; and 2dly, a concession by the Greek Government granting to his vessels important privileges in

Greek ports, and has also undertaken to pay all the preliminary expenses incurred in the launching of the company, and to assign over to the company the lease of offices at No. 9 Fenchurch Street, with the furniture and effects therein, it is agreed that, in consideration of the foregoing, he shall be paid the sum of £22,000, one-half in cash and the other half in shares, to be calculated at the rate of £16 paid; such shares, however, to rank [402] in point of money paid with the ordinary shares of the company, and the said Stefanos Xenos to be credited with the successive calls upon them up to the said amount of £16 upon each share."

The petition then stated the issuing of the prospectus and that the Petitioners had taken shares, and proceeded to make the following statements:—

"That the directors had purchased certain steam vessels for £200,000, and paid for the same partly by bills of the company, and partly by £3000 shares credited with £2, 10s. per share as paid up, and that Stefanos Xenos had received from the vendors in that transaction a commission or bonus of £10,000.

"That 987 only of the shares had been allotted to the general public, and 1650 shares to Count Metaxa, being the only shares *bond fide* allotted, and your Petitioners believe, that not more than £10,000 has been actually paid to the company in respect of the shares therein, and that the whole of the moneys so paid have been taken by Stefanos Xenos, on account of his alleged agreement with the company, and divided in certain proportions between himself and the other directors or some of them.

"Amongst others, there appear registered in the books of the company Emmanuel Mavrogordato for 900 shares and Alexander Carnegie for 600 shares each, credited with £2, 10s. per share paid thereon, both of those persons being, in fact, nominees of the said Stefanos Xenos, who have made no payment whatever to the company on the said shares.

"It is utterly impracticable with the amount of *bond fide* subscribed capital of the company to carry on the [403] business thereof, and your Petitioners believe it never was the intention of the said Stefanos Xenos and his co-promoters so to do, but to make the said company a means of their obtaining as much money as possible for their own purposes, and, when no more can be obtained, to wind up the same.

"The directors and the said Stefanos Xenos are making a pretence of carrying on business by means of the said ships, but your Petitioners believe that no real or *bond fide* business has been at any time done by the company, nor is there the slightest probability of its objects being carried out.

"Your Petitioners believe that it is to the interest and benefit of all the *bond fide* shareholders of the company, who have made any payment on their shares, that the proceedings of the directors should be stopped and the company wound up."

The petition was served on the company alone.

Evidence was entered into to prove and rebut these statements, but the effect of it is stated in the judgment of the Court.

Mr. Selwyn, Mr. Roxburgh and Mr. Graham Hastings, in support of the petition.

Mr. Druce, for Admiral Elliot.

Mr. Hemming, for Mr. Carnegie.

Mr. Swanston, for Stefanos Xenos.

Mr. Southgate and Mr. Cottrell, for the Agency Company, who were holders of 5120 shares.

[404] Mr. Homersham Cox, for Mr. Mavrogordato.

Mr. Bagshawe, for shipbuilders.

Mr. Roberts, for Count Metaxa and other shareholders.

Mr. Selwyn, in reply.

The following authorities were cited:—"The Companies Act, 1862," 25 & 26 Vict. c. 89, s. 79; *Ex parte Spackman* (1 Mac. & Gor. 170); *Maxwell v. Port Tennant, &c., Co.* (24 Beav. 495); *Re Marlborough Club Co.* (1 Law Rep. Eq. 216); *Shaw v. Forrest* (20 Beav. 249).

THE MASTER OF THE ROLLS [Lord Romilly]. This is an application by two shareholders to wind up this company under the 79th section of the statute. There are five different rules laid down in this section defining under what circumstances a company may be wound up. First, whenever the company has passed a special resolution requiring the company to be wound up by the Court. Secondly, whenever the

company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year. Thirdly, whenever the members are reduced in number to less than seven. Fourthly, whenever the company is unable to pay its debts. Fifthly, whenever the Court is of opinion that it is just and equitable that the company should be wound up.

Lord Cottenham laid down, and I and all the other [405] Courts have followed him, that these words in the fifth rule are to be considered words *ejusdem generis*, and that they must relate to the four subject-matters previously stated in the four previous rules. At the same time, if it were established that the company never had a proper foundation, and that it was a mere fraud, or what is commonly called a "bubble company." The Court would consider that it came within that fifth rule.

In this case, as none of the first four rules apply, it becomes necessary to examine into the constitution of the company to see whether there was anything which, under the fifth rule, would induce this Court to wind up this company. For this purpose, I have read and carefully considered the affidavits and the evidence of the witnesses given in Court, and, as far as the evidence allows me to judge, coupled with my very limited knowledge of the subject itself, I should judge favorably of the plan of this association, provided it were carried on in a *bona fide* manner with ready money, and not with money scraped together by large discounts and mulcted by heavy commissions.

The concessions, as far as I am able to judge from the evidence, appear to me to be valuable, the support of the Greek houses seems to me to be secured, the first voyages appear to me to have been prosperous, and to have produced fair and reasonable profits, and to forbode future prosperity, and the whole association might, I think, reasonably expect that fair and reasonable profits would be made by the contributories, if the assets of the company are not wasted by too heavy remunerations to the officers, by payments for loans or *quasi* loans and for obtaining shareholders.

[406] Having come to that conclusion, if this matter had rested there, the task I should have had to perform would have been very simple. I should, in fact, simply have dismissed the petition. But the petition goes on to attack several of the members of the concern and the directors themselves personally. If this had been simply denied by the company, and if they themselves had not personally appeared, I should have simply dismissed the petition, no case having been made out for the winding up the company. For, as I stated in the course of the argument, the misconduct of the directors, though it may be a reason why the shareholders should have relief against them, is not a reason for winding up the company. But the directors and other shareholders have appeared personally, and the affidavits and the cross-examinations have disclosed matters of great importance to the shareholders which much concern the interests of this association and which involves the question arising upon the fifth rule, which I have read. Their appearance and asking for costs have compelled me to go into the question, for without this I should not have been disposed to have done so, but I should simply have considered, as I have stated, that no case for winding up was made. For this purpose I have gone through the evidence and cross-examinations and the affidavits.

It is, as I have often said, the duty of all directors to be not only ready at all times to explain everything to the shareholders, but it is also their imperative duty to take care that there should be nothing of the character of underhand dealing between them, by which I mean that there should be no transaction connected with the company by which profits can be derived by them or any one of them, which is not openly known to and acquiesced in by all the shareholders.

[407] But every subscriber is, in my opinion, bound to know the articles of association, and he cannot complain of anything disclosed by them, which, if he does not know, he might know, and which he ought to know. Now, in this case, by sections 129 and 130 of the articles of association, it is provided that Mr. Stefanos Xenos shall, &c. [See *ante*, p. 401.]

Now I see no reason to complain of those clauses; for aught I know, they may be valuable concessions, and I think the evidence has established that both concessions were obtained by Stefanos Xenos' exertions, and assuming, as I assume the fact to be, that Stefanos Xenos possessed the requisite knowledge, and that he gave the

whole of his time to the concern, the remuneration does not appear to me to be excessive, and, above all, it is openly told to all the shareholders.

Then, by clause 109, a remuneration to the directors is given in addition to this managing director, amounting to £3000 a year between them. It runs thus. [See *ante*, p. 401.] This is all fair and open, and if the public think fit to subscribe to companies conducted on such terms, by persons receiving such a remuneration, it is their affair, and they cannot afterwards complain. They knew at the time they did so that £4200 was to be deducted out of the nett profits before any dividend was to be paid.

But the evidence before me discloses a further state of things, which was not disclosed by the articles of association, and which had not previously been made public. In the first place, Admiral Elliot was to receive £3000 from the promoter, and he has actually received it in paid-up shares, given to him by Mr. Stefanos Xenos as the reward of his assistance in [408] getting up the company, and for lending his name and services. He has also received £750 in cash from Stefanos Xenos, which is said to have been for money spent and for the time he bestowed in the service of the company, and for the knowledge he possesses in nautical matters, which made his services very valuable, and all this is above his remuneration for what he had done. This may have been a very proper payment in itself, but the evil is that it was not divulged to the public, who are asked to become shareholders, and it is not a fit matter as between directors themselves. In truth, the shareholders were not injured by Mr. Stefanos Xenos giving to Admiral Elliot, the chairman, £3000 of his own money and out of his own paid-up shares, rather than to any stranger, which he might have done. That is, they were not injured by the payment of that money, but the concealment that the care and superintendence of the interests of the association were only to be procured by such means makes it a different and serious matter.

Again, £300 was paid to Mr. Saxon, another director in the company, this was also paid by Mr. Stefanos Xenos; but if Mr. Stefanos Xenos could afford to pay those sums out of moneys paid to him by the company for the concessions which he had made over to them, and which it is proved were paid out of money that he had got from the company, then it was the company and not the directors who ought to have obtained the benefit. They gave a larger price for the concessions than Mr. Stefanos Xenos required, and the surplus was applied in bribing persons to lend their names, whom the public supposed to be induced to join the company solely from their confidence in the success of the undertaking. As between shareholders, these transactions would have been nothing, but, as between directors, [409] it becomes everything. The public has a right to expect that the directors, who have lent their names to an institution of this character, have carefully considered the chances of success of the scheme which has been announced to the public, and that they have, after much consideration, sanctioned it as favorable. The public rely on their names, they rely on the knowledge they possess, and judgment and capacity of the gentlemen who have become directors. But where the directors obtain large pecuniary interest in, or large pecuniary advantages out of, the concern, not mentioned to the public, it is impossible for the public to distinguish between the motives which have induced these gentlemen to support this scheme, or to ascertain how far they may depend upon the directors' belief in its chance of success, and that advantage which is common to all persons who are shareholders, as distinguished from that particular advantage or benefit derived personally by the directors themselves, which is not shared in by any of the members of the association.

Again, as regards Stefanos Xenos, another and one of the most important of the directors, the evidence discloses a matter which the Court cannot look upon favourably. The project was one which peculiarly required a large amount of ready money to be employed; many steamers were required and must be paid for in order to establish the association, and it appears that contracts were entered into for the purchase of five or six steamers for £100,000. These contracts, as far as I can judge, were very properly entered into with certain shipbuilders by Stefanos Xenos' brother, Aristides Xenos; but a part of the arrangement was, that the brother was to have a profit of £10 per cent. upon the transaction; that he was to receive £10,000 from the builders,

in consideration of their being employed to [410] build steamers to the amount of £100,000, and Stefanos Xenos admits that he was to share in that profit.

That is a transaction which cannot be supported upon any grounds. It is unnecessary for me to refer to this subject more in detail. I have often had occasion at great length to detail the principle that governs cases of this description. In the case of *The York and North Midland Railway Company v. Hudson* (reported on another point, 16 Beav. 485), I did not allow Mr. Hudson, one of the directors, who had bought iron for himself and resold it to the company at the market price after it had risen in value, to retain the profit by the resale to the company. Upon all these occasions, the directors are bound to do the best they can for the company, for the persons who are their *cestuis que trust*, and no director can make a profit out of the affairs of the company, except such profit is acknowledged, admitted and established by the rules of the association.

To conduct this company successfully large calls ought to have been made on the shareholders, in order to enable the directors to conduct the business with any reasonable chance of success. But how was this money obtained? The Railway Finance Company took 400 shares upon these terms:—That they were to be allowed a profit of £10 per cent. upon the amount of the calls; in other words, they were to pay nine-tenths for what every other shareholder was to pay ten-tenths; and they were to receive the same profit as every other shareholder. This £10 per cent. was paid in advance, and all the calls were to be made as if they had been paid up in full; and accordingly, upon payment of £10,000 by the railway company, they were to be treated as having paid [411] £20,000, that is to say, having paid up in full the first call, which was to be made in advance. In addition to this, a commission of £2,000 is given to the Imperial Finance Company for negotiating the taking of shares and for the advance of money made to this association.

I repeat that, in my opinion, there was a fair prospect of success under a proper and economical management; but if this system is to be pursued, it requires but very little prophetic power to foresee that this company will soon appear before this Court in a condition when the order, which I am now about to refuse to make, will become inevitable. All this I have referred to for this purpose only:—With reference to the fifth rule, and for the purpose of considering whether this company is in such a situation that the Court ought to wind it up, for all this is urged as a ground for an immediate order for winding up the company. I repeat again, that I do not so consider it. I am of opinion that the misconduct of the directors and manager towards the shareholders may be the subject of a suit, but that it is not a reason for winding up the company until that mismanagement has produced insolvency, which is very far from being the case now. There are no debts except that to the ship-builders, and some others which seem to be very small.

Assuming that a bill would lie to correct all these matters which I have mentioned, and assuming that the directors could be compelled to restore, for the benefit of the company, the moneys they have received, and that the shares of the Railway Finance Company ought to be cancelled, or some alteration made in that respect, still I am of opinion that is a matter for a suit, and not for a petition for winding up; and that there is no ground at present for obtaining an order [412] which might be made in the course of the suit to which I have referred. I see much that may be proper to reform, but I see nothing which, to use the words of the Act, would render it "just and equitable," in the present state of affairs, that the company should be wound up; nor should I, as indeed I stated originally, have gone into this matter so much in detail, but for the appearance of the several Respondents to meet the charges made against them in the petition. The petition must, therefore, be dismissed as regards the company, and must be dismissed with costs.

But I have now to consider the costs of the various persons who have appeared as Respondents upon this petition, some of the facts relating to whom I have already referred to. The rule I have always followed has been this:—If shareholders appear to support or to resist a petition for winding up a company, they do so at their own cost. But if a personal charge is made against any of the directors or against any member of the company in the petition, then the director or the member of the company so assailed is entitled to appear separately, and if the case against him fails, the Petitioner

must pay the costs. That is the general rule which I have made and have always followed—that the Petitioner, having made such a charge and failed, must pay the costs.

I will now proceed to enumerate the various Respondents who appear, and consider their cases *seriatim*. Mr. Roberts appears for shareholders having 2030 shares who support the petition. Among those for whom he appears is Count Metaxa, in respect to whom it is not necessary that I should make any observation further than this:—That it appears to be principally his petition, and that it has been got up at his [413] instance. The Petitioners do not ask for costs, and could not, if they did, obtain them.

The others who appear to oppose the petition are:—First, Mr. Hemming, who appears for Mr. Carnegie; Mr. Druce, for the chairman Admiral Elliot; Mr. Southgate, who appears for the holders of 5120 shares (the Imperial Agency 975, the chairman of that company 25, the Railway Finance Company 4000, and Mr. Fox 120); then Mr. Homersham Cox appears for Mr. Mavrogordato; Mr. Bagshaw appears for the builders of the boats, and last in order of argument, but one of the most important, is Mr. Stefanos Xenos, who appears by Mr. Swanston.

The first is Mr. Carnegie, and the charge against him is contained in the 15th paragraph of the petition, and it is this:—"Amongst others, there appear registered in the books of the company Emanuel Mavrogordato for 900 shares and Alexander Carnegie for 600 shares, each credited with £2, 10s. per share paid thereon, both of those persons being, in fact, nominees of the said Stefanos Xenos, who have made no payment whatever to the company on the said shares." Now this is not a very serious charge against Mr. Carnegie, but such as it is, it was sufficient, in my opinion, to justify Mr. Carnegie in appearing to contradict it. He has established that it was wholly without foundation, and in my opinion he is entitled to his costs of this petition, but his costs should be confined to his defence of this charge.

Admiral Elliot is the next, and the charges against him are these:—The 4th and 5th paragraph of the petition must be read together: "4. The company was promoted by Stefanos Xenos, with the view and objects solely, as your Petitioners believe, of obtaining from the [414] company a large sum of money for concessions alleged to have been obtained by him," &c. [See *ante*, p. 400.]

I am of opinion that the 4th paragraph is disproved, that is to say, it was not a mere fraudulent scheme and the concessions had an actual existence, and it would therefore follow that the charge of collusion is disproved. If it had rested there, I should certainly have given Admiral Elliot his costs; but the fact of the contract for the payment of £3000, which was not known to the shareholders, and the further payment of £750, are proved, and I regret to say that I cannot, in such case, where there has not been perfect openness to the shareholders, upon a transaction of so much importance and certainly very fit to be inquired into, give him his costs.

It is also to be observed that no access was given to the Petitioners to any of the books of the company, by which they seek to support these charges. It is said that this discovery was only sought for the purpose of making charges and for the purpose of endeavouring to support this petition. Now, undoubtedly, this is very likely to be true, but there ought to be nothing to be concealed in the books, nothing which cannot be made public, and nothing which the shareholders could find fault with. Concealment always does harm, and if the Petitioners had had the whole of the books and papers laid open to them, they might, possibly, never have presented this petition or carried on these proceedings. But whether this be so or not, if the charges made by them had been retained in the petition after full inspection of the books of the company, it would have been a much more serious matter, and would have been visited by me much more severely. If the allegation that the concessions had no actual existence, and that this was a scheme to put money into the pocket of Mr. Stefanos [415] Xenos had been omitted, the rest of the 5th paragraph would have been a sufficient charge. I cannot therefore give Admiral Elliot his costs of this petition.

Against the Railway Finance Company, the Imperial Agency Company and Mr. Jencken, there is no charge whatever made by the petition, and I think, therefore,

that they were not justified in appearing. It is true that in one of the affidavits a charge is made respecting the Railway Finance Company to the effect that it was a bubble company, which, in my opinion, has been wholly disproved, as far as there is evidence before me; but they appeared before this charge was made, and they only knew of it because they made themselves Respondents to the petition. This, besides, was another and a collateral issue, which it would be impossible for me to investigate, and one which is wholly immaterial as regards the order asked by this petition to wind up the Anglo-Greek Company.

The charge against Mr. Fox is of a very different character. He is charged with having received £500 from Mr. Stefanos Xenos for supporting his scheme, which is disproved, and, in my opinion, he must have his costs. This was a charge of a serious character, which entitled him to appear and resist. As, however, he has appeared in company with three others, I cannot give him more than his share of the costs. I do not mean to give him the whole cost, but his share only, in the same way as he would bear them if no costs had been given.

The charge against Mr. Mavrogordato I have read; it is that he had 900 shares, each credited with £2, 10s. per share paid thereon, when, in fact, he was the nominee of Stefanos Xenos, and had made no pay-[416]-ment whatever on those shares. This turns out to be correct literally, but not substantially. It is true nothing has been paid on those shares, but that is explained by the fact that the company were indebted to him as their agent, and employed him for various purposes in the Levant, for which they would have had to pay him. I do not think that would entitle him to a separate appearance, his defence would have been involved in that of the company, whose agent he was.

The case of Mr. Carnegie is different, because not only he was not one of the directors of the company or connected with it as agent in any way, except as a shareholder, but there was not a semblance of truth in his case, which is not the case with respect to Mavrogordato, and I am of opinion I can give no costs to Mr. Mavrogordato.

No charge whatever is made by the Petitioners against the builders of the boats, and they appear to support the company *simpliciter*. They must, therefore, pay their own costs.

With respect to Mr. Stefanos Xenos, the charge is unquestionably of a very serious nature. The charge is:—That Mr. Stefanos Xenos promoted the company “with the view and object solely, as they believe, of obtaining from the company a large sum of money” for certain alleged concessions, “which concessions the Petitioners believe had no actual existence.”

I am of opinion that the contrary is distinctly proved, and that he had concessions from the Greek Government, giving privileges in Greek ports, and that he had a concession from the Greek merchants for their support. He produced the document in Court.

[417] Now this is so serious and so direct a charge of fraud that I hesitated for a very long time whether I should not allow him his costs of meeting that charge, which, in my opinion, is wholly disproved; but then the facts which have been established of the agreements with the shipbuilders, the payments to Admiral Elliot and Mr. Saxon, none of which facts were disclosed to the public, and the withholding of all information from the Petitioners, have compelled me to say that to entitle any directors, and, above all, a managing director, to his costs in such a case, he must appear unsullied by any transaction he has entered into, and be able to shew that he obtained no benefit at all from any of those matters, unless it has been openly disclosed to the public. I cannot, therefore, with propriety, give any costs to Mr. Stefanos Xenos.

I wish I could now part with this case, with which I have little further to do, except to express dissatisfaction with almost everybody, and with all the proceedings from beginning to end, but I must still make some observations for the purpose of expressing my dissatisfaction at the mode in which the petition has been got up, and in which it has been launched in the first instance, and my regret that a gentleman, in the position of the Petitioner, should have thought he had sufficiently discharged his duty by making an affidavit of his belief of the truth of the contents of the

petition, which he had never read, and the statements in which he took entirely upon trust, statements of his solicitor which he was wholly ignorant of, and which he had neither read himself nor had heard read to him. In truth, he seems to have acted for another throughout the whole of this matter, to have been very indifferent upon the subject, and to have treated it as an ordinary matter, in regard to which he was to do whatever he was told. In my [418] opinion, that is not justifiable, and no care can be too great, where an oath is to be made of belief in the statements mentioned in a document, in ascertaining their truth. I have no doubt he was ready and willing to believe everything that was told him, still, in my opinion, he ought to have ascertained it carefully and fully. In my opinion, also, the solicitor who appeared for him ought not to have allowed his client to make such an affidavit, without having first taken care that his client well knew all that was stated in the petition itself, and without also informing his client why he called on him to say he believed the truth of the facts narrated by the solicitor, of which he, the client, was not personally aware.

The final result of the whole is, that the petition is dismissed with costs against the company, Mr. Carnegie and Mr. Fox, but without costs as regards all the other Respondents.

NOTE.—Subsequently, a judgment for a very large amount was obtained against the company, which, remaining unsatisfied, the Court, on the 28th of May 1866, ordered this company to be wound up.

[419] *Re THE ANGLO-GREEK STEAM NAVIGATION AND TRADING COMPANY (LIMITED)* (No. 2). *May 3, 1866.*

Petitioners neglected to file the petition and had lost it. On the application of the Respondents, liberty was given to file a copy, and the Petitioners were ordered to pay the costs of the application.

A petition being dismissed with costs (*ante*, p. 418), the Petitioners neglected to file the petition, and, upon an application being made to them, they said that it was lost.

Mr. Jessel, for the Respondents, applied for leave to file a copy of the petition, and that the Petitioners might pay the costs of the application.

Mr. Roberts, *contrà*, said that the application to the Court was unnecessary, as the Petitioners would have consented to the order.

THE MASTER OF THE ROLLS [Lord Romilly]. I must give the Respondents liberty to file a copy of the petition, and the Petitioners must pay the costs of the application. That is the proper form of order; I have made such orders before. (*Andrews v. Walton*, 1 Myl. & Cr. 360; *Re Devonshire*, 32 Beav. 241.)

The Petitioners have lost the petition, and have obliged the Respondents to make this application to the Court. The Petitioners, who have caused the necessity of the application, must pay the costs of it.

[420] *COPE v. HENSHAW.* *March 12, April 17, 1866.*

By a will, the residue was given to seven persons as tenants in common for life, and on the death of the survivor was to be divided amongst their children then living *per stirpes*. By a codicil, the gift to the children was revoked, and the residue was to be divided "from and after the several deceases" of the seven, "and after the decease of the survivor of them," amongst their children *per capita*. Held, that the words "from and after," &c., were to be read disjunctively, and that, on the death of any of the seven, one-seventh was divisible amongst children of the seven *per capita*.

By his will, the testator gave his residue amongst his nephews and nieces, excluding "John" Shutt. By a codicil, he varied the limitation to this class, and excluded

“William” Shutt “as in his said will was directed.” Held, that the exclusion was void for uncertainty, and that they both took a share.

The testator, by his will dated in 1838, devised and bequeathed his real and personal estate to trustees in trust to convert and invest and pay the income to his wife for life, and he proceeded as follows:—

“And from and after her decease, upon trust to pay the interest and dividends of the said trust moneys, stocks, funds and securities unto and equally between my brothers and sisters following, that is to say, John Worsey, Nathaniel Worsey, Ann the wife of Joseph Day, Mary the wife of William Shutt, Sarah the wife of Thomas Cope, Ellen the wife of William Worsey, and Elizabeth the wife of Joseph Eccles, for and during their several and respective lives in equal shares and proportions; and from and after their deceases and the decease of the survivor of them, upon trust to pay and divide the said trust moneys, stocks, funds and securities unto and between all and every the children and child of my said brothers and sisters who shall be living at the decease of the survivor of them my said brothers and sisters, and the issue of such children or child as shall be then dead, in manner hereinafter mentioned, that is to say, that on the decease of the survivor of my said brothers and sisters, the said trust moneys, stocks, funds and securities shall be divided into seven equal shares, and the children or child of each one of my said brothers and sisters shall have and be entitled to one-seventh share of the said trust moneys equally to be [421] divided between them, it being my intention that the children and issue of my said brothers and sisters shall take *per stirpes*, and not *per capita*. Provided nevertheless, and I do hereby direct, that my nephew John Shutt and my niece Sophia Shutt be excluded from any benefit arising from or any participations in the said trust moneys, stocks, funds and securities, either as children of my sister, taking under the before-mentioned bequest, or from any interest they may become entitled to by accruer or survivorship.”

On the 22d of May 1840 the testator made a codicil to his will, by which, after reciting that by his said will he had given and bequeathed the residue of his trust moneys and estate, after certain events therein named, unto and equally between the children of his brothers and sisters, &c., &c., he proceeded in the following words:—

“Now I do hereby revoke this bequest, and do direct my trustees hereinafter named to divide the said residue of my trust moneys and personal estate, from and after the several deceases of my brothers and sisters, to whom the interest is bequeathed for their respective lives by my said will, and after the decease of the survivor of them, unto and equally between the children of my said brothers and sisters, namely, John Worsey, Nathaniel Worsey, Ann the wife of Joseph Day, Mary the wife of William Shutt, Sarah the wife of Thomas Cope, Ellen the wife of William Worsey, and Elizabeth the wife of Joseph Eccles, in equal shares and proportions, excluding nevertheless thereout, as in my said will is directed, my nephew William Shutt and my niece Sophia Shutt, it being my will and intention each child of any brother or sister should take an equal share with the others, and not their parent's share, as directed by my said will; and it is my will and intention that the husband of any one [422] of my said sisters, who shall survive his wife, shall be entitled to her share for his life.”

The testator died in 1846, and his widow in 1852.

Nathaniel Worsey, who was the survivor of the brothers and sisters, died in 1861, and there were forty-four nephews and nieces living at his death.

Thomas Cope and William Worsey, the husbands of two of the testator's sisters, survived their wives.

Ellen the wife of William Worsey died in 1839, between the dates of the will and the codicil.

The following four questions arose on this will and codicil:—First. Whether the estate of the testator was to be divided into seven-sevenths, one of which was to be distributed on the respective deaths of each of the testator's brothers and sisters, or whether it was a gift in joint-tenancy amongst them, so that no distribution was to take place until the death of the survivor.

Secondly. Whether the class to take was limited to those who survived the

survivor of the brothers and sisters, or whether all the children of the brothers and sisters took vested interests on their births.

Thirdly. Whether William Worsey, the last surviving husband of the sister of the testator, took the whole property during his life; or, if not, whether he took any and what portion of it.

And fourthly. Whether the nephews John Shutt and William Shutt, or either of them, were or was excluded from taking any benefit under this will and codicil.

[423] Mr. Selwyn and Mr. Chapman Barber, for the Plaintiffs, the trustees, stated the case, and in regard to the question of uncertainty referred to *Drake v. Drake* (25 Beav. 641, and 8 H. of L. Cas. 172).

Mr. Baggallay and Mr. Rendall, for children, argued that on the death of any of the tenants for life his share became divisible amongst the class.

Mr. Hobhouse and Mr. Cracknall, for the husband who survived his wife, argued that the husband was placed in the same situation as the deceased wife, and that as the fund was not divisible until the death of the surviving brother or sister, the income, until that event, was divisible amongst the brothers and sisters then living, either under an implied gift or in right of survivorship incident to a joint-tenancy. That the husband was entitled to a share in the whole income; *Hawkins on Wills* (pp. 269, 245); *Jarman on Wills* (ch. xvii. p. 476 (1st edit.)); *Armstrong v. Eldridge* (3 Bro. C. C. 215); *Tuckerman v. Jefferies* (3 Bac. Ab. 681); *Pearce v. Edmeades* (3 Y. & Coll. 246); *Cranwick v. Pearson* (31 Beav. 624).

Mr. Bird, for John Shutt. In the direction for the exclusion contained in the codicil, the words "as directed by my said will" have reference not to the person but to the manner of exclusion, and William is substituted for John. Instead of repeating the long proviso in the will, the testator effects his objects by a reference.

Mr. Rowcliffe, for other parties, observed that the gift to the "issue" of deceased children had not been revoked by the codicil.

[424] April 17. THE MASTER OF THE ROLLS [Lord Romilly], after stating the will and the four questions, said—

On this there is no doubt that, under the will alone, those children alone who survived the last tenant for life take, and they take *per stirpes*, and that John Shutt is excluded and that the husbands of the daughters take nothing.

The codicil raises all the four questions. Now it is to be observed that, by the codicil, the testator revokes the former bequest to the children, and consequently, the will can only be referred to for the purpose of shewing in what sense the testator used particular expressions which he employed in the codicil.

I think the words "after the several deceases of my brothers and sisters," &c., and "after the deceases of the survivors of them" must be read disjunctively, and that each share is divisible, on the death of the tenant for life of that share, amongst the persons then entitled. The previous gift in the will gives the brothers and sisters separate estates or one-seventh each as tenants in common; this codicil makes each one-seventh share divisible on the death of the tenant of that particular share. I read the will and codicil together, exactly as I should do the will alone, if the whole of the gift that follows the words "in equal shares and proportions" in the will had been expunged and the words in the codicil substituted for them, excepting the passage relating to John Shutt in the will and that relating to William Shutt in the codicil. So reading it, it appears to me to be clear that each share is divisible upon the death of the tenant for life of that share.

The consequence that follows from this is that every [425] child, or, in other words, every nephew and niece, on its birth, took a vested interest, and that the class of takers of each share is ascertained on the death of the tenant for life of that share, all of whom take *per capita*.

Not only does this appear to me to be the plain meaning of the words, but there is another circumstance which leads me to a confirmation of this conclusion, which is this:—that one of the testator's sisters, Mrs. William Worsey, died in the interval between the will and the codicil. The testator must have known this, and he thereupon introduces a direction that the husband who should survive his wife should be entitled to her share for life. That seems to me to be a direction that William Worsey, whose wife was already dead when the codicil was executed, should take, for

his life, the one-seventh share which his wife would have taken had she survived the testator. The period of distribution of this share, therefore, is postponed till the decease of William Worsey, but the period of distribution of each of the other shares is on the death of each brother or sister.

The contention that the brothers and sisters took as joint-tenants, or rather that the share of each one that died survived to the other, is not, in my opinion, capable of being supported; it is contrary to the express words of the will and codicil, and is contrary to the scope and object of them as forming one testamentary instrument.

I think that the words of the codicil respecting William Shutt annul the meaning of the will respecting John Shutt, and that the words "excluding nevertheless thereof as in my will is directed my nephew William Shutt," renders the whole void for uncertainty.

I will accordingly make the declaration following:—As to the first question, I declare that the estate of the [426] testator is to be divided into seven-sevenths, one-seventh of which is to be distributed on the death of William Worsey, and the other six-sevenths on the respective deaths of each brother and sister of the testator, and that the distribution takes place between all the children of all the brothers and sisters then alive and the legal personal representatives of each of such children as have died since the death of the testator, such children and representatives taking *per capita*; that is, the representatives only taking the share which the child they represent would have taken if living.

As to the second question, which is involved in the first, the declaration will be, that there is no survivorship between the tenants for life of the various shares.

As to the third question, the declaration will be that William Worsey takes one-seventh for his life, and that on his decease that one-seventh will be distributed amongst all the children of the deceased brothers and sisters then alive and the legal personal representatives of such of them as may be then dead since the death of the testator, such children taking *per capita* and the representatives the share which the deceased child would have taken if living.

As to the fourth, that the directions respecting John and William Shutt are void for uncertainty, and that they both take vested interests in reversion in the shares so given to the brothers and sisters and to William Worsey for their respective lives.

[427] BOVILL v. GOODIER. Feb. 19, 20, 21, 22, 23, 26, April 18, 1866.

[S. C. 35 L. J. Ch. 432; 12 Jur. (N. S.) 404.]

The distinction in equity is, that where the validity of a patent has not been the subject of any legal proceedings, the patentee must prove its validity at law, before the Court of Equity will protect him; but having once established its validity, then the Court of Equity will protect him against any other person until that person proves its invalidity.

A patentee established the validity of his patent in an action against A. B. Held, in a subsequent suit by the patentee against C. D., that C. D. was not concluded by the proceedings at law, to which he was not a party, and that he was not to be driven to contest the validity of the patent by *scire facias*.

After a patentee had established his patent as against one person at law, he instituted proceedings for an infringement against another in equity. The Court granted the Defendant an issue as to the novelty of the invention, but refused it as to the utility of the invention and the sufficiency of the specification, holding that the utility was not contested or had been proved in the suit, and that the sufficiency of the specification had been already decided in the action at law, a decision in which this Court, so far as it was matter of law not depending on the novelty of the invention, concurred.

The object of this suit was to restrain the infringement of a patent, and to recover the amount of profits made by the use of it.

On the 5th of June 1849 the Plaintiff obtained letters patent for certain improvements for the manufacture of wheat and other grain into meal and flour. These improvements are detailed in the specification [*post*, p. 431]; but the substantial object of the invention was to get rid of the clamminess or pastyness of the meal caused by the heat produced by the friction in grinding; and, secondly, to separate the dust or stive in the air drawn through the surfaces of the millstones, which affected the cleanliness of the mill and the health of the workmen, and also occasioned the loss of the small particles of flour.

The Plaintiff had been engaged in extensive litigation in the defence of his patent. In July 1856 he had brought an action against Keyworth for an infringement of it, and had obtained a verdict. In this action (*Bovill v. Keyworth*) Lord Campbell had certified that the validity of the patent had come in question and was [428] proved. In Michaelmas term 1856, a rule was obtained by Keyworth to set aside the verdict and to enter a verdict for the Defendant or a non-suit, or to have a new trial. This rule was discharged by the Court of Queen's Bench, after full argument, on the 28th of May 1857; see *Bovill v. Keyworth* (7 Ell. & B. 725). In 1857 the Attorney-General declined granting a writ of *scire facias* to repeal the patent, and in June 1863 the Privy Council extended the patent for five years, after a strenuous opposition on the part of some millers; but in which the present Defendant took no part.

The Defendant by his answer disputed the validity of the patent, and alleged that he had not infringed it.

The cause now came on for hearing.

Mr. Grove, Mr. Baggallay, Mr. Hindmarch, Mr. Druce and Mr. Aston, for the Plaintiff, argued that the Plaintiff having established the validity of his patent at law, and overcome all opposition before the Attorney-General and the Privy Council, the Court would act upon it.

They cited *De la Rue v. Dickinson* (*Ibid.* 738; 3 Kay & J. 388); *Lister v. Leather* (8 Ell. & B. 1004); *Bovill v. Keyworth* (7 Ell. & B. 725); *Betts v. Mensies* (10 H. of L. Cas. 117); *Hills v. The London Gas Company* (5 Hurl. & Nor. 312); *Davenport v. Goldberg* (2 Hem. & M. 282); *Foxwell v. Webster* (3 N. R. 180, and 9 Jur. (N. S.) 1189); *Neilson v. Harford* (Webster's Pat. Cas. 331; and 8 Cl. & Fin. 726).

Sir R. Palmer (Attorney-General), Mr. Selwyn, Mr. [429] Little and Mr. Watkin Williams argued that the patent was invalid, and that the present Defendant was in no way bound by the prior proceedings to which he was not a party.

They cited *Lang v. Gisborne* (31 Beav. 133); Hindmarch on Patents (p. 108); *Liardet v. Johnson* (Webster, P. C. 53); *Crossley v. Beverley* (*Ibid.* 106); *Bett's Patent* (1 Moore, P. C. C. (N. S.) 49); *Bridson v. Benecke* (12 Beav. 1); *Newall v. Wilson* (2 De G. M. & G. 282); *Crosskill v. Tusford* (5 L. T. (O. S.) 342); *Crosskill v. Ivory* (10 *Ibid.* 459); *Davenport v. Goldberg* (2 Hem. & M. 282); *Newall v. Elliott* (1 Hurl. & C. 797); *Spence's Patent* (3 De G. & J. 523); Hindmarch on Patents (p. 306); *Russell v. Barnsley* (Webster, P. C. 472); *Hills v. Evans* (31 Law J. (Ch.) 457); *Woodcroft's Patent* (10 Jur. (O. S.) 363); *Hill's Patent* (Webster, P. C. 225).

Mr. Grove, in reply, referred to *Lister v. Eastwood* (26 L. T. (O. S.) 4).

April 18. THE MASTER OF THE ROLLS [Lord Romilly]. This suit is instituted by the Plaintiff to restrain the Defendant from infringing a patent, obtained by the Plaintiff for improving the grinding of flour, for collecting and utilizing the stive or small particles of flour, which formerly was almost all lost, and occasionally or generally created an injurious dust in the body of the mill itself. The Defendant, by his answer, contests both the validity of the Plaintiff's patent and also the fact of the infringement of it by him the Defendant.

The history of the Plaintiff's invention is an instance [430] of the troubles which, in the present state of the law, await a successful inventor. The patent in question was taken out by the Plaintiff in June 1849. Since then he has been engaged in constant and expensive litigation up to 1863, when the patent was prolonged by the Privy Council for five years. This, however, has not produced any termination to the litigation, of which the present suit is an instance. At the same time, much of this is incidental to the nature of things. The claim of having made an invention is not to preclude others from using an old process and old machines, because some person *bonâ fide* believes that he has invented what, in truth, has been long known; nor ought

the fact that one person has infringed the patent, being ignorant that the discovery of the patentee was not a new one, to preclude another person from shewing that it had before been known and been in use. It may well be that Mr. Bovill invented the process he has patented, and yet that the same process may have been used by other persons before the date of Mr. Bovill's patent, and it would be injustice to stop the use of a process long employed, because some other person had subsequently discovered the same process. It would also be unjust, because one person has been unable to prove that the discovery was not new, to prevent another from doing so, and bind him by a proceeding over which he had no control and of which he knew nothing. The consequence is, that in almost every case, the Plaintiff has to establish his case, from the beginning, against any fresh person who chooses to impugn the patent and to contest its validity.

At the same time, the law properly attaches superior rights to a patentee who has established the validity of his patent, to those which belong to a patentee who has not done so. The former stands on a different footing, [431] and though the patent may be contested by fresh persons, he will receive protection until the invalidity of it is shewn. The distinction hitherto made by Courts of Equity has been:—Where the validity of the patent has not been the subject of any legal proceedings, the patentee must prove its validity at law, before the Court of Equity will protect him; but having once established its validity, then the Court of Equity will protect him against another person until that person proves its invalidity.

Accordingly, the first thing I have to consider in this case is, the fact whether Mr. Bovill has established the validity of his patent in a Court of law. If he has done so, it has been by the case of *Bovill v. Keyworth* (7 Ell. & Bl. 725). The Defendant contends that this case does not establish the validity of the Plaintiff's patent; and that, if it does, it is for an invention not infringed by him. The way in which the Defendant puts his case may be shortly stated thus: if the patent be such as is established by the case of *Bovill v. Keyworth*, then the Defendant has not infringed it; but if the patent be such as the Plaintiff now contends that it is, then its validity is not established by the case of *Bovill v. Keyworth*, and the patent so alleged is invalid, and principally by reason of its want of novelty.

In order to estimate the value of this argument, it is necessary to consider what the invention is which is described in the specification, and what the case of *Bovill v. Keyworth* has decided. The specification thus describes the invention of the Plaintiff:—

"Firstly, in an arrangement for ventilating the grinding surfaces of the millstones, and the introduction of air through the top stone, when fixed, either by blow-[432]-ing or exhaustion. Secondly, in exhausting the air from the cases of the millstones, combined with the application of a blast to the grinding surfaces. Thirdly, in separating the stive or dust of flour from the air when exhaustion or blast is employed to facilitate grinding and preventing the dust and waste in the mill." Then further on he says this: "In carrying out the second part of my invention, when working millstones with a blast of air, I introduced a pipe to the millstone case from a fan or other exhausting machine, so as to carry off all the warm dusty air blown through between the stones to a chamber as hereinafter described, by which the dust in the mill is avoided and grinding improved. And this part of my invention relates only to sucking away the *plenum* of dusty air forced through the stones, and not to employing a sufficient exhausting power to induce a current of air between the millstones without a blast, this having before been practised as above mentioned. The third part of my invention consists in straining the stive or air which is surcharged with fine flour through suitable porous fabrics, which retain the flour and allow the air to pass through, and this I accomplish by exhausting the air from the millstone case, or other closed chamber, receiving the meal from the stones by means of a fan or other exhausting machinery, and blow the stive so exhausted into a chamber having its sides and top formed of one or more thicknesses of suitable porous fabrics to allow the air under pressure to pass out deprived of the flour by means of this filtration. I also obtain the same result by placing the filtering chamber between the stone case or chamber receiving the meal and dust from the stones and the exhausting machine. The stive or dusty air is then sucked through the filtering fabrics instead of being blown through, and the air passes away clean as before."

[433] It is argued that this is merely a patent for a combination of three processes, each of which was old, and that all that *Bovill v. Keyworth* has done is, to determine that the specification correctly describes an invention consisting of the combination of the three; that this combination is new, and that in this consists the invention, and that *Bovill v. Keyworth* does not go beyond this. I have, therefore, in the first instance, to consider whether the case of *Bovill v. Keyworth* has established the validity of each of these three matters separately, or only in combination with each other.

The judgment of the Court of Queen's Bench appears to me to determine the validity of each of these inventions. Lord Campbell says in the first part, "the whole of the Plaintiff's process, if the combination is new, is certainly the subject of a patent, and so would the part No. 2, if taken separately, for exhausting the air from the cases of millstones, combined with the application of a blast to the grinding surfaces, as they introduce very important improvements in manufacturing wheat and other grain into meal and flour." Now, that appears to me to point out that the No. 2, taken separately, is also described as an invention by itself and not in combination. That is made more clear afterwards. He says, if the specification does not point out the mode in which this is done it would be invalid. "But we are of opinion that the specification on the face of it cannot (as contended) be pronounced in point of law to be bad in this respect, and we are of opinion that the evidence adduced at the trial shews it to be quite sufficient." He says, "The exhaust produced by the pipe and fan is to be proportioned to the *plenum* caused by the blast, taking care not to produce the inconvenient current of air against which a caution is given. How can a Judge take upon himself to say that this may not be enough to enable a [434] workman of competent skill to construct the machinery?" In a further place he says, "We do not think it necessary to try to reconcile the different parts of the specification (which are somewhat conflicting), or to give any positive opinion upon this question; for, supposing the patent to be for a combination consisting of several parts for one process, we are of opinion that the Defendants are liable in this action for having used a material part of the process which was new for the same purpose as that mentioned in the specification, although they did not at the same time use all the parts of the process as specified." "If the fixed upper millstone were equally described by the Plaintiff in the statement and diagram to be found in his specification as part of the combination for which he took out his patent, as No. 2 is a material part of the combination and was new, we are of opinion that they cannot lawfully use No. 2 for the same purpose by substituting a rotating upper millstone for a fixed upper millstone, or by resorting to any other equivalent for any other separate part of the process specified."

Great stress was laid in the argument upon these words in the specification, "and this part of my invention relates only to sucking away the *plenum* of dusty air forced through the stones, and not to employing a sufficient exhausting power to induce a current of air between the millstones without a blast, this having been practised as above mentioned." But I am of opinion that the application of the exhaust to drawing away the *plenum* is a material invention of the Plaintiff by itself, although the combination of it with the other parts of the invention may be properly and validly claimed as another part of the Plaintiff's invention, and this double fact appears to me to be established by the passages in the judgment to which I have referred.

[435] There is also this preliminary obstacle in the way of the Defendants on the question of the validity of the patent, namely, that the specification of the Plaintiff is a written document, of which the construction must be the same in a Court of law as a Court of Equity, and the Court of Queen's Bench has determined that this patent is valid, that is, that the invention is new, that it was useful, and that it is sufficiently described in the specification. The objections urged against it before me obviously were urged at law, and were present to the mind of Lord Campbell when he delivered his judgment, and the words I have read appear to me distinctly to point to the validity of the patent, not merely in respect of the combination of the matters there stated, but also to the validity of each of the three separate parts which are separately and distinctly claimed as inventions by the Plaintiff in his specification. I am of opinion, therefore, that the sucking away of the *plenum* of dusty air forced through

the stones is a separate distinct part of the invention of the Plaintiff claimed by his specification, and that the Court of Queen's Bench has determined that this is valid.

I admit that this decision would not be conclusive at law in a fresh case, nor would it be binding on this Court if evidence were now produced which was not before the Court of Queen's Bench, but on this point I do not find that any evidence has been laid before me not before the Court of Queen's Bench, with the exception of the French patents, but as to those, I give little weight to them. I think that they all differ essentially from the inventions of the Plaintiff as to the mode of drawing away the dusty air from the *plenum*; they do not appear ever to have been successful. Indeed, the fact that the Defendant does not use them, and that no one uses them, and that they have all expired, is a proof that they are [436] not the same as that of the Plaintiff, which is confessedly a process of great value.

I am further of opinion that the decision of the Court of Queen's Bench also establishes the validity of the Plaintiff's patent as regards the third invention claimed, namely, the use of the stive room, and that this is effected in combination with the exhaustion of the air from the millstone cases. It does not appear to me that the forcing air into the millstone case from above is a necessary part of the invention. The invention, as described in the specification and as established in the Court of Queen's Bench, consists, I think, in the employment of a sufficient power to suck away the dusty air in the millstone case, and the discharging it through a porous fabric, by which the fine flour is retained and the air is allowed to escape. It is true that the air which is drawn away from the millstone case must find its admission into the millstone case from some separate entrance; but the invention now before me, as I understand it, consists in exhausting the dusty air in that case in such a manner as to draw it all off without employing such a force as to draw with it the meal, and to transmit the air so drawn off through a chamber formed wholly or in part of a porous fabric which will retain the dusty particles of flour and allow the air to escape.

The French patents which relate to this subject appear to me to be quite distinct from that of the Plaintiff; I think it unnecessary to go through them in detail. The idea was possibly present to the mind of one or more of the inventors, but they failed in discovering the method by which they could exhaust the dusty air merely, without drawing the meal with it; I am therefore of opinion that the validity of the Plaintiff's patent, as now claimed [437] by him, is established by the decision in *Bovill v. Keyworth*.

I have next to consider what the consequences are which flow from this, both as regards the Plaintiff and the Defendant. The consequences as regards the Defendant are nothing, if he has not infringed the Plaintiff's patent. Therefore, the next thing to be determined is, whether the evidence before me is sufficient to prove that the Defendant has infringed the Plaintiff's patent. The burthen of proving this lies on the Plaintiff. The evidence is to this effect; that the Defendant has employed a fan placed on the spindle of the millstones, working in the case below the lower millstone, and extending a little beyond the periphery of the millstone. This fan is driven by the ordinary power of the mill. The effect of the action of this fan is, that the dusty air of the *plenum* is driven or blown out into an escape-pipe, and so on through another pipe or chamber into the open air. Some blast is produced by the centrifugal action of the millstones, but the revolution of the fan increases the ordinary centrifugal blast arising from the action of the millstones to an extent sufficient to drive the dusty air from the *plenum* into the escape-pipe, without sending out the meal, which descends in the regular manner down the meal spouts.

I attended carefully to the evidence given on this subject in Court, in conjunction with the models then produced, and I listened attentively to the arguments of counsel on this point, and certainly no case was better argued. I have since read over again the evidence, and considered the whole matter; and my opinion at the close of the argument, since fortified by my examination and reconsideration of the subject is, that the process used by the Defendant, which is Messrs. Blake & Lee's patent, [438] is substantially, that is in essential points, the same as the Plaintiff's patent; the only difference appears to me to be that the Plaintiff exhausts the *plenum* or removes the hot dusty air from the millstone case by means of a sucking process applied externally,

which draws the air from the *plenum* through a shaft prepared for the reception of it, and that the Defendant exhausts the *plenum* or removes the hot dusty air from the millstone case by means of a blowing process, which drives the air from the *plenum* into a shaft prepared for the reception of it. I do not find that, before the Plaintiff's invention in 1849, any process had been discovered by which the hot, dusty air could be exhausted from the *plenum*, carrying with it the stive only, and carrying it, not into the body of the mill, but into a separate shaft where the stive could be collected and utilized. This is done in both the Plaintiff's processes and in that used by the Defendant. The Plaintiff sucks the air out; the Defendant blows it out—in both instances it is done by a fan. In every case where a fan is driven, it must suck the air from one place and blow the air into another place. In the Plaintiff's invention the fan is placed away from the millstone case in the air-shaft, and it draws the hot, dusty air from the millstone case into the shaft. In the Defendant's invention the fan is placed within the millstone case itself, and blows the hot dusty air from thence into the air-shaft. It is wholly immaterial, as it appears to me, for this purpose, whether the air that is expelled from the millstone case is drawn through the eye of the millstone case, or whether it is drawn up through the meal spout, or whether it is introduced through pipes constructed specially for the purpose of admitting the air. The invention consists in producing a blast of sufficient power, and exactly so regulated as to exhaust the hot dusty air from the millstone case, and drive it, with the stive only, into a shaft where it may be utilized and prevented from [439] injuriously affecting the air of the body of the mill. This appears to be done in both cases by the Plaintiff and by the Defendant; and as soon as the Court arrives at the conclusion that the invention of the Plaintiff is not confined to the combination of the matters described in his specification, but that it extends to this withdrawal, whether by expulsion or by exhaustion, of the dusty air from the millstone case for the purpose of utilizing the stive contained in it, as a separate and distinct invention, then it seems to me that the Defendant has made use of the invention of the Plaintiff, and that he has in all essential particulars adopted the same process.

With respect to the remaining part of the Plaintiff's invention, the separation of the stive from the air drawn or blown into the shaft, I entertain no doubt that the Defendant's is essentially an adoption of the Plaintiff's process. The blast from the fan must be sufficiently strong to blow the dusty air through the shaft, and ultimately into the open air; but in the Defendant's process this is done through a long pipe or horizontal shaft, at the bottom of which is placed the porous fabric which receives the stive, from whence it is removed from time to time. I am convinced on the evidence that this, although as I believe imperfectly, performs the same function as the Plaintiff's stive chamber performs; that it is intended to be, and that it is, an imitation of the Plaintiff's process, and that along the whole course of this shaft air escapes through the porous fabric, and deposits the stive along the course of it, which is removed from time to time by the Defendant, and that without the use of this porous fabric the stive would not be utilized.

I am of opinion, therefore, that the process used by the Defendant may be correctly thus described:—That [440] he has made an arrangement for ventilating the grinding surface of the millstones by a fan which is attached to the lower stone, and that, by means of this fan, he exhausts the air from the millstone case and removes the dusty air into a shaft, where the air surcharged with stive is partially strained through a porous fabric, and, in doing so, deposits the stive or finer particles of flour, which thereby become useful, instead of being injurious. I am of opinion that the whole of this is an infringement of the Plaintiff's patent, and that the invention and mode of doing these things is sufficiently described in the Plaintiff's specification, and the patent so described in the specification and so construed by the Judges of the Court of Queen's Bench has been determined to be valid, with which decision, as far as I am able to judge from the evidence before me, I desire deferentially to express my concurrence. It certainly had not been my intention when I began to hear this case to go into or express any opinion upon the validity of the Plaintiff's patent, but the course which the case has taken, and the evidence gone into, has compelled me to investigate the matter to the extent of the materials laid before me, and I have thought it proper that, having formed an opinion, to express it,

if, as I should hope, it may have the effect of preventing further litigation. I have therefore arrived, first, at the conclusion that the validity of the Plaintiff's patent, as now claimed by him, has been established at law, and also that the Defendant has infringed that patent.

There remains to be considered, as I before observed, what are the consequences which flow from these conclusions as regards the Plaintiff, and as regards the Defendant? In the first place, as regards the Plaintiff, I am of opinion that he is entitled to a decree for an injunction; but, on the other hand, as regards the De-[441]-fendant, I am of opinion that I cannot properly compel him to submit to the decision of the Court of Queen's Bench, or to acquiesce in any opinion I may have formed. He was no party to the suit of *Bovill v. Keyworth*; he is not bound by the proceedings in that case, and many cases are on record where, after the Plaintiff has established the validity of his patent in one case, it has been decided to be invalid in a second. Numerous cases have been cited before me; *Bridson v. Benecke* (12 Beav. 1); *Newall v. Wilson* (2 De G. M. & G. 282); *Hill v. Thompson* (1 Webs. P. C. 237); *Crookill v. Twiford* (5 Law T. (O. S.) 342); *Crookill v. Every* (10 L. T. (O. S.) 459); which establish that a Defendant is not to be concluded by a trial at law to which he is no party, and that he is not to be driven to contest the validity of the patent by a *scire facias*. It is true that the case of *Davenport v. Goldberg* (2 Hem. & Mill. 282) seems to point the other way, and it is also to be borne in mind that the law was established on this point at a time when the Act of Parliament had not been passed which compelled the Court of Equity itself to decide any question of common law which might come before it without the assistance of any other tribunal, as to which, however, it is proper to observe that this is not so much a question of law as it is a question of fact.

I cannot also but bear in mind that, although I have considered the validity of the patent of the Plaintiff, it is only so far as regards the effect of the decision in *Bovill v. Keyworth*, and the sufficiency of the specification; but, as to the question of novelty, I have done so solely on the evidence at present laid before me, and I have also done so reluctantly, because I early felt the difficulty I should have in going into that question, and [442] I checked the entering into it at first, as much as I could consistently with allowing the Defendant to bring forward his case. It is also a matter so far favourable to the Defendant that the form in which this case comes before me is that of a cause in which neither side has had an opportunity of knowing, before the hearing, what evidence he would have to meet, and which circumstance tends strongly to prevent the bringing forward of evidence which might, at the hearing, be material until after the opportunity of doing so is lost.

It is after I have considered all these matters that I have come to the conclusion that the results above mentioned as those at which I have arrived ought not to prevent the Defendant from having, if he pleased to do so, a further opportunity of trying this question against the Plaintiff. I regret it much, because of the great expense which it will necessarily entail on both parties; but I think myself bound by the authorities to direct an issue to try whether the Plaintiff is the first and true inventor of the processes described in his specification, or of either, and which of them. This issue I will direct if the Defendant requires it.

I direct no issue as to the utility of the invention, or as to the sufficiency of the specification. I consider the former of those matters to be not contested or to be established by the evidence; and as to the second, I consider it to be decided definitely in favour of the Plaintiff by the decision in *Bovill v. Keyworth*, which I have minutely examined, and in which I have, after consideration, for the reasons I have stated, expressed my concurrence, so far as it is matter of law, not depending on the novelty of the invention. The novelty of the invention is a question which, in my opinion, I ought to allow the Defendant to try again, if he chooses to do [443] so; but, in the meantime, I must restrain him from carrying on his present processes, which, in my opinion, infringe the Plaintiff's invention. I will reserve the costs of the cause until after the trial of the issue, and give either party liberty to apply.

NOTE.—The case was tried at law, when the Defendant was successful; but this Court directed a new trial.

[443] *In re DREW. Ex parte MASON. Dec. 12, 1865; March 2, April 18, 1866.*

[S. C. L. R. 2 Eq. 206; 35 L. J. Ch. 845; 14 L. T. 278; 12 Jur. (N. S.) 425.]

A. B., the owner of seven lots of land, sold two of them to C. D., and he retained five. They entered into mutual covenants for bearing, in proportion, the expenses of a road common to all the lots, and there was a proviso that the expenses should be a charge upon the owners of the seven lots in proportion. Held, that the land was not charged, and that A. B. was entitled to have an indefeasible title to his five lots registered under the 25 & 26 Vict. c. 53, without noticing the proviso or the claims of C. D.

This was an appeal from the decision of the registrar under the Land Registry Act (25 & 26 Vict. c. 53), deciding that a proviso, in a deed of the 3d of August 1863, did not constitute such a charge on the land sought to be registered as ought to be noticed on the register.

Mr. Drew, the owner of some land, divided it into seven lots, which were numbered from 71 to 77 inclusive. In 1863 Mr. Drew sold Lots 71 and 72 to Mr. Mason, and arrangements were made between them for the formation and the future repair of a road, which was common to all the lots.

To carry this arrangement into effect Mr. Drew, by an indenture dated the 1st of August 1863, conveyed Lots 71 and 72 to Mr. Mason. All the seven lots were shewn in a plan on the conveyance.

About the same time an indenture, bearing date the 3d of August 1863, was executed by and between [444] Mr. Drew of the one part, and Mr. Mason of the other part, by which it was witnessed, and he, Mr. Drew, for himself, his heirs, executors and administrators, covenanted with Mr. Mason, his heirs and assigns, that he, Mr. Drew, would within six months complete a road set out on the said plan attached to the conveyance, and a copy of which was annexed to this deed, so far as related to the pieces of land numbered 71 and 72; and further, that he would keep the road repaired, and that if he failed in doing so, it should be lawful for Mr. Mason to do so, and that Mr. Drew would, on demand, pay to Mr. Mason, his heirs, administrators and assigns, the whole of the money expended by him or them in completing, and two-thirds of the money expended by him or them in repairing, the road. And Mason covenanted with Drew, his executors, administrators and assigns, that after the completion of the road, he, his heirs, executors, administrators or assigns, or the person for the time being entitled to the pieces of land numbered 71 and 72, would pay one-third of the moneys which Mr. Drew or his heirs, executors or administrators should have expended in the reparation of the said road, until it should be taken to by the parish or other lawful constituted authority.

Then followed this proviso:—

“Provided always, and it is hereby mutually agreed and declared, between and by the parties to these presents, that, in addition to the covenants hereinbefore contained, it is intended that, by virtue of these presents, the costs and expenses of the repair of the said proposed road shall, until the same shall be taken by the parish or other lawfully constituted authority, be considered as a charge in equity, and, as far as circumstances will admit, at law also, upon the owners for the time being of the several pieces of land numbered respectively [445] 71, 72, 73, 74, 75, 76 and 77 in the said plan, to such an extent, as that each such owner, or if more than one, each set of owners, shall be chargeable with such a part of the costs and expenses of the said repairs as shall bear the same proportion to the whole of such costs and expenses, as the quantity in acres, roods and perches of the said closes or pieces of land of which he or they shall be the owner or owners, shall bear to the aggregate quantity of the said several closes or pieces of land.”

In 1865 Mr. Drew applied to the Land Registry Office for the registration of an indefeasible title to the lots numbered 73, 74, 75, 76 and 77. But Mr. Mason, having notice of this, claimed to have an entry or notice made on the record of title of the

proviso in the deed of the 3d of August 1863, which he contended constituted a lien on the land sought to be registered.

The registrar having decided against Mr. Drew, he appealed under the 25 & 26 Vict. c. 53, s. 17, which provides, "that if, in making up the record of title, any question shall arise as to the construction of any deed, &c., &c., or the mode in which any entry ought to be made in the record of title, or any doubtful or uncertain right or interest stated or dealt with by the registrar, it shall be competent for the registrar or for any of the parties interested to refer the same to a Judge of the Court of Chancery; if, on such reference, the Judge, having regard to the parties appearing before him, shall think proper to decide the question, he shall have power to do so, or to direct any proceedings at law or in equity to be instituted for that purpose, or, at his discretion and without deciding such question, to direct such particular form of entry to be made on the record [446] of title, as, under the circumstances, shall appear to be right."

Dec. 12. Mr. Fry, on behalf of Mr. Mason, now asked the Court to direct an entry of the proviso on the register. He was proceeding to argue the case; but no one appearing on behalf either of the registrar or Mr. Drew,

THE MASTER OF THE ROLLS said, I cannot determine this question unless it is argued. I cannot overrule the decision of an officer of the Court, of great knowledge and experience, upon a mere *ex parte* argument.

Dec. 13. On appeal, the Lord Chancellor thought that the course in *Re Kennard* (11 Jur. 27) ought to be followed, and that a statement should be prepared, and the case brought again before the Master of the Rolls.

March 2, 1866. That course having been taken, the case again came before the Court.

Mr. Fry, for Mr. Mason, in support of the application. It was clearly the intention of the absolute owners to make the repairs of this road a charge on the property, and which they were entitled to do; *Roe v. Trammer* (1 Wills, 682, and 2 Wils. 75).

Secondly. But even if the obligation does not attach to the land itself, still all purchasers with notice would [447] be bound to give effect to it; *Tulk v. Moxhay* (11 Beav. 571, and 2 Phill. 774). Mr. Mason's rights ought therefore to be reserved in the record of title.

THE MASTER OF THE ROLLS referred to *Western v. Macdermot* (*ante*, p. 243).

April 18. THE MASTER OF THE ROLLS [Lord Romilly]. There is a considerable inconvenience arising from the mode in which appeals are heard under the Land Registry Act. They are, in fact, *ex parte*. The person who is interested in contesting the claim of the Appellant either does not appear, or, as is the case in the majority of instances, is unable to appear. For instance, if the registrar determines that the person who seeks to have his land and title to it registered has not a clear title, and that person appeals to the Judge in Chancery who is intrusted with the duty of revising the opinion of the registrar, the argument is necessarily one-sided. The person in possession contends that he has made out a good title to the land, the registrar thinks that he has not done so, but the registrar does not appear to support his own decision, and no other person exists who can be served or required to appear to oppose the claim of the possessor and owner of the land.

In the present case, I should have thought that an exception would have occurred to this, the general rule, for, in this instance, the Appellant seeks to have a proviso noticed on the register, which, if registered, will be a charge on the property of the claimant. But Mr. Drew, who is the owner of the property sought to be registered with an indefeasible title, does not appear to [448] support the decision, and no other person exists who can be served or required to appear to oppose the claim of the possessor and owner of the land. I have solely the argument of Mr. Mason's counsel, who is opposed to the decision of the registrar, to assist me in coming to a conclusion.

The covenant is in these terms. [His Lordship read it, see *ante*, p. 444.]

Before I mention the rest of the deed, which contains the proviso, I should notice that the effect of it, up to this point, is a pure personal covenant on both sides, there is nothing to affect the land, but immediately following is set forth the proviso in

question, which it is contended has this effect. It is in these words. [His Lordship read it; see *ante* p. 444.]

The question is, whether this proviso ought to be noticed in registering an indefeasible title of the pieces numbered 73, 74, 75, 76 and 77 on the plan above mentioned.

Upon carefully considering this question, I am of opinion that this ought not to be noticed in the register of the five pieces of land above mentioned. In the first place, it is to be observed that the covenant contained in the proviso is not a covenant running with the land, still less is it any charge or burthen attaching to the land itself; it is merely an undertaking by Mr. Drew and Mr. Mason, as far as they can, that the owner of each of the five pieces of land shall be bound by the same covenants as those by which Mr. Drew and Mr. Mason are bound; that they shall have the same rights and be subject to the same obligations: but that is all. I see nothing in this which can properly be made the subject of registration; it is no interest in the land [449] itself; nor does it arise out of it; and is merely a personal matter, binding the parties to this deed and no other persons. It is a mere personal obligation, which the parties to the deed covenant that they will endeavour to induce subsequent owners of the land to take upon themselves and undertake to fulfil. But in this endeavour, it is possible that the parties to the deed may fail, in which case, the remedy is not against the land, which is not charged with the expenses of the repair of the road, but solely against the covenantors and their representatives.

I am, therefore, of opinion that the registrar under the Land Register Act has come to a correct conclusion, and that I must make no order on this application.

[449] *Re THE EXHALL COAL COMPANY (LIMITED). Re BLECKLEY.*

Feb. 12, April 19, 1866.

[S. C. 14 L. T. 280; 12 Jur. (N. S.) 757; 14 W. R. 599. See *In re Pooley Hall Colliery Company*, 1869, 21 L. T. 691.]

The right of a trustee to be indemnified out of the trust property is the first charge thereon, and it has priority to any charge created upon it by the *cestuis que trust*. And, consequently, the right of a trustee of a public company to be indemnified out of the property has priority over the debenture creditors.

This was a summons adjourned from Chambers by Mr. Bleckley, the trustee and original promoter of the Exhall Mining Company, seeking to have such of the assets as were still belonging to this company (which was insolvent and in the course of being wound up) applied in payment of liabilities incurred by him on behalf of the company. This was resisted by the debenture-holders of the company.

The case arose thus:—The association or company to take and work the mine was formed in the year 1852, and it was, at first, intended to work it on the cost-book principles. On the 10th June 1852 the lessor, Mr. [450] Blakesley, executed a lease to William Law, Henry Bleckley, Thomas Masters and Robert William Crowe, their executors, administrators and assigns, for sixty-three years from 1st May 1852, paying a royalty of one-eighth of the gross moneys for which the coals were sold, if the quantity were under 40,000 tons annually; one-ninth when the coals exceeded 60,000 tons in any one year, and one-tenth when the coals exceeded that amount; and paying also a royalty of one-eighth of the gross moneys for which the ironstone sold, with a proviso that the royalty should not, in the first year, be less than £500, £750 in the second, and £1000 in every succeeding year.

In January 1854 Robert William Crowe, with the concurrence of Mr. Blakesley, assigned his one-fourth in the said mine to the three other lessees, and on the following day Law, Bleckley and Masters executed a declaration of trust that they held the mines for the sole use and benefit of the Exhall Mining Company.

In November 1854 the present company was formed.

It appeared that the mine could not properly be worked on the cost-book principle, and, in consequence, this company was formed to work it on the principle

of the Joint Stock Companies Act on limited liability. Accordingly, in January 1857, the company was registered under the Act of 1856, and the articles of association were executed in April 1857. By the 7th and 8th articles of association of the company, the property of the company was to be vested in the trustees, who were to be indemnified against all liabilities affecting it, other than and except what they might incur from their own wilful neglect and default.

[451] Two other persons (Black and Clark) were named as trustees of the company, and it was intended that the property of the company should be conveyed and the lease assigned to them upon such trusts.

This had not, in fact, been carried into effect, and Mr. Bleckley remained, as before, the trustee for the company of the mine, fixtures, plant and machinery, and was the person who, at law and in fact, was responsible for the rent to the lessor Mr. Blakesley.

In 1860 debentures were issued by the company of £100 each, by which the company assigned to the creditors "all and every the undertaking, mines, buildings, plant and assets, real and personal, of the company" and the estates, to hold until repayment, on a fixed day, of the £100 out of the corporate assets of the company, which alone should be charged therewith.

The company was being wound up under an order made in the year 1864.

The rent due for the mine had been duly paid down to May 1864, but the legal personal representatives of the lessor had brought an action for the rent due since that time against Mr. Bleckley, and he had been compelled to pay the amount of the rent due into Court, as the price of the injunction to restrain that action, he being, at law, the person liable to discharge it.

There was now a sum of £1016 in Court, which had arisen from the sale of the fixtures, plant and machinery at the mine. Mr. Bleckley claimed this as a fund to indemnify him against the claim of the lessor. On the other hand the debenture-holders insisted that it ought to be divided amongst them.

[452] Mr. Jessel and Mr. W. W. Cooper, for Mr. Bleckley, argued, first, that the debentures were void, being unauthorized. Secondly, that the fund in question was primarily liable to indemnify the trustee, first, by virtue of the articles, and secondly, by the general law of this Court, which gave to a trustee the first charge on the property, as against his *cestuis que trust*, and all claiming under them, and for whom he was a trustee. They cited *Furness v. The Caterham Railway Company* (27 Beav. 358); *Legg v. Mathieson* (2 Giff. 71).

Mr. Southgate and Mr. Locock Webb, for the debenture creditors, argued that they had the first charge, by virtue of the assignment to them. Secondly, that the fund in question had arisen from property severed from the leasehold, and no longer the subject of the trust; and that the order for sale was for the benefit of the creditors of the company generally, and reserved no right in favor of the trustee. They cited *Ernest v. Nicholls* (6 H. of L. Cas. 401); *King v. Marshall* (33 Beav. 565).

April 19. THE MASTER OF THE ROLLS [Lord Romilly]. On considering the whole matter, I am of opinion that Mr. Bleckley is entitled to this sum. He was the trustee of the mine, including the fixtures, the plant and machinery; he is the owner of this property at law, and when called upon to account in equity, he is entitled to deduct, out of the trust property in him, all that is necessary for the purpose of repaying him the sums he has properly paid, and of indemnifying him against such sums as he is liable to pay in the dis-[453]-charge of his trust; and, in my opinion, this liability to repay and to indemnify him is the first charge on the property.

It has been argued before me that the debentures are invalid. I think it unnecessary to enter into that question; for the present purpose I assume them to be valid; but, in my opinion, the debenture-holders can only claim the property belonging to the company after payment of the charges previously and properly attaching thereto, of which I think the indemnity of the trustees is one. The debenture-holders can only take all that the company could give, the company could only give the net produce of the property, after discharging the charges properly attaching thereto, and, in my opinion, the first charge on the property is the indemnity of the trustees. I do not put this on the question of contract, arising from the 7th and 8th clauses of the articles of association, because, in my opinion, it is a right incidental to the

character of trustee and inseparable from it, that he should be saved harmless from obligations which are attached inseparably to his office, and by which anyone taking a charge upon or mortgage of the mine from the *cestui que trust* is bound.

Assuming the mine to be now a valuable property, it is clear that the trustee would be entitled to deduct all that he had properly paid for the preservation of that property. If he had parted with the mine, in accordance with the directions of his *cestui que trust*, he would still, in my opinion, be entitled to recoup himself out of any money belonging to the company in his hands.

The fact that the fixtures, plant and machinery have been sold, under the order of the Court, by the official [454] liquidator, in the course of the proceedings for winding up the company, does not, in my opinion, make any alteration in the case. The Court never allows the steps it directs to be taken for the realization of property to vary the right of the parties; this is always effected without prejudice to the rights and interests of any of the parties concerned. Nor is it necessary, in any such case, to introduce words to save the right of the parties; such words, when used, are, at the best, superfluous, and they usually have an injurious effect, as intimating a doubt that, without them, such rights would not be preserved.

I am therefore of opinion that Mr. Bleckley has exactly the same rights as if such fixtures, plant and machinery had not been sold, and that he is entitled, out of the money produced thereby, as far as the fund will extend, to be repaid the sums he has already spent, and also to be indemnified against the future liabilities which attach to him solely in his character of a trustee.

I must therefore order the £1016 to be paid to Mr. Bleckley, subject to payment of such costs as are properly payable out of it, if there be no more funds belonging to the company applicable for that purpose.

[455] LEIGH v. LLOYD. April 20, 1865.

[S. C. affirmed on appeal, 34 L. J. Ch. 646; 12 L. T. 813; 13 W. R. 1054.]

A. mortgaged some property to B. by deposit of deeds, with a written engagement to execute a mortgage when called on. A. next sold and conveyed the legal estate to C., subject to the mortgage. Afterwards A. executed the mortgage to B. This contained a power of sale, under which B. sold the property to the Plaintiff. Held, that C. was bound by the power of sale and the sale, and that he was a trustee for the purchaser.

Necessity of proving a deed by the attesting witness, where its validity and the payment of the consideration is contested by a person not a party to it.

Mr. Wood, a member of a benefit building society, was the owner of some leasehold property at Woodford. He entered into an arrangement with the society to get an advance of £200, in the usual way, upon the security of his leasehold property, and on the 1st of May 1849 he deposited with the society the title-deeds of this property, and signed a memorandum, by which he "engaged to execute a mortgage to the society" for £200, when called on so to do.

Accordingly, on the 20th of July 1849, Wood executed an assignment of the leasehold to the society, by way of mortgage to secure the £200. This mortgage contained a power of sale in default of payment. The advance was made by four instalments of £50 each on the 2d of January, the 12th of June, the 20th of July, and the 26th of September 1849.

Wood having made default, the society on the 18th of May 1856 sold and conveyed the property to the Plaintiff in consideration of £240, and the Plaintiff entered into possession.

So far the Plaintiff's title appeared complete, but in 1863 the Defendants Lloyd and Batley commenced an action of ejectment against the Plaintiff to recover possession of the property. They founded their title on a deed dated the 2d of June 1841, executed between the equitable and the legal mortgage to the society, by which Wood, unknown to the society, had assigned the legal estate in the leasehold to these Defer-

dants on certain trusts in favor of Wood and his family. This assignment was [456] stated to be in consideration of £150; but it was made expressly "subject" to the mortgage to the society, "with all benefit of the proviso for redemption, in the mortgage deed thereof."

The Plaintiff filed this bill in 1864 for an injunction to restrain this action, and to obtain a declaration that the Defendants held the legal estate in trust for the Plaintiff. The bill contested the *bond fides* of the deed of the 2d of June 1849 and the payment of the alleged consideration money.

Mr. Southgate and Mr. Marten, for the Plaintiff. The Defendants obtained the legal estate in this property, with notice of the society's mortgage, and expressly subject to it; they are therefore bound by that mortgage. The engagement to execute a mortgage deed necessarily implies a proper mortgage containing power of sale; *Russell v. Plaice* (18 Beav. 21); *Bridges v. Longman* (24 Beav. 27).

Secondly, the conveyance to the Defendants is fraudulent and void, and the consideration mentioned in it was never paid. The admission or proof of its execution by Wood is not sufficient; the attesting witnesses ought to have been called in order to give the Plaintiff, who contests the deed and is no party to it, the opportunity of cross-examining them.

Mr. Selwyn and Mr. G. L. Russell, for the Defendants. The Defendants took subject to the "mortgage deed;" but none had then been executed; there was nothing at that time, beyond the memorandum. The Defendants therefore took subject only to the rights given to the [457] Plaintiff by the memorandum, and that does not warrant the introduction of a power of sale into the mortgage. The remedy of an equitable mortgage is foreclosure, and not sale; *Moore v. Perry* (1 Jur. (N. S.) 126); *Underwood v. Joyce* (7 *Ibid.* 566); except under the statute 15 & 16 Vict. c. 86, s. 48; and see *Cox v. Toole* (20 Beav. 145).

Again, none of the advances were made by the society prior to the deed of the 2d of June, and the liability of Wood, at that time, could only be for the first instalment of £50. The execution of that deed by Wood is admitted, and no further proof of it is necessary.

THE MASTER OF THE ROLLS [Sir John Romilly] (after stating the facts of the case). The Defendants purchased this property, and took a conveyance of it expressly subject to the mortgage, which very properly contains a power of sale. Is it possible to cut that power of sale out of the deed, and say that there has not been a valid sale under it? I think not.

The society have advanced their money without any notice of the conveyance to the Defendants, and on the belief that the property was unincumbered. It follows, therefore, that the Defendants take subject to the mortgage, and that they are necessarily trustees for the mortgagees, and for the Plaintiff who claims under them.

As to the proof of the deed, when the execution of a deed and of the payment of the consideration money is contested by a third party, it is impossible, upon the admission of the execution of the deed and proof of the signature of the receipt, to dispense with the usual [458] proof by the attesting witness. If the execution of a deed is disputed, you must prove it by the attesting witness in order to give to the opposite party the opportunity of cross-examining him.

I assume that the deed of the 2d of June 1849 is a valid deed as between the parties thereto. I decide nothing as to that, but I say that the conveyance of the legal estate to the Defendants, if attempted to be used against the building society, was fraudulent and void, and that the Defendants to whom Wood conveyed the legal estate are trustees of it for the society and those claiming under them, and are bound to convey it to them.

I will make a declaration to that effect with costs.

NOTE.—Affirmed by Lord Cranworth, L. C., 25th July 1865 (34 L. J. Chanc. 646).

[458] ARTHUR v. CLARKSON. April 25, 1866.

[S. C. 14 W. R. 754. Criticised, *In re Whitaker*, 1889, 42 Ch. D. 119.]

A person voluntarily gave his promissory note to trustees for his natural child, and deposited with them the title-deeds for the purpose of carrying into effect his intention as to the promissory note. Held, that a valid trust had been created.

The testator made several wills, by which he gave £100 to his natural daughter Jane absolutely, and £1000 to his natural daughter Hannah and her children.

On the 29th of December 1862 the testator gave his promissory note for £1000, payable to two friends, in trust for Hannah and her children, and his promissory note, to the same persons, for £100, in trust for Jane. He afterwards made another will, by which he gave nothing to his daughters, and stated that he had, by promissory notes of even date, "made payable to his two trustees," provided for Hannah and Jane.

[459] The promissory notes were delivered to the trustees, together with a box containing the testator's title-deed, for the purpose of carrying into effect his intention with respect to the promissory notes. They remained in the trustees' possession down to the testator's death in May 1864.

This suit was instituted by the legal personal representatives to have the rights of the parties declared.

Mr. Baggallay and Mr. C. Hall, for the Plaintiffs. The trustees cannot recover on the promissory notes at law, for want of consideration, and therefore an effectual trust has not been created. The deeds, if delivered over for the purposes alleged, can only stand as a security for what is recoverable by virtue of the promissory notes.

Mr. Jessel, for Hannah and her child, Mr. Williamson, for the trustees, and Mr. Rowcliffe, for Jane, argued that there was a perfect trust created by the deposit of the deeds for the amount of the promissory notes.

They cited *Lloyd v. Chume* (2 Giff. 441); *Dawson v. Kearton* (3 Sm. & Giff. 186); *Burkitts v. Ransom* (2 Coll. 395).

THE MASTER OF THE ROLLS [Lord Romilly]. The promissory notes were given to secure the two sums, and the deeds were deposited in trust to secure the amount. There is evidence of that, and there is no getting over it.

If a man gave the title-deeds of his estate to A. B., [460] and said, "Keep them as a security for £1000 for my brother," and gave his promissory notes at the same time for that amount, it would be a valid trust, which could not be defeated.

I must direct payment of the £1000 and £100 with interest, if assets of the testator be admitted.

[460] CLARK v. WALLIS. April 26, 1866.

[See *Hutchings v. Humphreys*, 1885, 54 L. J. Ch. 652.]

A decree for specific performance was made against a purchaser in possession, but he was unable to complete the purchase. The Court rescinded the contract and ordered the purchaser to pay to the vendor the rents received by him, together with the costs of suit and those occasioned by the non-completion of the purchase.

This was a suit, instituted by a vendor against the purchaser in possession, for the specific performance of the contract. The decree was made on the 20th of December 1865 with costs, and the Chief Clerk had reported in favor of the title.

The purchaser was unable to pay the purchase-money and complete the contract.

Mr. Jones Bateman now moved to rescind the contract.

He cited *Sweet v. Meredith* (4 Giff. 207); and see *Foligno v. Martin* (16 Beav. 586); *Simpson v. Terry* (34 Beav. 423).

THE MASTER OF THE ROLLS [Lord Romilly]. All I can do is this:—I will order the contract to be rescinded and the Defendant to deliver up possession of the estate

to the Plaintiff. Then take an account of the rents received by the Defendant, and tax the Plaintiff's costs occasioned by the non-completion of [461] the purchase and his subsequent costs. The Plaintiff must be at liberty to retain the amount out of the £115 paid to him on account of the purchase-money. If that should be insufficient, the Defendant must pay the deficiency. (NOTE.—Reg. Lib. 1866, A. 948.)

[461] DALTON v. FURNESS. April 19, 23, 1866.

Whether a sheriff can file a bill of interpleader in respect of goods which it is alleged he has wrongfully seized, *quære*.

A sheriff, who has seized goods under a *fi. fa.* issuing out of this Court, and which are claimed by a third party, cannot file a bill of interpleader until he has given notice to the judgment creditor of the adverse claims to the goods seized.

A writ of *fi. fa.* issued out of this Court to the Sheriff of the county of Southampton against the goods of the Huxley Railway. On the 9th of March 1865 the sheriff seized some rails and other chattels on the railway. But, on the same day, Furness, the contractor to the line, gave notice to the sheriff that the property seized belonged to him, and he gave a second notice on the 14th. On the 16th of March the sheriff was ordered to make his return to the writ on the 17th. On the 19th of March he filed a bill of interpleader against Furness and the judgment creditors; but he did this without having previously informed the judgment creditors of the claim set up by the contractor. The Plaintiff, on the 21st of March, gave notice of motion for the usual interpleading order, and, on that day, the judgment creditors, for the first time, had notice of the contractor's claim, and on the 22d they wrote to the solicitors of Furness that they would authorize the sheriff to withdraw.

The motion stood over, and the judgment creditors abandoned all claim to the goods seized by the sheriff.

The motion was now (19th April) brought on, and [462] the only question (by agreement) was, who ought to pay the costs of the suit.

Mr. Gardiner, for the Plaintiff. The Plaintiff is a mere stakeholder, who has no personal interest in the matter; he is therefore entitled to call on the Defendants to interplead. Consequently, his costs ought to be paid by the Defendants or one of them. He cited *Symes v. Magnay* (20 Beav. 47); *Hale v. The Saloon Omnibus Company* (4 Drew. 492); *Mason v. Hamilton* (5 Sim. 19).

Mr. Roberts, for Furness. The sheriff has wrongfully seized Furness's goods. There can be no interpleader where there is a wrongful taking; and Lord Eldon thought that a sheriff could not file a bill of interpleader; *Slingsby v. Boulton* (1 Ves. & B. 334). The Plaintiff ought therefore to pay the costs of this suit. He also referred to *Tufton v. Harding* (29 L. J. (Chanc.) 225); Story on Equity (vol. 2, p. 105).

Mr. Speed, for the judgment creditors, argued that this Court had no jurisdiction in the present case; that the sheriff could not compel an interpleader in this Court, and that, before filing a bill of interpleader, he was bound to inform the judgment creditors of the adverse claims, and give them the opportunity of deciding on the course they would take. That, at law, the sheriff never got costs, and the parties were put on terms not to bring an action against him. He cited 1 & 2 Will. 4, c. 58; 1 & 2 Vict. c. 48, s. 2; 23 & 24 Vict. c. 126, ss. 12, 13; Chitty's Archbold (p. 1315); and see Chitty's Stat. (vol. 2, tit. Interpleader).

[463] Mr. Gardiner, in reply. This *fi. fa.* issued out of Chancery, and therefore the sheriff could not apply to a Court of law. The cases before Lord Cottenham and the Vice-Chancellor of England are distinct authorities for the proposition that the Acts cited do not apply to a Court of Equity; and *Tufton v. Harding* (29 Law J. (Chanc.) 225) shews that the sheriff is strictly a mere stakeholder having no interest, and that he may file such a bill as the present.

April 23. THE MASTER OF THE ROLLS [Lord Romilly]. In this case, I am afraid the sheriff is in the wrong. Being intrusted with a *fi. fa.* against the railway company, he levies on the goods of a contractor which were lying on the line of railway, and ostensibly the property of the company. Thereupon the contractor

gives notice to the sheriff that the goods are his, and not those of the company, and he threatens to bring an action against the sheriff if they are not restored to him. The levy took place on the 9th of March 1866, and the contractor gave notice on the same day. Afterwards, on the 14th of March, he gave a second notice, by which he made a distinction between the two sorts of rails. He said that those rails which weighed forty pounds by the yard and upwards were his, and that those which were not of that weight belonged to the company; but, he added, you must make the distinction. He also claimed the rolling stock to be his.

The sheriff gave no notice of this to the judgment creditors, who knew nothing about the contractor's claim; and on the 16th of March the judgment creditors obtained an order on the sheriff to make his return on the 17th, and which would, of course, be followed by an attachment if he did not make it.

The sheriff filed his interpleader bill on the 19th of March, and gave notice of motion for the 22d. But it was not until the 21st that the judgment creditors had any knowledge of what had been actually seized, or what had been claimed by the contractor.

The notice of motion stood over until next day. It was not heard then, but they asked time to look into the matter, and it stood over until the second seal in Easter term (19th April). On that day, the judgment creditors say, "We find that these goods were not the property of the railway company, and we disclaim any interest in them, and we should have done so if the sheriff had applied to us before."

Upon which, the sheriff gives up the goods; but he now says to the judgment creditors, "My costs of this suit you must pay me." The judgment creditors, on the other hand, say, "You had no right to file a bill of interpleader at all, you seized the goods at your own peril, and you ought to have given us notice of the adverse claim." They referred to the case of *Slingsby v. Bolton* (1 Ves. & Bea. 334), where Lord Eldon lays down the proposition that a sheriff cannot file a bill of interpleader at all, he being bound to take the goods at his own peril. I doubt, having reference to more modern decisions, whether I should be disposed to fix the rule so tightly as to say that a sheriff cannot file a bill of interpleader at all. But it is clear that he cannot do so until he has informed the judgment creditors of the adverse claim, and [465] ascertained whether they claim the goods he has seized, or will give them up. I am therefore of opinion that the sheriff, who has not done this, is in the wrong, and that this bill must be dismissed with costs, to be paid by the Plaintiff.

[465] JOYCE v. RAWLINS. April 26, 1866.

An order to revive, under the 15 & 16 Vict. c. 86, s. 52, cannot be obtained against executors who have not proved the will, though it is alleged they have acted.

Mr. Kingdon applied, under the 15 & 16 Vict. c. 86, s. 52, for an order to revive against the executors of a deceased Defendant. They had not as yet proved the will of their testator, but it was alleged that they had acted.

He argued that as the Plaintiff might file a bill against executors who had acted, so he might equally obtain the order now asked.

THE MASTER OF THE ROLLS [Lord Romilly]. I do not think this is an ordinary case for revivor by order. You must cite the executors in the Probate Court and get a properly constituted legal personal representative.

[466] ALSTON v. TROLLOPE. May 7, 1866.

[S. C. L. R. 2 Eq. 205; 35 L. J. Ch. 846; 14 L. T. 451; 14 W. R. 722.]

In an administration suit, the administratrix and all the persons interested (except one who was not before the Court) declined to object that some of the debts which were claimed were barred by the Statute of Limitations. The Court, on the administratrix taking the risk, ordered payment of such debts.

Mr. Alston died intestate, leaving a widow and five children; his widow became his administratrix.

This was a suit for the administration of his estate, and on the usual reference some of his debts appeared to be barred by the Statute of Limitations. The widow and four of the children were desirous that these debts should be paid, and they declined taking the objection. But the fifth son, who had gone to America in 1862 and had joined the Confederate Army but was believed to be dead, not being before the Court, the Chief Clerk thought he was bound himself to take the objection of the statute, and he disallowed these debts.

This was a motion to vary the certificate.

Mr. O. Morgan, for the Plaintiff, argued that there was no case in which the Court itself had insisted on taking the objection. That the administratrix fully represented the estate and was not bound to take the objection, though she might hereafter be answerable for not doing so.

[THE MASTER OF THE ROLLS. The question is, whether I should take the objection. My difficulty is that if the son were here he would be entitled to insist on the statute as a bar.]

Mr. Martineau, for the widow and all the four [467] children, supported the application, and, on behalf of the widow, offered to run the risk. He stated that the assets amounted to £1000, while the debts were about £600 in all. See *Shewen v. Vanderhorst* (1 Russ. & Myl. 347, and 2 *Ibid.* 75); *Fuller v. Redman* (26 Beav. 614); *Phillips v. Beal* (32 *Ibid.* 26).

THE MASTER OF THE ROLLS [Lord Romilly]. I shall not raise the objection, but it must be understood that the administratrix pays these debts at her own peril, and that I do not give her any sanction for doing so. I will direct the payment, and it must appear on the order that the administratrix does not choose to raise the objection of the Statute of Limitations to the payment of these debts, and that all the parties to the suit consent to their payment.

[467] THE ALEXANDRA HALL COMPANY. ROEBUCK'S CASE.

May 8, 24, 1866.

Where an action is brought for calls, and in which the question whether the Defendant is or not a shareholder will be determined, this Court, on an application by such Defendant to correct the register, by omitting his name, will postpone its decision until the result of the action is known.

This was an application by Mr. Roebuck, under the 25 & 26 Vict. c. 89, s. 35, to rectify the register by omitting his name.

It appeared that he had applied for shares in March 1865, and that an allotment had been made, but the applicant had repudiated his liability. His name having been inserted on the register, the company, in August 1865, brought an action at law against him for the calls. [468] In November 1865 the action was stayed for the company to give security for costs, and no further proceeding had taken place.

Mr. Selwyn and Mr. Roxburgh, in support of the application.

Mr. Southgate and Mr. Roberts, *contra*.

Mr. Selwyn, in reply.

Re South Kensington Hotel Company (12 Law T. 259); *Shropshire Union v. Anderson* (3 Exch. Rep. 401); *In re The British Sugar Refining Company* (3 Kay & J. 408), were cited.

THE MASTER OF THE ROLLS [Lord Romilly]. I consider that the Lords Justices have decided this: that where an action is brought in which the question whether the Defendant is or not a shareholder will be tried, and an application is made to this Court to correct the register, this Court will suspend making any order on it until the action has been tried. I will take care that this action is tried speedily, and if the company should not give security for costs before the first day of next term, I shall know how to dispose of the application.

The matter stood over, the Respondents undertaking to give security in the action.

May 24. The security for costs having been given,
THE MASTER OF THE ROLLS said the question must be tried at law.

[469] BELANEY v. BELANEY. *May 25, 1866.*

[S. C. L. R. 2 Eq. 210; 12 Jur. (N. S.) 445; affirmed on appeal, L. R. 2 Ch. 138; 36 L. J. Ch. 265; 16 L. T. 269; 15 W. R. 369. See *Jones v. Robinson*, 1878, 3 C. P. D. 347.]

A. B., being owner of a leasehold, purchased the reversion in fee and had it conveyed to a trustee expressly that the term might not merge. He afterwards bequeathed to his wife "the whole of his personal property, estate and effects of every and whatsoever kind they might be." Held, first, that the real estate did not pass; and, secondly, that the term did not attend the inheritance, but passed to the widow.

This was a special case for obtaining the opinion of the Court on the construction of the will of a testator, dated in May 1865.

At the date of his will and at his death the testator was the owner of a house and plot of ground at Croydon under the two indentures which are next stated.

By an assignment, dated the 27th of July 1864, this property was, in consideration of £825, assigned to the testator for the residue of a term of ninety-nine years, subject to a rent of £8, 2s. 6d.

The testator occupied the premises, and by an indenture dated the 12th of January 1865, and made between Jones of the first part, the testator of the second part, and Cotton (a trustee) of the third part, after reciting the lease and an agreement on the part of the testator to purchase the fee-simple of the property, subject to the lease, for £220, and reciting that the testator was desirous that the term of ninety-nine years *should not merge*, and that it had been agreed that the said hereditaments should be assured in manner after mentioned, Jones conveyed the property to Cotton in fee and the rent of £8, 2s. 6d., &c., to hold (subject to the lease) in trust for the testator, his heirs and assigns, and to be conveyed and disposed of as he or they should direct.

Being thus entitled to the property, the testator, on the 23d of May 1865, made his will as follows:—

"I hereby appoint my beloved wife, Juliana Mary [470] Henrietta, my whole and sole administratrix of this my said last will and testament. I hereby give and bequeath to my said wife *the whole of my personal property, estate and effects of every and whatsoever kind they may be* for her sole use and benefit."

The testator died on the 1st day of June 1865.

The widow contended that, according to the true construction of the will, all the estate and interest of the testator in the premises, under the indentures of assignment, were effectually given and passed to her by the general gift.

The heir at law, on the other hand, contended that the estate and interest of the testator under the assignment were not effectually given and did not pass to the widow, but were, or, at all events, that the reversion in fee-simple expectant on the determination of the said term of ninety-nine years was, undisposed of and descended to him the heir.

Mr. E. Charles, for the widow. Both the term and the fee-simple passed to the widow, or, at all events, the term passed to her. First, this is a gift of his "personal property" and also a gift of his "estate," which latter word is unrestricted by the adjective "personal." The cases establish that the word "estate" applies both to realty and personalty, and that it must have its full signification, unless express words can be found in the will shewing a contrary intention. Again, the circumstance that the word "estate" occurs in the middle of words which apply to personalty does not cut down its extended signification, if the other words are sufficient to pass the personal estate; *Terrel v. Page* (1 Chanc. Cas. 262); *Tilley v. Simpson* (2 Term Rep. 659, n.); [471] *Jongsma v. Jongsma* (1 Cox, 362); *Doe d. Evans v. Evans* (9 Adol. &

E. 719); *O'Toole v. Browne* (3 Ell. & Bl. 572); *Midland Counties Railway Company v. Oswin* (1 Coll. 74); *Noel v. Hoy* (5 Madd. 38).

Secondly, the term at least passed to the widow. It was purposely kept alive as a term in gross, and was not a satisfied term attending the inheritance; *Gunter v. Gunter* (23 Beav. 571).

THE MASTER OF THE ROLLS [Lord Romilly]. I will not trouble the Defendant on the first point, for I must strike out the word "personal" to make the will include freeholds.

The cases referred to were cases in which, after a long enumeration of particulars relating to personal chattels, the word "estate" was used, and the question was whether it was to be treated as a word *ejusdem generis*, and I am of opinion that they have no application to this case. Here the testator gives "the whole of my personal property, estate and effects of every and whatsoever kind they may be." If he intended to give her all his freehold as well as his personal estate, it was wholly unnecessary for him to insert the word "personal." If I were to hold that the word "personal" applied only to his "property" and not to his "estate," I must introduce something between the words "property" and "estate," and read it thus:—"The whole of my personal property and the whole of my estate and effects." I am of opinion that this is a gift of personal property and estate only, and that the real estate does not pass thereby. (See *Coard v. Holderness*, 20 Beav. 147; *Woolam v. Kenworthy*, 9 Ves. 143.)

[472] Mr. Bevir, *contra*, on the second point. The term did not pass to the widow; it is not merged, but it has become consolidated and passed with the inheritance. The testator was owner in fee, and could not be called his own lessee, so as to pay his own rent to himself, and there was no object in keeping the term and inheritance separate. The rule, as laid down in Sugden's Vendors (vol. 3, p. 87 (10th edit.)), shews that this term attended the inheritance; *Dowse v. Percival* (1 Vern. 104); *Tiffin v. Tiffin* (*Ibid.* 1); *Attorney-General v. Sands* (3 Chanc. Rep. 33); *Cooke v. Cooke* (2 Atk. 67); *Capel v. Girdler* (9 Ves. 509); *Goodright v. Searle* (2 Wil. 29).

If the testator had died intestate, his widow would have been entitled to dower. The term was virtually consolidated with the fee, and descended with it on the Defendant.

THE MASTER OF THE ROLLS. I do not dispute or doubt the authority of any of the cases cited, but I think they do not apply to this particular case. They determine that when a legal term is vested in a trustee for the person entitled to the inheritance, such person is entitled to call on the trustee to assign this term to him, and this testator might have done so.

Here the testator has taken care to preserve it as a term in gross, by having the fee conveyed to a trustee expressly in order that the term may not merge. There is no question that this term is personal estate, and the testator bequeaths the whole of his personal estate to his wife. This being personal estate at law, [473] why is it not to pass to her? The equitable doctrine that a term is to go with the inheritance is another question; and if this testator had left the land to another person, it might be that it went with the inheritance; but he died intestate as to the inheritance. If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir; but when the testator has kept the term alive, and has given the whole of his personal estate to his widow, I think he must have intended to include the term. I am therefore of opinion that it passed to the widow.

NOTE.—The widow appealed, but the case was affirmed on both points by Lord Chelmsford, L. C., 14th January 1867, 36 L. J. (Chanc.) 265. [L. R. 2 Ch. 138.]

[473] *Re THE RAILWAY FINANCE COMPANY (LIMITED)*. May 24, 28, 1866.

An order for the appointment of an official liquidator, obtained *ex parte* before an order to wind up the company had been made, discharged.

A petition had been presented by a creditor to wind up this company, but, before

it had been heard, the Petitioner obtained *ex parte* an order for the appointment of a provisional liquidator.

Mr. Southgate and Mr. Cottrell, for the company, now applied to discharge the order, contending that it was irregular to appoint a liquidator until an order had been made to wind up the company; see 25 & 26 Vict. c. 89, s. 92.

Mr. Swanston, *contrà*.

[474] THE MASTER OF THE ROLLS [Lord Romilly]. I never appoint a provisional liquidator until it appears that the company must be wound up.

I must discharge the order.

[474] EDWARDS v. JONES (No. 2). June 5, 1866.

A testator devised to each of his four daughters a house and garden at G., to be built at the expense of his executors. A daughter, M., requiring the house, one was built with a garden by D., the executor, who was also residuary legatee and devisee. Held, after the death of D., that the gift was not void, and that M. was entitled to the house and garden.

The testator, by his will dated in 1835, gave as follows:—

"Also I give, devise and bequeath unto each of my daughters Mary Ann, Sarah, Eliza and Margaretta and their heirs and assigns for ever a house and garden in the village of Gwynfil, free of rent, if they feel inclined to live in the said village, but not otherwise, which house or houses is or are to be built at the expense of my executors."

The testator died in 1835.

After the testator's death, his daughter Margaretta and her husband requested his son Daniel (who was residuary devisee and legatee and also executor) to build a dwelling-house on some part of the testator's real estate in the village of Gwynfil, and he accordingly, in 1841-2, erected a house on the testator's estate, which was called "Tymelin."

Daniel Lewis died in 1851, and Margaretta and her husband took possession of "Tymelin" (as they said) in 1851, but they went to reside in it in 1861. They now claimed to be entitled to "Tymelin."

[475] The Chief Clerk considered the devise void for uncertainty, and that "Tymelin" formed part of the testator's residuary estate. This was a motion to vary the certificate.

Mr. Chitty, for Margaretta. It is said that this gift is void for uncertainty, but the rule of law is this:—*Id certum est quod certum reddi potest*. If the gift had been considered invalid, no inquiry would have been directed by the Court at the hearing of the cause. Time is no bar, for no period is mentioned within which the option is to be exercised; and it is not an immediate devise, but was to operate when the daughter "felt inclined to live in the said village."

He cited *Grace Marshall's case* (Dyer, 281 a.); *Hobson v. Blackburn* (1 Myl. & K. 571); *Jacques v. Chambers* (2 Coll. 435); *Wood v. Drew* (33 Beav. 610); *Duckmanton v. Duckmanton* (5 Hurl. & N. 219); *Jarman on Wills* (vol. 1, p. 335 (3d edit.)); *Coke Litt.* (p. 145 a.).

Mr. Everitt, *contrà*, argued that the gift was too indefinite and was void for uncertainty, for the size and nature of the house and extent of the garden were undefined. Secondly, that the claim was barred by the Statute of Limitations.

He referred to *Jones v. Hancock* (4 Dow. 145); *Jarman on Wills* (vol. 1, p. 207).

THE MASTER OF THE ROLLS [Lord Romilly]. I think Margaretta is entitled to have the certificate varied. The meaning of this devise is that any of the [476] daughters, having a *bond fide* intention of residing in Gwynfil, was, upon the application to the executor, entitled to have a house built with a garden attached to it. It is possible, if the executor were now living, and an application were now made to him, for the first time, to have a house built with a garden attached, that he might say, "This is too uncertain; I do not know what species of house or garden you are entitled to:" on the other side, it would be said, the house and garden must be of the character usual in the village of Gwynfil. But, however that may be, I think

that the parties have themselves disposed of the question ; one of the four daughters has applied to the executor to build a house, and he has built one, and has attached a garden to it. Two of the daughters are dead, having made no claim ; the third is residing in the town, and the fourth makes no claim ; but she may still make one. You therefore know what sort of house it must be, because the parties themselves have agreed on that, and have built one accordingly.

Margaretta, having a right to exercise the option, was the first person who claimed to reside at Tymelin, and I think that she is entitled to it in fee and for her separate use. If her husband wishes to be heard on that point, he must apply.

[477] OVERMAN v. OVERMAN. *April 19, 1866.*

After decree, a suit became defective by the transfer of the Plaintiff's interest. The Plaintiff and his transferees having, after notice, neglected to revive, an order was made, on the application of the Defendants, for an order to revive, and that they might carry on the suit.

A decree had been made in this suit, and, pending the proceedings in Chambers, the Plaintiff in September 1865 transferred all his interest to trustees for the benefit of his creditors, and no proceedings had been taken since July 1865.

The Defendants gave notice to the Plaintiff and the trustees that unless they took steps to obtain an order of revivor, they (the Defendants) would do so. These parties having taken no steps, the Defendants, on the 5th of April, gave them notice of motion for an order of revivor under the 15 & 16 Vict. c. 86, s. 52.

Mr. Chitty, in support of the application, relied on *Noble v. Stow* (30 Beav. 512), and he distinguished this case from *Dendy v. Dendy* (28 Law T. (O. S.) 262). He said that a simple bill of revivor would have been sufficient before the statute, and that therefore the order asked was now authorized by the statute.

THE MASTER OF THE ROLLS [Lord Romilly]. The Defendants may take an order to revive the suit, and that they may carry it on ; in substance, an order like that made in *Noble v. Stow* (30 Beav. 512).

[478] HARMAN v. GURNER. *Jan. 30, 1866.*

A person purchased a piece of land abutting on O. Street on the east and on T. Street on the west. He built two houses, one in O. Street and the other in T. Street, and he divided the property into two portions. By his will, he devised "all that his freehold estate situate in T. Street." Held, that the whole property passed.

The testator, by his will dated in 1862, devised to his son and his heirs "all that his freehold estate situate in Three Colt Street, Old Ford, Bow, in the county of Middlesex."

The testator died in 1863.

With regard to this property, it appeared that, in 1837, the testator had purchased a plot of land 134 feet by 15 feet, which abutted on Old Ford Road towards the east, and on Three Colt Street on the west. In 1838 he erected two separate houses, one fronting Old Ford Road and numbered No. 4, and the other fronting Three Colt Street and numbered 5. He divided the two gardens which were at the backs of these houses.

There was some parol evidence that the premises were called by the testator his freehold property in "Three Colt Street."

The question was, whether the whole of this property passed to the son under the devise.

Mr. Graham Hastings, for the Plaintiff, argued that the whole property passed, because it was not only the testator's freehold estate in Three Colt Street, but because that was the name by which the testator usually designated the whole of this property ; *Newton v. Lucas* (6 Sim. 54, and 1 Myl. & Craig, 391).

[479] Mr. Daunev, in the same interest.

Mr. Crossley, for the residuary legatees. The property in Three Colt Street, which exactly fits the description, alone passes. The other premises were the testator's "estate in Old Ford Road." The parol evidence is inadmissible. He cited *Smith v. Ridgway* (1 Law Reports (Ex.), 46); *Doe v. Bowen* (3 Barn. & Ad. 453); *Doe v. Brown* (3 Maule & Sel. 171); Jarman on Wills (vol. 1, p. 753); *Doe d. Chichester v. Ozenden* (3 Taunt. 147); Johnson's Dictionary, "Estate."

THE MASTER OF THE ROLLS [Lord Romilly]. The only question is, what is the meaning of the word "estate?" When the testator bought this property, his estate in Three Colt Street consisted of this plot of land 134 feet by 15 feet, and I am required to say that I must cut down the word "estate" and to consider it "house," because he has built two houses on the property. Having this "estate" he devises "all that his freehold estate situate in Three Colt Street." This includes all the houses upon it. He does not designate it by the number of the house. If he had said "my freehold house numbered 5 in Three Colt Street," there would be something which would exclude the other house.

There is also evidence, which is admissible for this purpose, to shew that the testator always called the whole of this property "his property in Three Colt Street."

I think that the fact of one of the houses abutting on another street does not limit the force of the word "estate," and I am of opinion that the devisee is entitled to the whole property and the houses on it.

[480] JOHNSON v. THE EDGWARE, &C., RAILWAY COMPANY
AND OTHERS. Feb. 15, 23, 1866.

[S. C. 35 L. J. Ch. 322; 14 L. T. 45; 14 W. R. 416.]

A landlord was empowered to resume possession of any part of the land demised, in case it should be required by him "for the purpose of building, planting, accommodation or otherwise." Held, that this did not entitle the landlord to resume possession of land required by a railway company, so as to defeat the tenant's right to compensation. Held, also, that the word "otherwise" was to be read as being *eiusdem generis*.

This company obtained its Act of Parliament in 1862, and shortly afterwards (16th August 1862) Mr. Cooper granted to the Plaintiff Johnson a farming lease of a farm of 218 acres, through which the railway was to pass, for a term of twenty-one years, determinable at the option of the landlord at the end of fourteen years. The lease contained the following proviso:—

"Provided always and it is hereby agreed, that in case any portion or portions of the said demised lands shall be required for the purpose of building, planting accommodation or otherwise, or for the purpose of working the clay, sand or gravel, in, under or upon the same, by E. P. Cooper, his heirs or assigns, or his or their tenants, before the expiration of this demise, it shall be lawful for E. P. Cooper, his heirs or assigns, to resume and take any such portion or portions accordingly, on giving to Johnson, his executors or administrators, three calendar months' previous notice of his intention so to do, such notice to expire at any time during the year, and E. P. Cooper is thenceforth, during the term hereby granted, determinable as hereinafter mentioned, to allow Johnson, his executors or administrators, out of the rent hereby reserved, £3, 10s. per acre, and so in proportion for a greater or less proportion than an acre, for so much of the said land as shall be so resumed and taken under the present proviso."

The railway company required 2a. 3r. 6p. of the farm for their railroad, which went through the middle of it [481] and necessarily interfered with its convenient cultivation. On the 23d of April 1863 the company served the Plaintiff with the usual notice to treat, and on the 17th of September 1863 they agreed to give him £270 for purchase-money and compensation. This was, however, done on the Plaintiff's representation that he had an absolute term of twenty-one years in the farm.

The company proceeded to treat with the landlord, Mr. Cooper, for his interest, and they became acquainted with the facts of his right to resume the land under the above proviso. On the 4th of March 1864 Mr. Cooper gave Johnson a written notice that the 2a. 3r. 6p. of the farm "were required by him for the purposes, or some or one of them, in the lease mentioned, and that it was his intention to resume and take such portions of the said demised lands *on or after the 5th day of June* next ensuing the day of the date thereof."

On the 18th of August 1864 a jury assessed the amount payable by the company to Mr. Cooper for the purchase of his interest at £3000 and one shilling for damages.

The company having refused to pay the Plaintiff any compensation, he, on the 5th of December 1864, instituted this suit against the company and (by amendment) against the representatives of the lessor for an injunction to restrain the company from taking or keeping possession of the land until they had paid the Plaintiff, and that the fair compensation might be assessed and paid to the Plaintiff by the company, or for the specific performance of the agreement of the 17th of September 1863.

Mr. Selwyn and Mr. Bagshawe, for the Plaintiff, [482] argued, first, that the lessor had no power, under the proviso, to retake the land for the purpose of selling it again to the company, for that could not be called a taking "for the purpose of building or plantation" of the lessor; and that the words "or otherwise" were not general, but were restricted to purposes like those already specified, and were *ejusdem generis*. Secondly, that this could not be done so as to affect the Plaintiff's rights after the notice to treat and the contract between the railway company and the tenant. And thirdly, that the notice to resume possession "on or after the 4th day of June" was informal and insufficient. They cited *The Metropolitan Railway Company v. Woodhouse* (11 Jur. 296); *Williams v. Golding* (1 Law Rep. (C. P.) 69); *Harrison v. Blackburn* (17 C. B. Rep. (N. S.) 678); *Sandiman v. Breach* (7 Barn. & Cr. 96); *Haynes v. Haynes* (1 Drew. & S. 426); *Re Arnold* (32 Beav. 591).

Mr. Bristowe, for the representatives of the lessor, argued that these Defendants had no interest in this question. He said that the finding of the jury had been framed so as not to affect the Plaintiff's right, but that the formation of a railway and making a station might properly come within the word "accommodation" to the lessor and his farm.

Mr. Daniel and Mr. T. Stevens, for the railway company. When the company entered into the agreement of the 17th September 1863, they were misled by the statements of the Plaintiff as to his interest in the land. They supposed that he had an absolute term of twenty-one years, but it turned out that he had only a term of thirteen years, and that even this was determinable and had been determined by notice from the lessor. This [483] agreement cannot, therefore, be enforced as it stands, though the company are content to carry it out with an abatement in the price. They have never repudiated the agreement, but they say that, by subsequent events, consequent on facts of which they were not aware, the Plaintiff has become a mere tenant at will or by sufferance, that his interest has been reduced to nothing, and, therefore, that he is entitled to no compensation. The £3000 was assessed as the amount of compensation on the basis of the Plaintiff's having no interest, and the question, therefore, really is one between the landlord and the tenant as to their rights in that sum.

Mr. Bagshawe, in reply.

Feb. 23. THE MASTER OF THE ROLLS [Lord Romilly], after stating the facts of the case, said—A good deal might turn on the validity of the notice given by the landlord on the 4th of March 1864. The proviso requires (assuming that the landlord had the power to give it) "three calendar months' previous notice of his intention so to do, such notice to expire at any time during the year." But this is a notice to take the land *on or after the 5th of June* next; and if he did not take it on the 5th of June, it is difficult to say when he would, for there is nothing to define when he was to take it after the 5th of June next. But it is not necessary to decide that point, because I am of opinion that the case does not come within the proviso.

It is necessary to refer to what afterwards took place, which was this:—The railway company having, by various letters, thought fit to say to the Plaintiff, "You have no interest whatever in this land; we will not perform our [484] contract with

you, and you have no right to compensation," went before a jury, in August 1864, to assess the compensation payable to Mr. Cooper. They gave notice, it is true, to the Plaintiff, that, if he liked to go before the jury and make a claim, he might, but he very wisely did not think fit to do so, or make any claim at all. The jury, as far as I can judge from the evidence, assessed the value of the fee-simple in possession of the eight acres belonging to Mr. Cooper, including therein the two acres and three-quarters which were in the Plaintiff's occupation, at a sum of £3000, and it is clear, upon the evidence, that this was for the fee-simple with the possession delivered up at once. Thereupon the Plaintiff, being dissatisfied, called upon the railway company to compensate him, which they declined to do, and the Plaintiff filed this bill on the 5th of December 1864.

I must refer to this proviso again, and state why I do not think it applies to this case. In the first place, it is to be observed that all deeds are to be construed most strongly against the grantor. Next, it is also to be observed that the railway company had obtained their Act just before the contract with the Plaintiff was entered into, which was on the 18th of August 1862, so that both the Plaintiff and Mr. Cooper, the lessor, knew perfectly well that this Act had passed, and that the railway was to pass through the farm, for they had received the usual preliminary notices. Knowing this, Mr. Cooper demises the farm to the Plaintiff for seven, fourteen or twenty-one years, determinable, if he pleases, at the end of the first fourteen years, with this proviso:—"Provided always," &c., &c. Now does the case come within that proviso? This bit of land is clearly not required either "for the purpose of building or planting." Then is it required for the purpose of "accommodation?" In my opinion it is not, for I understand the word "accom-[485]-modation" to mean something of this nature, *e.g.*:—if the lessor had built a house, and wanted to make a road to get access to it, and required this land for that purpose, that might properly be called "accommodation," or if he wanted to add a small piece on to his garden or the like, that again might be called "accommodation." But if a third person said to him, "I should like to buy a piece of this land to make a railway upon it," that would not be an accommodation to the lessor, though it might be an accommodation to the railway company. But even then it would not be an accurate expression, for it would, in fact, be a perfectly distinct thing; it would be required for the purpose of alienation, and if he might require this bit of land for that purpose, he might require the whole farm. Accommodation means "accommodation to Mr. Cooper, his heirs and assigns," for the purpose of more usefully and beneficially occupying and enjoying the land itself; and that expression does not, in my opinion, extend to the selling of two and three-quarter acres to a railway company; the more so, because both parties knew well at that time that the railway was coming across the farm; and if they intended the proviso to meet that case, why did they not introduce the proper expression for that purpose, and not leave it altogether vague?

I am, therefore, of opinion that this grant, which must be taken most strongly against the lessor, does not authorize him to retake the property for the purposes of the railway company. I am also satisfied that no ordinary person would suppose, on reading a proviso in a lease, saying that, if a portion of the land was wanted by the lessor "for building, planting or accommodation, it might be resumed," the tenant was bound to allow a railway to go through the farm and receive no compensation for the damage it occasioned him by what is [486] commonly called "severance," and which, in fact, would produce a much more serious inconvenience to the tenant than any building or planting by or accommodation to the landlord.

Having come to that conclusion, it remains to consider whether this case comes within the words "or otherwise;" and I think it is quite clear that it does not. It cannot be denied that, where a person speaks of three purposes, "A, B. and C. or otherwise," the latter words refer to something *ejusdem generis*, and can only be applicable to things of the same character as those previously specified, or, in this case, something of the same character, as "building, planting or accommodation," though not coming precisely within the exact definition of those words. I am of opinion, therefore, that the case does not come within the words "or otherwise;" and it is quite clear that it does not come within any other part of the proviso relating to "clay, sand or gravel." Having come to that conclusion, I am of opinion that the

notice of the 4th of March 1864 was invalid, and that Mr. Cooper had no power to resume this land. He did not want it for the purpose of any accommodation at all, but he wanted it in order to obtain from the company that compensation which, if he had not interfered, would have been paid to his tenant. The clause cannot mean this—that if some third person would want to buy this land and to make a railway across the farm, I (the landlord) will have the compensation for the damage done to you (the tenant), and I will resume it for that purpose. This clause was introduced *bond fide* for the better enjoyment of the land itself, and not for the purpose of depriving the tenant of that compensation which he would naturally have a right to demand from the railway company for the injury done to him.

[487] I have now to consider what is the consequence of that conclusion. The railway company have paid the £3000, 1s. to Mr. Cooper for the whole of this land, and the Vice-Chancellor Sir William Page Wood being of opinion, and, as it appears to me, very wisely, that he could not dispose of the question in the absence of the lessor, as he was materially interested in this matter, and might be seriously affected by any decision made in his absence, the case stood over, and the landlord has been made a party.

In the first place, the Court cannot now grant any injunction; for to stop this railway on account of this mistake is quite out of the question, and the only point then is, what compensation the Plaintiff is entitled to? I have held that the company have taken two acres and three-quarters acres, of which the Plaintiff was the tenant for thirteen years certain, for, holding that the landlord could not properly give the notice under that proviso at that time and for that purpose, it must necessarily follow that he could not do so at a later period during the fourteen years. I must therefore, for this purpose, hold that the Plaintiff was absolutely entitled to the land for fourteen years, and that he is entitled to compensation for that term. But then I cannot divide the compensation of £3000 already paid, for I have no power to deal with that. The railway company, as I understand, are willing to be bound by the agreement they have entered into with the Plaintiff; and, if that be so, I am disposed to think that, as the Plaintiff entered into that agreement on the assumption that he had twenty-one years certain, and as it turns out that he had only fourteen, I should, if the railway company agreed to pay him the £270, hold him bound to accept it; for I do not think he could claim anything beyond that. But if that should not be so, the only [488] course I can take is, to direct a reference in Chambers to ascertain the proper amount payable to the Plaintiff.

I am also of opinion that the Plaintiff is entitled to the costs of the suit; for in my opinion he was not, but both the Defendants were in the wrong. The landlord was mistaken in supposing he could resume the property, and the railway company were wrong, because they had notice of the lease and the proviso before they assessed the compensation payable to Mr. Cooper, and they were therefore wrong in acquiescing in the landlord's construction of the proviso. The railway company might have said—as indeed they seem disposed to say now—at the hearing, "This is an affair with which we have no concern; it is for you, the landlord, on one side and the tenant on the other to fight it out, the only question being, which of you is entitled to this £270 for compensation?" If the railway company had thought fit to say, "If you cannot agree and settle the matter between yourselves, we shall file a bill of interpleader and pay the money into Court, in order that you may settle your dispute," I should have held that they were justified in taking that course, and should have allowed them their costs as against the party who failed. But instead of doing so, they have adopted the view of the landlord, which in my opinion was a mistaken one, and I am therefore of opinion that the railway company must pay the Plaintiff's costs of suit.

I cannot give the landlord any costs; he was in the wrong, and he was a necessary party.

I do not see how I can settle the matter of difference which will probably arise between the railway company and the landlord. If they will consent, then of course I can easily make an order to ascertain how much of the [489] £3000 ought properly to be paid to the Plaintiff, but I can only do this by consent.

The only compulsory order which I can make is, to refer it to Chambers to ascertain the amount of compensation to which the Plaintiff was entitled when the

land was taken, and to direct the railway company to pay him the amount with interest at four per cent., together with the costs of suit.

[489] SHATTOCK v. SHATTOCK. Feb. 9, 12, 13, Apr. 23, 1866.

[S. C. L. R. 2 Eq. 182; 35 L. J. Ch. 509; 12 Jur. (N. S.) 405; 14 W. R. 600. See *Mrs. Mathewman's case*, 1866, L. R. 3 Eq. 786; *London Chartered Bank of Australia v. Lemprière*, 1873, L. R. 4 P. C. 572; 9 Moo. P. C. (N. S.), 426; 12 E. R. 574; *Adamson v. Hammond*, 1873, L. R. 3 P. & D. 147; *In re Roper*, 1888, 39 Ch. D. 489.]

Property was settled on a *feme covert* for her separate use for life, with a power to appoint it by deed or will. She executed the power by will. Held, that the appointed property was not liable to pay a promissory note signed by her.

A married woman cannot bind herself by contract, but equity holds that she may, by contract, bind her separate estate. Her separate estate will be liable to pay any debt of hers which she has secured by writing. Equity has also held that it is sufficient if it be shewn that the married woman verbally promised that her debt should be paid out of her separate estate.

The separate property of a married woman is not, after her death, liable to pay her general debts either in the case of her having been absolutely entitled to the property, or of her having only a life-estate with a power to dispose of it by deed or will.

The principle of Courts of Equity is, that, as regards her separate estate, a married woman is a *feme sole*, and can act as such; but this is only so far as is consistent with the other principle, viz., that a married woman cannot enter into a contract.

In the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of priority and not *pari passu*.

In this case, some real and personal property was settled on the marriage of Mr. and Mrs. Rowcliffe in 1807, upon trust for the separate use of Mrs. Rowcliffe for her life, and after her decease for the children of the marriage [which limitation failed], and for default of such issue, then upon the following trusts:—

“Upon trust for such person or persons, for such estate or estates, interest or interests, and in such parts, shares or proportions, and charged with such annual or other sums of money, upon such conditions, with such restrictions and limitations over, and in such manner and form, as Elizabeth Shattock, notwithstanding her said intended coverture by any deed or deeds, instrument [490] or instruments in writing, with or without power of revocation, to be sealed and delivered by her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be such, or any codicil or codicils thereto, to be respectively signed and published by her in the presence of and attested by three or more credible witnesses, and which last-mentioned deed writing, will or codicil, or writing purporting to be such will or codicil, and in such will or codicil, or writing purporting to be such will or codicil, one or more executor or executors, the said Elizabeth Shattock was thereby and by the said William Rowcliffe, her said then intended husband, enabled and empowered to make and appoint, should from time to time direct, limit or appoint, and in default of and until such last-mentioned direction, limitation or appointment, and until such estate and estates, interest and interests so directed, limited or appointed should respectively end and determine; and as to such parts of the same hereditaments, moneys and premises, whereof no such direction, limitation or appointment, as last mentioned, should be made, then upon trust, as to the said freehold hereditaments, for the said Elizabeth Shattock, her heirs and assigns, for ever; and as to the said principal and interest, moneys and securities, upon trust for such person or persons as would be next of kin of the said Elizabeth Shattock, and entitled thereto under the Statute for Distribution of Intestate's Effects, in case she had died sole and unmarried, and to and for no other use, trust, intent or purpose whatsoever.”

There was no issue of the marriage, and Mrs. Rowcliffe died *coverte* in 1823,

having appointed the property by her will. The question was, whether the appointed property was liable to pay a promissory note [491] signed by her, but not witnessed. The facts are more fully detailed *post* in the judgment of the Court.

Mr. Jessel and Mr. F. H. Colt, for the claimant under the promissory note, cited *Vaughan v. Vanderstegen* (2 Drewry, 165); *Hobday v. Peters* (28 Beav. 354); *Johnson v. Gallagher* (30 L. J. (Chanc.) 298); *Allen v. Papworth* (1 Ves. sen. 163); *Hulme v. Tenant* (1 Bro. C. C. 16); *Heatley v. Thomas* (15 Ves. 596); *Owens v. Dickenson* (Craig & Ph. 48); *Norton v. Turvill* (2 Peers Wms. 144); *Taylor v. Meads* (34 L. J. (Chanc.) 203); *Blatchford v. Woolley* (2 Drewry & Sm. 204); Sugden's Powers (p. 476 (8th edit.)).

Mr. Southgate and Mr. Langley, for the Plaintiffs, cited *Tullett v. Armstrong* (1 Beav. 1, and 4 Myl. & Cr. 377); *Jacob v. Husband and Wife* (vol. 2, p. 243); *Lee v. Muggersidge* (1 Ves. & B. 118); *Murray v. Barlee* (3 Myl. & K. 209).

Mr. Freeman, Mr. B. B. Rogers, Mr. Martineau and Mr. E. K. Karslake, for other parties.

Mr. Jessel, in reply, referred to *Socket v. Wray* (4 Bro. C. C. 484).

April 23. THE MASTER OF THE ROLLS [Lord Romilly]. The question raised in this case is one of considerable importance; it is this:—Whether an estate which is limited to the separate use of a *feme covert* for her life, with a power to her to appoint it either by deed or will, is liable, after her death, to be applied in payment of the general debts incurred by her, when she has exercised the power by her will?

[492] In this case, the married woman, Elizabeth Shattock, afterwards Rowcliffe, had her property settled on her marriage with William Rowcliffe in October 1807, in the following manner:—The real estate and personal property therein mentioned was conveyed and assigned to John Shattock and Robert Beadon, their heirs, executors, administrators and assigns for ever, upon trust for Elizabeth Shattock absolutely until the marriage, and after the solemnization thereof (subject to certain directions respecting a sum of £5001 therein particularly mentioned), in trust that John Shattock and Robert Beadon and the survivor of them, his heirs, executors and administrators, should stand seised and possessed thereof, in trust for the sole and separate use of Elizabeth Shattock for her life, exclusively of her husband, and from and after her decease, upon trust for the children of the marriage as she should appoint, and in default, amongst them equally, and for default of such issue, upon trust for such person or persons, for such estates and interests, upon such conditions, and with such restrictions and in such manner and form as Elizabeth Shattock, notwithstanding her coverture, should by deed or will appoint, and in default of such appointment, upon trust as to the freehold hereditaments for the said Elizabeth Shattock, her heirs and assigns for ever; and as to the principal moneys and securities, upon trust for such persons as would be the next of kin of the said Elizabeth Shattock under the Statute of Distributions, in case she had died sole and unmarried.

By the same indenture, Elizabeth Shattock assigned to the same trustees all her household goods and implements, to hold upon the like trusts as were before expressed concerning the hereditaments, moneys and premises, or as near thereto as the different nature of the property would admit.

[493] In February 1808 Mr. and Mrs. Rowcliffe agreed to live apart, and Mrs. Rowcliffe settled £150 per annum permanently on her husband; and in August 1808 a deed, regulating the terms of their separation, was duly executed.

In August 1820 Mrs. Rowcliffe executed the power of appointment contained in the marriage settlement in favor of John Shattock, her brother, for £610. In November 1822 she duly executed her last will, whereby she executed the power contained in the marriage settlement, and disposed of the remainder of her property in the manner therein specified, and she appointed Stephen Bridge and Joseph Yates executors of her will.

A few months afterwards, in March 1823, she died, without having altered her will, leaving her husband, William Rowcliffe, surviving her, and without having had any child of the marriage. Administration with the will annexed was granted to Stephen Bridge.

In 1824 the suit of *Bridge v. Rowcliffe* was instituted to administer the trusts of the will and execute the trusts of the settlement. Various proceedings took place in

that suit, and under it William Rowcliffe was put into possession during his life of certain personal property belonging to his wife, in order to secure the annuity of £150 per annum before mentioned. He died in January 1864, and there is now a sum of £2440 consols standing to the credit of that cause, which represents what was formerly the separate property of Mrs. Rowcliffe. The bill in this cause was filed in December 1864, praying, by way of supplement to the former suit, that the trusts of the settlement of October 1807 and of the will of Elizabeth Rowcliffe, so far as they remain unperformed, might be carried into execution.

[494] Mr. Stephen Franklin Bridge, the executor of her will, by his answer filed in January 1865, claims to be entitled to be paid out of the estate of the testatrix the sum of £14, 15s. and interest, by virtue of a promissory note, signed and delivered by her to the Defendant, to secure the amount due from her, and which is as follows:—

“I promise to pay Mr. S. F. Bridge, on demand, with lawful interest, the sum of £14, 15s. for value received. “ELIZABETH ROWCLIFFE, Rockwell Green.”

“November 9th, 1822.”

The note is produced and proved. The Defendant says that he was unable to obtain payment before the death of the husband, as the whole of the property was impounded to secure the payment of the annuity of £150 to the husband.

It is proposed now, by the decree, to settle and divide the whole fund amongst the persons entitled, who are ascertained and the terms of the decree agreed upon, save so far as regards the debt claimed by Mr. Bridge, upon which the question is, whether the debt so secured is payable out of the estate of the wife so settled. It is a small matter as to interest, and I should have been glad if it could have been settled without recourse to the decision of the Court; but as this has not been done, it has become my duty to consider and deliver my opinion on this somewhat contested point.

The law on this subject is in some degree anomalous. The general rule is that a married woman cannot bind herself by contract; but Courts of Equity hold that she may, by contract, bind her separate estate. The extent to which her separate estate is bound to satisfy her [495] debts and obligations after her decease is the question to be now determined. It is therefore unnecessary to consider here any question as to the liability of her separate estate during her life. So treating the subject, it will be proper to consider it—first, where the married woman has an absolute interest in the property settled to her separate use; and, secondly, where she has only a limited interest with a power of disposing of the rest of the property after her death. In the first instance, the law now, as administered by Courts of Equity, seems to be settled to this extent:—That her separate property will be liable to pay any debts of hers which she has secured by any writing, the Courts holding that giving such a writing as a security for the debt must have a meaning, and that, unless the meaning be to charge her separate estate, there is no meaning whatever in the writing, which, without it, is a mere piece of waste paper. Equity has also held that it is sufficient if it be shewn that the married woman verbally promised that her debts should be paid out of her separate estate. All these cases rest on contract either expressed or implied; but whether the existence of the contract is necessary—whether the separate estate of the married woman would, after her death, be liable to pay the debts due to her general creditors, who could not allege that she had entered into any contract with them on the subject, is a matter of much importance. It has a direct bearing on this case, and it is one on which the decisions are conflicting.

The second case, where property is settled upon a married woman for life, with a power of disposing of it, may be considered under three heads.

First, when the married woman has the power of disposing of the property by deed only; secondly, where [496] she has the power of disposing of it by deed or will; and thirdly, where she has the power of disposing of it by will only. Each of these is, of course, divisible into these two cases, first when she has and secondly when she has not executed the power.

The first is very simple; if she has executed the power by deed, it takes effect

according to the deed, and if she has not executed the power, it goes as in default of appointment.

In the second, where the married woman has power of disposing of the property by deed or will and does not exercise the power, it is also quite clear that her creditors can take nothing, and the property goes as in default of appointment. Her execution of the power by deed, during her lifetime, takes effect of course according to the tenor of the appointment, and lets in no one else; but her execution of the power by will, when she has the power to dispose of it by deed or by will, raises the question now before me, that is, whether the fact of executing such power of appointment lets in her general creditors to require payment out of that property, although they are not directly appointees of the property; that is, where they cannot claim it under the words of the will. Of course, if this were the property of a man, it would become assets for the payment of his general creditors; this has been decided in *Jenney v. Andrews* (6 Mad. 264); and in many other cases. But whether, in the case of a married woman, the appointment lets in her general creditors to be paid out of it, appears to me to depend on exactly the same principle as whether the separate property to which a married [497] woman was entitled absolutely becomes, after her death, assets applicable to the payment of her debts generally. And this appears to me to depend upon the answer to be given to this question, viz., whether the doctrine of the Courts of Equity on this subject is, that when a married woman has separate estate she stands in the same position as if she were a *feme sole* generally. In other words, whether any contract she has entered into is a binding contract, provided it can be satisfied out of her separate estate, though entered into without knowledge of, or upon the faith of, such promise for its fulfilment, or, on the other hand, whether the capacity of acting as a *feme sole*, by a married woman having separate estate, is confined to the property itself and to acts done by her in respect of, and in regard to, the property itself. The difference is most material, and the cases on this subject are not easily to be reconciled in all respects.

After giving the case the best consideration I can, and reading over all the cases I can find on the subject, I have come to the conclusion that the only mode of reconciling the greater mass of the authorities with each other, and, which is still more important, of reconciling them with the fundamental principles regarding married women, is to answer in the affirmative the second branch of the question I have stated, that is, to hold that such separate property is not, after the death of the married woman, liable to pay her general debts, either in the case of having been absolutely entitled to the property, or her having only a life-estate with a power to dispose of it by deed or will and having exercised that power by will.

The principle of the Court of Equity which relates to this subject, in my opinion, is that, as regards her separate estate, a married woman is a *feme sole*, and can [498] act as such; but this is only so far as is consistent with the other principle, viz., that a married woman cannot enter into a contract. These principles are reconciled in this way:—Equity attaches to the separate estate of the married woman a quality incidental to that property, viz., a capacity of being disposed of by her; in other words, it gives her a power of dealing with that property as she may think fit. But the power of disposition is confined to the property, and the property must be the subject-matter that she deals with; and therefore, if she makes a contract, the contract is nothing, unless it has reference directly or indirectly to that property. This is, in my opinion, the extent of the doctrine of equity relating to the separate estate of a married woman. It is on this principle that every bond, promissory note and promise to pay given by a married woman has, for the reason I have already stated, been held to be a charge made by her on her separate estate; that is to say, it is a disposal of so much of her property, the whole of which, if she pleased, she might give away. But if equity goes beyond this, it appears to me that it is laying down this principle; that when a married woman has separate estate, she may bind herself by contract exactly as a *feme sole*; or, in other words, that the possession of separate property takes away the distinction between a *feme covert* and a *feme sole*, and makes them equally able to contract debts. It is clear that this implication of a charge cannot exist in the mere case of simple contract debts without a word said or written to shew that the separate property is to be bound.

It is proper to point out, before going further in the discussion of the authorities, the manner in which the case before me must be governed by the conclusion to be come to in the case where the liability of the separate [499] property of a married woman, in which she had the absolute interest, to pay her general debts, is to be determined. If, in that case, the married woman had given a promissory note, it would have been a charge upon her separate property, for the reason I have already stated, and because, as she had the absolute interest in it, she had a power to charge her separate property after her death in any way she pleased, and might do so by a promissory note; but when she is entitled for life only and can only charge the property after her death by deed or will, the promissory note, being neither a deed nor a will, has no effect in charging the property after her decease. During her life it would be a charge upon her life-estate, because she could so bind her life-estate, but when the life-estate had no longer any existence, the note constitutes no charge on the property at all.

After a careful examination of the authorities on this subject, I do not think that I should have hesitated long in the conclusion to which I have come had it not been for the learned and elaborate judgment of Lord Justice Turner in *Johnson v. Gallagher* (30 L. J. (Chanc.) 298), in which he came to an opposite conclusion. On reading that judgment, it seems to me that he was of opinion that the leading case on this subject was *Hulme v. Tenant* (1 Bro. C. C. 16), and that this decision laid down the proposition broadly in favor of this view. The case itself, as reported in Bro. C. C. (p. 16 (vol. 1)), came twice before the Court, and is so reported as to give a foundation for either view of the case. As I considered the case originally, it appeared to me that the principle as laid down by Lord Thurlow in that case was, that a *feme covert* could act with respect [500] to her separate property as a *feme sole*, but, if without reference to her separate property, she entered into an engagement which would bind a *feme sole*, this would have no effect on her or on her property. The Lord Justice Turner, in his judgment in *Johnson v. Gallagher* (30 L. J. (Chanc.) 309), considered that Lord Thurlow distinctly laid down the opposite doctrine, that is, that the separate estates of married women were liable for their general engagements. When I refer to the report itself, I find that on the first occasion Lord Thurlow uses these words:—"It is not like the case of an infant, who is incapable of acting; but, in respect to a *feme covert*, determined cases seem to go thus far: that the general engagements of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate and rents and profits, when they arise, to the satisfaction of such general engagements." On the second occasion the reporter, Mr. Brown, was not present, he reports it *ex relatione* and very shortly, and so reported it does state the proposition as noticed by Lord Justice Turner. I doubt whether both are reconcilable: but the decree is not to the effect stated in the second part of the Report, for the decree merely affects the rents of the wife's separate estate, which were settled for her separate use without any restraint upon anticipation, and as the wife had joined in one bond and had alone given the other bond, it was clear that she thereby intended to bind her separate estate, and that she did bind it to the extent of her power. Therefore Lord Thurlow's decree was clearly right on the facts, without resorting to the doctrine that the general debts of a *feme sole* could be paid out of her separate estate. I must therefore consider the case of *Hulme v. Tennant* [501] as only an authority for the principle as I have stated it, and that it is in this limited form that it is confirmed by Sir William Grant in *Heatley v. Thomas* (15 Ves. 596); that is, that the engagement need not be in writing, but it must be proved that it was entered into with an intention on her part of making her separate estate liable to discharge that debt, and this intention will be inferred from the mere circumstance of contracting the debt. When I say that the engagement need not be in writing, of course there is this qualification:—that if the separate property of the married woman consist of real estate only, the Statute of Frauds applies as in every other case affecting land; but if she have an absolute interest in personalty settled to her separate use, then a verbal engagement that her personal estate shall be liable to pay the debt will bind it.

On referring to the other case I find two, and I think only two, which support the

doctrine that separate estate of the married woman is liable to pay her general debts, for in *Field v. Sowle* (1 Russ. 82), on which the Lord Justice Turner relies, Sir John Leach treats the debt only as an equitable appointment. But the two cases to which I refer confirm the doctrine laid down by Lord Justice Turner only indirectly; these are *Anon.* (18 Ves. 258), the proper name of which appears to be *Bruere v. Pemberton*, and *Gregory v. Lockyer* (6 Mad. 90). These are cases of the administration of the separate estate of a married woman after her decease, and it appears that the debts were paid *pari passu*, which obviously is inconsistent with the doctrine of paying out of the separate estate only those debts which are charged upon it, as, in that case, they must be paid according to their priority; but I do not find [502] that this point was argued before the Court, and this mode of administration seems to me to have been taken inadvertently. The Lord Justice Turner seems to consider that in the case of *Vaughan v. Vanderstegen* (2 Drew. 165), before Vice-Chancellor Kindersley, the principle he lays down was adopted and acted upon. But I do not so understand it. In *Vaughan v. Vanderstegen* the Vice-Chancellor decided that a married woman, having a life-estate in personalty to her separate use with a general power of appointment by will, does not, by exercising that power, make the property applicable to the payment of her engagements in the nature of debts, viz., of such engagements as would be charges on her separate estate, and in pages 176-7 he uses these words:—

"The appointees resist this claim on several grounds. 1st. They insist that the principle is not applicable even in the case of a man where (as in the present case) the power is not only to be exercised by will and not by deed. No authority whatever is adduced in support of this proposition. It is admitted that if the power authorizes its being executed by deed or will and the donee exercises it by will, the principle will apply. Now it is not the mere possession of the power but the exercise of the power which can ever give occasion to the application of the principle, and if it will be applied at all where the power is exercised by will, I do not see what difference it can make whether the power did or did not authorize the exercise by deed as well as by will." Therefore it is clear, in the view of Vice-Chancellor Kindersley, that this case must be decided exactly the same, whether the married woman had power to dispose of the property by deed or will or by will only, provided she exercised the power by will. I agree with everything the Vice-Chancellor has said in that case with respect to the execution of powers.

[503] The result is that, in my opinion, the rule is that the liability of the separate estate of a married woman is only created by something which operates as a specific charge upon it, and that this charge can be produced only by an intention on the part of the married woman to create such a charge.

I adopt the expression of the Vice-Chancellor Sir John Leach, in *Stuart v. Kirkwall* (3 Madd. 387), viz., "that a *feme covert* being incapable of contract, this Court cannot subject her separate property to general demands, but that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate." The only alteration I should wish to make would be, to substitute another word for the word "appointment," because it is not the execution of a power, it is a disposal *pro tanto* of her separate estate, which she has the power of disposing of.

I do not think it necessary to cite in detail the other cases, all of which I have carefully examined and, as they appear to me, support the view I have stated. I think, as I have stated, that this view is taken by the Vice-Chancellor Kindersley in *Vaughan v. Vanderstegen*, and by me in following that decision, and it appears to me to be the only mode by which the authorities can be reconciled with principle.

It follows, of course, in my opinion, where a married woman has an estate for life only and a power of disposition after her decease, by will only, that this separate property will not, after her decease, be liable to pay her general creditors, and also that in the administration of the separate estate of a married woman after her decease [504] the debts are to be paid in order of priority and not *pari passu*.

I have given to this subject the best attention I have been able, and such is the conclusion to which I have arrived. I regret that the smallness of the amount in question in this case is such as to render the probability of an appeal to the highest tribunal very remote; but I have, on this account, given the subject, if possible, more

consideration than I should otherwise have done. The consequence of my decision is that the promissory note given by Elizabeth Rowcliffe did not constitute any charge on her separate estate, and that the claim of Mr. Bridge in respect of it cannot be allowed. In other respects the decree is settled. (NOTE.—See 12 Jurist, part 2, p. 243.)

[504] COOPER v. MACDONALD. *May 28, 1866.*

Under a power to the survivor to appoint new trustees, the Court held, upon the terms of the power, that surviving trustees, appointed by the Court and not under the power, had no authority to exercise it.

The testator died in 1852, having devised his estate to four trustees, whom he appointed his executors.

The testator's will contained the following power to appoint new trustees :—

He declared that if the trustees thereinbefore named, or either of them, or any trustees or trustee to be appointed under the now stating clause, should die or be unwilling or incompetent to execute the trusts of the said will, it should be lawful for his said wife, in her lifetime, and for the surviving trustees or trustee (if any) after her decease, whether retiring from the office of trustee or not, and if none, for the executors or administrators of the last surviving trustee, to appoint, by [505] any writing under his hands or hand, any fit person or persons to fill the office of the deceased, retiring or incompetent trustee or trustees, but no such appointment should take place after his said wife's decease without the concurrence in writing of the major part of his children who should be then of age and in England; and such trustees or trustee so to be appointed should have, execute and exercise the same trusts, powers or authorities as if they or he had been originally appointed, and the surviving acting trustees or trustee for the time being should be fully competent to execute and exercise all the trusts and powers thereby given until another trustee or other trustees was or were appointed, and the majority of the acting trustees for the time being should bind the minority.

In 1863 one of the trustees had disclaimed, another had died, and a third was desirous of being discharged, and thereupon the Court appointed two new trustees to act with John Macdonald, the last original trustee.

John Macdonald died in 1866, and a petition was now presented to appoint a new trustee in his place.

The widow being dead, the surviving trustees claimed, under the terms of the power, the right to appoint the trustee with the consent of the children.

Mr. Southgate, Mr. Selwyn, Mr. Baggallay, Mr. Beavan, Mr. Everett and Mr. Speed, for different parties.

THE MASTER OF THE ROLLS [Lord Romilly] held that the surviving trustees, having been appointed by the Court and not under the power, had no authority to nominate new trustees, and he directed a reference to appoint new trustees.

[506] PATERSON v. PATERSON. *April 21, 23, 24, 1866.*

[S. C. L. R. 2 Eq. 31; 35 L. J. Ch. 518; 14 L. T. 320; 14 W. R. 601. For subsequent proceedings, see S. C. sub nom. *Bristow v. Booth*, L. R. 5 C. P. 80; 39 L. J. C. P. 47; 21 L. T. 427; 18 W. R. 138.]

A. B., being tenant on the rolls of copyholds held in trust, devised them to C. D., who disclaimed. The Court having made an order, under the Trustee Act, in the absence of the lord of the manor, vesting the copyholds in a new trustee: Held, that the order was regular in form, and that it did not prejudice the right of the lord.

Whether two fines were payable to the lord on the admission of the new trustee *quære*, but *semble* not.

In 1817 Peter Paterson the elder was admitted tenant to some borough English

property held of the manor of Woodford in Essex. He died in 1860, having devised this property to Peter Paterson the younger upon certain trusts.

In 1861 Peter Paterson the younger was admitted tenant of the property, to hold according to the tenor and effect of the will and according to the custom of the manor.

In 1864 Peter Paterson the younger died, having devised his real estate to his widow in fee, and she in 1865 disclaimed the devise of the copyholds.

The parties beneficially interested presented a petition to the Court under the Trustee Act (13 & 14 Vict. c. 60), and, in the absence of the lord of the manor of Woodford, the Court, on the 3d of June 1865, ordered as follows:—"That Abraham Booth be appointed a trustee of the will of Peter Paterson the elder, so far as related to the copyhold and customary hereditaments devised thereby, in substitution for Peter Paterson the younger deceased. And it is ordered that all the estate and interest in these copyhold or customary hereditaments devised by the will of Peter Paterson the elder, which would have vested in Sarah Paterson, if she had accepted the devise of the same hereditaments in the said will of the said Peter Paterson the younger contained, do vest in the said Abraham Booth, upon the [507] trusts by the said will and codicil of the said Peter Paterson the elder declared concerning the same, or such of them as are now subsisting and capable of taking effect."

Upon Mr. Booth's applying to be admitted tenant to the property, the lord of the manor required to be paid two fines.

Mr. Booth declined to pay the two fines, and he obtained from the Court of Queen's Bench a rule against the lord of the manor to shew cause why a *mandamus* should not issue to compel him to admit him. This rule had not yet been argued.

The lord of the manor now presented a petition stating that he was advised that the order of the 3d June 1865 was informal and irregular and was not in accordance with the Trustee Act, 1850, and that no order could, under that Act, be made to vest copyholds in the manner such order purported to do without the consent of the lord of the manor, and that such consent had not been obtained or given, and that such an order must, in all cases, be subject to the usual payments for fines and fees. He also stated that the legal estate in the copyholds was vested in Peter Paterson the son by his admission of the 24th December 1861, and that it made no difference, in regard to the lord of the manor and to the fines and fees, whether he was admitted as trustee or in his own right. That he was advised that although the order of the 3d of June 1865 was informal and irregular, the Court of Queen's Bench could not, on the argument of the rule, entertain the question as to whether it was informal or irregular but would treat it as formal and regular in all respects. That the Petitioner would not be able successfully to resist the issuing of a writ of [508] *mandamus* directing them to admit Mr. Booth, and that they might thereby lose the fines properly payable by Mr. Booth on his admission to the copyholds.

The petition prayed that the order of the 3d of June 1865 might be discharged or reversed, and that, if necessary, the petition upon which it was made might be reheard, and for costs.

Mr. Selwyn and Mr. Nalder, for the lord of the manor. Two fines are payable upon the admission of Booth. The effect of the disclaimer of the devisee was, to vest the copyhold in the heir; and considering the case, first, independently of the Trustee Act (13 & 14 Vict. c. 60), there would be one fine payable on the admission of the heir and one upon his surrender and the admission of Booth. The heir, it is true, might surrender to the lord to the use of another without being admitted, but that "cannot prejudice the lord of his fine due to him by the custom of the manor upon the descent;" *Brown's case* (4 Rep. 22 b.); *Morse v. Faulkner* (1 Anstruther, p. 13); Cruise, Dig. (vol. 1 (4th edit.) p. 292).

But the lord's right is not affected by the Trustee Act (13 & 14 Vict. c. 60). By the 34th section the Court may direct that "lands subject to the trust shall vest in the" new trustee, and the order is to have the same effect as if the previous trustee "had duly executed all proper conveyances" of such land. By the interpretation clause (s. 2), the word "land" includes copyholds, and the word "conveyance" includes "surrenders and other acts which a tenant of customary or copyhold lands can himself perform, preparatory to or in aid of a complete assurance of such customary

or copyhold lands." The 28th section [509] does not apply, for the order was not made with the consent of the lord, and it does not appoint a person to convey. Even if it did apply, it imposes no obligation on the lord to admit except subject to "the usual payments." There have been two devolutions of title, and therefore two fines were payable, which cannot be recovered in an action of debt; Gilbert's Tenures (p. 292).

The order ought to be discharged or varied in form, for while it stands the Court of law will be bound by it.

They also cited Scriven on Copyholds (p. 342 (4th ed.)); *Lord Londesborough v. Foster* (3 Best & Sm. 805); *In re Howard* (3 W. Rep. 605); *In re Flitcroft* (1 Jur. (N. S.) 418); *Cooper v. Jones* (25 L. J. (Chanc.) 240); *Re Howard* (3 W. Rep. 605); *Brown's case* (4 Rep. 22); Gilbert's Tenures (p. 292); Lewin on Trusts (p. 179); 1 Vict. c. 26, s. 3.

Mr. Joshua Williams and Mr. C. Browne, *contra*. The only question that can be now determined is, the regularity of the order of 3d of June 1866. That order is in the usual form and it was properly made *ex parte*, for the lord could not appear or oppose it; *Ayles v. Cox* (17 Beav. 584). The question as to fines is not to be determined here but in a Court of law, and this order cannot affect that question or prejudice the rights of the lord.

The lord cannot insist on payment of the fine as a condition precedent to admission; he is not to be the judge of the amount payable to him but is bound to admit, and he may then enforce payment of the proper [510] fines either by action or by seizure of the land. Here there cannot be said to be two descents, the land descended originally on the heir on trust and subject to the right of the devisee in trust to be admitted, and the Court, under the 32d section, has merely substituted another trustee and vested in him the right of the prior trustee to be admitted.

They cited Watkins on Copyholds (vol. 1, p. 255); *Reg. v. Willesley* (2 Ell. & B. 924); *In re Flitcroft* (1 Jur. (N. S.) 418); *In re Hurst* (Seton on Decrees, 799); *Glass v. Richardson* (2 De G. M. & G. 658).

Mr. Ellis, Mr. Speed and Mr. Pontifex, for other parties beneficially interested.

Mr. Selwyn, in reply. The fines were payable on admission and the lord is justified in refusing to admit until he has been paid.

This order prejudices the lord's right in a Court of law; a Court of law would assume its regularity and that it was made in the presence or with the consent of the lord. The order represents that there is only one devolution of title, whereas there have been two, and it orders the estate, which would have vested in the widow if she had not disclaimed, shall vest in Booth. She was not the trustee in whose place Booth was appointed, but the heir was such trustee. He referred to *Reg. v. Wilson* (3 Best & Sm. 201); *Townson v. Tickell* (3 Barn. & Ald. 31).

[511] April 24. THE MASTER OF THE ROLLS [Lord Romilly]. I have considered this case and the authorities, and I intend to express an opinion, to some extent only, on this matter.

It is an application by the lord of the manor praying that the vesting order made by me on the 3d of June 1865 may be discharged. For that purpose the lord comes before me and points out that he is entitled to double fines.

I am of opinion that the form of that order is quite right, and that it is in the form in which I have made many orders, and that it is the ordinary form in which the appointment of new trustees of copyholds is usually made by this Court. I am also of opinion that the *cestuis que trust* were wisely advised that the lord ought not to be served with their petition, and that it was not a proper occasion to discuss the rights of the lord of the manor upon the hearing of the petition for the appointment of a new trustee. I am also of opinion that that order has not prejudiced the lord in the slightest degree, and that if he is entitled to double fines and bring his action to recover them, the form of my order will not affect his rights.

I have also listened carefully to all the arguments of the Petitioners' counsel, but they have failed to prove that there have been two devolutions of title in this case. No doubt if I were to make two devolutions of title in my order it would be very advantageous to the lord of the manor; but I am not entitled to do it, nor am I aware that the lord is entitled to require a fine to be paid on the substitution of one trustee

for another, provided there has been no admittance. If there has [512] been an admittance of the first trustee, there can be no question but that the lord would be entitled to a fine on the admission of the second.

If this Court appointed a new trustee who died before admittance and the Court then appointed another trustee, I am not aware that that would be a devolution of title which would entitle the lord to a fine, but where there is a distinct devolution of title he is entitled to it.

I am disposed to think that the view taken by Mr. Joshua Williams is the correct one, namely, that the copyhold descends to the heir subject to the right of the devisee to be admitted, and that the Court has substituted another person for such devisee.

I am of opinion that the form of the order is correct, that it was not intended to prejudice, and that it does not prejudice, the rights of the lord if he should bring his action, and I certainly do not intend to prejudice his rights; but I consider this to be the proper form of order and that it would have been wrong to have served the lord with the petition for obtaining it. I have been obliged to hear the points argued in order to consider if the order was right, but the only order I can make on this occasion is, to dismiss this petition with costs.

[513] CLEMENTS v. WELLES. Dec. 13, 1865.

[S. C. L. R. 1 Eq. 200; 35 L. J. Ch. 265; 13 L. T. 548; 14 W. R. 187.
Distinguished, *Evans v. Davis*, 1878, 10 Ch. D. 748.]

The assignee of an under-lease held to have constructive notice of a covenant in restraint of trade contained in an assignment of the original lease, he having precluded himself, by agreement, from examining the prior title.

In 1857 the Plaintiff Clements carried on the business of hairdresser on premises situate in Leicester Street, which he held for a term of twenty-one years.

By an indenture dated the 1st of June 1860 the Plaintiff, Clements, assigned the residue of the term to Welles in consideration of £250. And Welles thereby, for himself, his heirs, executors, administrators and assigns, did covenant, promise and agree, to and with the Plaintiff, his executors, administrators and assigns, that he, Welles, his executors, administrators or assigns, or under-tenants, should not nor would, during the said term, carry on, on the said premises thereby assigned, the trade or business of a hairdresser.

The Plaintiff afterwards carried on his business in Tichbourne Street, which was not far distant from Leicester Street, and the object of the covenant was, to prevent anyone setting up in business as a hairdresser on the premises in Leicester Street, where that business had, for a considerable time, been carried on by the Plaintiff, and thereby availing himself of the Plaintiff's connexion in business.

By an indenture, dated the 6th of June 1860, Welles granted an under-lease of the premises at Leicester Street for seventeen years to Filippo Ghio, who covenanted that he, his executors, administrators and assigns, would not exercise or carry on upon the premises, or permit to be exercised or carried on therein, any art, trade or business whatsoever, except that of a tailor.

[514] By an indenture, dated the 29th of November 1861, Welles assigned all his interest in the premises (subject to the under-lease to Ghio) to Mr. Hall.

Ghio's under-lease became vested in Devick, and, in April 1865, the Defendant Sheat (a hairdresser) agreed to purchase it from Devick; but the agreement for the purchase provided that the Defendant should not require the production of any title anterior to the indenture of the 6th of June 1860, nor any evidence of the lessor's title to grant the same.

Sheat's solicitor required the vendor's solicitor to obtain from the lessor of the lease of the 6th day of June 1860 his consent to his using the premises for the business of a hairdresser and perfumer, and, on the 24th day of April 1865, he received the following permission so to use the premises:—

"Whereas Edmund Lionel Welles, the grantor of the lease of No. 19 Leicester Street, Regent Street, to Phillipo Ghio, dated the 6th day of June 1860 (which lease has since been assigned to Joseph Devick), has since assigned all his interest in the said premises to me, by a certain deed bearing date the 29th day of November 1861: Now therefore I do hereby consent to Joseph Devick, or his under-tenants or assigns, carrying on in and upon the said premises the trade or business of a hairdresser and perfumer.

"W. H. HALL."

"24th day of April 1865."

The under-lease was thereupon assigned by Devick to Sheat, who commenced fitting up the premises for the purpose of carrying on his business of hairdresser and perfumer there.

[515] The Plaintiff filed this bill on the 10th of May 1865 against Welles and Sheat, praying that Welles might specifically perform the covenant in the deed of the 1st of June 1860, against carrying on the trade or business of a hairdresser on the premises in Leicester Street and for damages, and for an injunction to restrain Sheat from carrying on that trade on the same premises.

Mr. Baggallay and Mr. Terrell, for the Plaintiff. The Defendant Sheat, having precluded himself from looking into the title to the property, cannot now say that he is a purchaser without notice; *Robson v. Flight* (34 Beav. 110); *Parker v. Whyte* (1 Hem. & Mel. 167); and see *Peto v. Hammond* (30 Beav. 495); and *Worthington v. Morgan* (16 Sim. 547). He has therefore constructive notice of the covenant, and whether it runs with the land or not it is binding on him with this notice; *Tulk v. Moxhay* (11 Beav. 571, and 2 Phil. 774).

Secondly, Welles, the original covenantor, has properly been made a party, for his liability is such that he could never get rid of it by assignment.

Mr. Jessel and Mr. C. Hall, for Welles, submitted that having parted with all his interest and being in no default, he had improperly been made a party to this suit.

Mr. Southgate and Mr. J. Simmonds, for Sheat, submitted that he had taken every reasonable and practicable precaution in the matter; that the covenant in question was not binding on him because he had no notice or knowledge or means of notice or knowledge thereof until after he had completed his purchase of the [516] premises; that the covenant could not be binding on him even if he had had notice of it, as it only purported to restrain Welles, his executors, administrators or assigns, or under-tenants, and that Sheat occupied the premises as under-tenant of Hall, and in no other character; that the covenant was purely personal and could not run with the land, either at law in the strict sense of the term or in equity with notice, and that Welles, and his executors or administrators, could alone be made liable for any breach of such covenant. They also submitted that the covenant was void, as an unreasonable restraint of trade, and also because it was founded on no sufficient consideration. The cited Smith's Leading Cases (p. 74), and *Flight v. Barton* (3 Myl. & K. 282).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that as against the Defendant Sheat the Plaintiff is entitled to an injunction. If it were not so, and I were to accede to the argument on his behalf, observe what the consequences would be. If a builder, having erected a house, granted a lease of it to another person, and in order that his adjoining house might not be injured, he introduced into the lease a covenant that the lessee would not carry on noxious trades in it, such as that of a soap-boiler, the lessee might grant an under-lease of the property to another person discharged from the covenant, who might carry on any species of trade on the premises, provided that other persons did not look into the title of his lessor, so that the whole covenant would become useless. I am of opinion that this is not so, and that the fact of a person granting an under-lease does not put the under-lessee in any different [517] position from that of the person granting it, and who has distinct and positive notice of and is bound by all the covenants contained in the original lease.

In this case, though it is hard on Sheat, because he knew nothing of the matter and acted perfectly *bonâ fide*, yet when he found that no trade except that of tailor

could be carried on upon the premises, he applied for a licence, which was given, and I am of opinion that he thereby had constructive notice of the covenant prohibiting other trades. He applied to Mr. Hall, knowing that he was the person to apply to for the licence, and the licence refers to the assignment of the 29th of November 1861, which was the assignment from Welles to Hall of the interest in the property which had been assigned to Welles by the Plaintiff, and which assignment contains the covenant in question.

Mr. Sheat, therefore, had constructive notice of this covenant, and he cannot now say he is at liberty to carry on the trade of hairdresser on the premises. I must therefore make a decree for a perpetual injunction against him.

But I must dismiss the bill as against Welles, who is not in default. He has done no act which could mislead anyone; he has granted an under-lease with a covenant on the part of the lessee that no trade shall be carried on upon the premises except that of a tailor. He has since assigned all his interest to another person, who, when applied to for a licence, ought to have refused it. Welles has not broken the covenant, and he does not intend to do so, and there is no case made for bringing him here. I must dismiss the bill against him, with costs.

[518] *In re LONDON, HAMBURG, &C., BANK. EMMERSON'S CASE. TOOMBS' CASE.*
May 2, 24, 1866.

[S. C. L. R. 2 Eq. 231; reversed on appeal, L. R. 1 Ch. 433; 36 L. J. Ch. 177; 14 L. T. 746; 12 Jur. (N. S.) 592; 14 W. R. 905. See *Chapman v. Shepherd*, 1867, L. R. 2 C. P. 238; *Musgrave v. Hart's case*, 1867, L. R. 5 Eq. 204; *Paine v. Hutchinson*, 1868, L. R. 3 Ch. 391; *In re London and Manchester Industrial Association*, 1875, 1 Ch. D. 471; *In re Oriental Bank Corporation*, 1884, 28 Ch. D. 640.]

The first appearance of the advertisement to wind up a company determines the position of all the shareholders, but up to that time it is open to them to deal exactly as if the company were not about to be wound up, provided the transaction be *bonâ fide*.

A. sold shares in a company to B., both being ignorant at the time that a petition had been presented to wind up the company, and upon which an order was subsequently made. Held that, notwithstanding the 84th and 114th sections of "The Companies' Act, 1862," there was a valid and binding sale.

Under the above circumstances, the Master of the Rolls held that he had authority under that Act to deal with the case, and he placed the purchaser on the list in lieu of the vendor, whose name had remained on the register. The Lords Justices concurred in thinking that the Court had such authority, but held that the circumstances were such that the Court could not specifically perform the contract. Practice as to appointing provisional liquidators.

Emmerson's case was as follows:—

On the 6th of April 1865 Mr. Ward sold twenty shares in this company to Mr. Emmerson for £90, and the bought note was dated the 11th of April. The vendor executed the transfer, and the purchaser paid the consideration money, but the transfer had never been registered, in consequence of an order having been made to wind up the company. It was admitted that the sale was perfectly *bonâ fide*, both parties being ignorant, at the time of the sale, that a petition had been presented to wind up the company.

The facts, however, turned out to be that, prior to the contract, and on the 25th of March 1865, a petition had been presented to wind up the company, that the petition had been first advertised in the *Times* and *Gazette* on the 11th of April, and that an order to wind up the company had been made on the 22d of April. The consequence of this was that the transfer of the shares could not be registered, and that the name of Mr. [519] Ward still appeared on the register as holder of these twenty shares. He now applied, by summons, to have his name removed and that of Mr. Emmerson substituted.

Another similar case (*Toombs' case*) came before the Court, and was argued at the same time as *Emmerson's case*. The facts relating to *Toombs' case* were as follows:—

On the 27th March 1865 Colonel Toombs, by his broker, sold twenty shares to Mr. Emmerson for £170. On the 11th of April 1865 the transfer was duly executed by Colonel Toombs and sent to Mr. Emmerson, and in this case the money was duly paid by Mr. Emmerson. The sale was *bonâ fide*, but the transfer of the shares was not registered, solely by reason of the winding up of the company.

The question really was whether the sales on the 6th of April and the 27th of March respectively, being subsequent to the presentation of the petition to wind up, were not void under the 84th and 153d sections of "The Companies Act, 1862."

Mr. Everitt, for Colonel Toombs. The purchaser is, in equity, the real owner of these shares, and he therefore is the contributory in respect of them. This was a *bonâ fide* sale to a solvent person, and by the 153d section it is not void if "the Court otherwise orders." The Court ought, therefore, to exercise its discretion and make such an order. There is a marked difference between this section and the 163d and 164th, which enact that certain dealings "shall be void to all intents," thus leaving no discretion to the Court. The Legislature could never have intended that a secret peti-[520]-tion, if followed by an order to wind up, should invalidate all the *bonâ fide* transactions, between individuals and not affecting the company, subsequent to the presentation of such petition. In this case there had been a previous petition in December for winding up the company, presented by an adverse party, but which he abandoned. This shews the difficulty of holding that the validity of all dealings like the present are to depend on the will of the Petitioner, and on the chance of his prosecuting or abandoning his petition.

Mr. E. R. Turner, for Mr. Ward. A valid *bonâ fide* contract was entered into in ignorance of the existence of any petition to wind up the company. That contract might have been specifically enforced, and the shares and every subsequent dividend belonged, in equity, to the purchaser, and they might have been recovered by him. The party who is entitled to the benefit of the shares is bound to bear the responsibilities. The Court has jurisdiction to determine who is properly the contributory, and in settling the list it must necessarily determine that question.

He referred to *Beckett v. Bilbrough* (8 Hare, 188); *Shaw v. Fisher* (5 De G. M. & G. 596); *Cheale v. Kenward* (3 De G. & J. 27); *Walker v. Bartlett* (18 C. B. Rep. 845); *Costello's case* (2 De G. F. & J. 302).

Mr. Baggallay and Mr. E. K. Karlake, for Mr. Emmerson. This transaction was incomplete, and could only be made perfect by the execution of a transfer and its due registration. It is altogether void under the 153d section, for it is a "transfer of shares," made "between the commencement of the winding up" [the [521] presentation of the petition] and "the order for winding up." The Court is bound by the register; *Birck's case* (2 De G. & Jones, 10); *Whittel's case* (*Ib.* 577); *Lindley on Partnership* (Appendix, 167); *Hoare's case* (2 J. & H. 229); *Bugg's case* (2 Drew. & Sm. 452); and by the 16th clause of the articles of association equities are not to be regarded.

Again, this was a contract entered into under a mutual mistake, which avoids all contracts. It is like the sale of something which, unknown to the parties at the time, does not exist at the date of the contract, as of a horse which is dead at the time, or timber which is severed; *Bradshaw v. Bennett* (5 Car. & Payne, 48). The thing purchased, namely, shares in a going company, did not exist, and the liability in a company under liquidation cannot be substituted for it. Lastly, this is not a proper question to be decided summarily on a summons in Chambers.

Mr. Selwyn and Mr. Roxburgh, for the official liquidator, referred to "The Companies Act, 1862" (25 & 26 Vict. c. 89, ss. 35, 98); *Birmingham v. Sheridan* (33 Beav. 660); *Bosanquet v. Shortridge* (16 Beav. 84, and 5 H. of L. Cas. 207); *Sanderson's case* (3 De G. & Sm. 66).

May 24. THE MASTER OF THE ROLLS [Lord Romilly] (after stating the facts relating to Emmerson's case) proceeded:—It was after the petition had been presented, but before any advertisement had been published to the effect that the petition had been presented, that the [522] contract between Ward and Emmerson was entered into. I have hitherto held, and further consideration of the subject confirms me in

my opinion of the correctness of the decision, that the first appearance of the advertisement determines the position of all the parties, and that it must be treated as a notice to all the world, not that it necessarily informs the persons who are dealing with the shares of what has occurred, but because I am of opinion that every person who sells such shares ought to satisfy himself previously if any such petition has been presented. He is, in my opinion, bound to make the inquiry before he offers them for sale. It may, no doubt, be justly said that this applies to both sides, but it applies in greater force to the vendor, because it behoves him not to sell as valuable that which is worth nothing, and no one can ascertain the veracity of his oath, if he should swear that he had not seen or heard of the advertisement which states the failure of the company. These observations, however, only apply to the present case to this extent:—that, holding as I do that the day on which the advertisement appears binds all parties as they then stood, I am also of opinion that, up to that time, it is open to the parties to deal exactly as if the company was not about to be wound up, assuming, of course, the transaction to be *bond fide* in the strictest sense of the term, and that the vendor has no sort of information relative to the instability of the company which he conceals from the purchaser, for, if he does, the fraud vitiates the contract. In addition to which, I regard also the public and the other shareholders, and no transfer of shares with a view to escape from the consequences of having become a shareholder, whether pecuniary or moral, when the transferor knows of the condition of the company, will be valid.

It is important on this subject to read the sections of [523] the statute (15 & 16 Vict. c. 89) which relate to this subject.

The 84th section is in these words:—"A winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

By the 114th section, any petition for winding up a company "shall constitute a *lis pendens*" within the 2 & 3 Vict. c. 11, "provided the same is duly registered in manner required by such Act concerning suits in equity."

The 153d section enacts, that "where any company is being wound up by the Court or subject to the supervision of the Court, all dispositions of the property, effects and things in action of the company, and every transfer of shares, or alteration in the *status* of the members of the company, made between the commencement of the winding up and the order for winding up, shall, unless the Court shall otherwise order, be void."

By this 153d section a discretion is given to the Court, and I think that the proper mode of exercising it is that which I have already stated. If I adopted the extreme argument, founded on this section that all transactions from the date of the filing of the petition to wind up are void, this consequence might happen:—a petition to wind up a company might be presented and filed and not advertized for many months; no one might be aware of it except the Petitioner, and then, after the lapse of many months or even of a year, it might be advertized and an order to wind up made, and thereupon the *bond fide* transactions during the twelve months would be rendered invalid. This could not be [524] the meaning of the Legislature; it gives a discretion to the Court in order that *bond fide* transactions may be made valid, and none other.

I am therefore of opinion that, in this case, the sale from Ward to Emmerson was a valid and binding sale, and that upon its taking place, so far as concerns the rights and obligations attaching to a shareholder in the company for the twenty shares sold, they cease to attach to Mr. Ward and became attached to Mr. Emmerson. He would be entitled to all dividends and profits, if any, declared and made since that time, and he is also liable to the consequences which belong to shareholders existing at that time.

It follows from what I have stated, that, in my opinion, Mr. Emmerson must be put upon the list of contributories in respect of the twenty shares bought by him from Mr. Ward in April 1865.

TOOMBS' CASE.

THE MASTER OF THE ROLLS. The same observations apply to this as they did to *Emmerson's case*. Colonel Toombs might have enforced specific performance of the contract in this case, as Mr. Ward could in the last.

I abstain from repeating my views, and hold that Mr. Emmerson must be put on the list of contributories in respect of the twenty shares brought by him from Colonel Toombs on the 27th of March 1865.

I am of opinion that the costs of all parties must be paid [525] out of the funds of the company, the matter could not have been settled without a reference to and the decision of the Court.

I think it right to add that since the hearing of this matter an application has been made to me by a solvent company, having shares in another company which was being wound up, to transfer such shares from the name of the first company, in the list of the shareholders, into that of A. B., the first company undertaking that A. B. should pay all the calls. The object was very obvious, it was to conceal the fact that the first company had taken shares in the other company, and I refused to interfere. Truth is the foundation of all equity, and I beg it to be known that if any person comes before me to assist them in misleading others, they must not apply to me for this purpose, for I shall refuse to make an order. The transfer in the case which I have referred to was made prior to the petition to wind up, but when it was known that the failure of the second company was impending. The registration of the transfer was not complete when a provisional liquidator was appointed.

My practice as to appointing an official liquidator is this:—Where there is no opposition to the winding up I appoint a provisional liquidator; but when there is any opposition, I never do so, because I might thereby paralyse all the proceedings of the company, and possibly no order to wind up might afterwards be made. After the appointment of a liquidator no transfer can take place without the sanction of the Court.

NOTE.—Upon appeal, the Lords Justices Sir J. L. Knight Bruce and Sir G. J. Turner thought, with the Master of the Rolls, that under the 153d section the Court had authority to deal with the case; but they thought that, under the circumstances, the Court would not have decreed a specific performance of the contract. The order was consequently discharged. 36 L. J. (Ch.) 177. [L. R. 1 Ch. 433.]

[526] *In re Moss.* June 2, 4, 1866.

[S. C. L. R. 2 Eq. 345; 35 L. J. Ch. 554; 14 L. T. 536; 12 Jur. (N. S.) 557; 14 W. R. 814.]

- A. B. was a partner in a mercantile firm, and was also a partner in a firm of solicitors. The mercantile firm alone were made bankrupt. Held, that their assignees were not entitled to the delivery to them, by the firm of solicitors, of the papers of the mercantile firm, until their lien on them had been satisfied.
- A solicitor was also a partner in a mercantile firm, which became bankrupt. Held, that the bankruptcy of the mercantile firm operated as a discharge of the solicitors' clients, so as to entitle them to the delivery of their papers, upon terms, before the satisfaction of the lien.

Mr. Moss carried on the business of shipbuilder in partnership with Alexander Samuelson and Martin Samuelson.

In 1863 Alexander Samuelson retired, and the shipbuilding business was thenceforward continued by the surviving partners; but in 1865 this firm (Samuelson & Moss) became bankrupt.

Mr. Moss had also, during the same period, carried on the business of solicitor in partnership with Mr. Lowe, and this firm (Moss & Lowe) had been employed as the solicitors of the firm of Samuelson & Moss in certain suits and matters, and there

remained, at the bankruptcy, in their possession and that of their London agents papers and documents belonging to Samuelson & Lowe and to Alexander Samuelson. On these they claimed a lien for costs, and refused to deliver them up.

After the bankruptcy, the assignees of Samuelson & Lowe did not continue to employ Moss & Lowe, who still carried on business as their solicitors, and the assignees and Alexander Samuelson, requiring the papers for the purpose of the pending proceedings, now applied together for an order on Moss & Lowe and their London agents for the delivery up of all books and papers in their possession belonging to the applicants without prejudice to the solicitors' lien, or upon such terms as the Court should direct.

Mr. Selwyn and Mr. Bagshawe, in support of the ap[527]-plication. When a solicitor discharges himself, he must deliver over the papers of matters in progress to his successor, notwithstanding his lien upon them; *Rawlinson v. Moss* (7 Jurist. (N. S.) 1053); *Heslop v. Metcalfe* (3 Myl. & Cr. 183).

In like manner, the client is entitled to the delivery of the papers in a cause where an alteration takes place in a firm of solicitors, as where one retires; *Griffiths v. Griffiths* (2 Hare, 587); for the retainer is given to the partnership firm, and ceases when that firm no longer exists, or is substantially changed in its composition. So where a solicitor refuses to proceed; *Wilson v. Emmett* (19 Beav. 233); or is imprisoned for debt and rendered incapable, by statute, to act as a solicitor, the papers must be handed over; *Scott v. Fleming* (9 Jurist (O. S.), 1085). Here, the bankruptcy of Moss made an entire change in the circumstances of the solicitors, and it dissolved his partnership with Lowe; Lindley on Partnership (p. 187). The fact of their having afterwards continued to carry on the business does not alter the effect of the bankruptcy in regard to clients; and the circumstance that one of the clients was one of the firm of solicitors can make no difference.

Mr. Jessel and Mr. Macnaghten, for Messrs. Moss & Lowe.

Mr. Miller, for the London agents.

THE MASTER OF THE ROLLS [Lord Romilly]. In the first place, I think it a matter of great importance that the lien of solicitors should be preserved, it is the only way in which a solicitor can safely engage in [528] business, and it would frequently happen that, but for such a lien, solicitors would decline to act and the clients would be deprived of the means of obtaining justice. I therefore consider it a matter of great importance for the clients themselves, for the prosecution of their rights in Courts of Justice, that the right of lien of their solicitors should be preserved.

There are two distinct cases arising here; one relating to the shipbuilding firm, consisting of Martin Samuelson and Moss, and the other to the rights of Alexander Samuelson alone. The firm of solicitors acted for both, and the question appears to be a new one.

I hold this to be settled by authority:—That if a firm of solicitors becomes bankrupt, the bankruptcy operates as a discharge by them of their clients. But if the client becomes bankrupt and the assignees do not continue to employ the firm of solicitors, that, on the contrary, is a discharge of the firm of solicitors by their client.

Here a mercantile firm employs a firm consisting of two solicitors; the mercantile firm became bankrupt and their assignees refused to employ the same solicitors. That of itself is a discharge of the solicitors. But this further circumstance occurs:—One of the members of the mercantile firm is also one of the firm of solicitors. The firm of solicitors is perfectly solvent and continues to carry on business as before, but it is the firm who employed them that has become bankrupt. I am not disposed to carry the rule further than it has already been carried, and I think that, this being a case in which the clients have become bankrupt, I cannot apply to it the principles of those cases in which a solicitor has discharged himself, and that I cannot make the order for delivering up of papers belonging to the firm of bankrupts.

[529] The case of Alexander Samuelson is different, one of his solicitors has become bankrupt, and I do not see why the altered firm of solicitors should not deliver up the papers to Alexander Samuelson; but he must enter into his personal undertaking to pay the costs and the bill of costs must be delivered.

The assignees must pay the costs.

[529] REDMAYNE v. FORSTER. May 29, 30, 31, June 5, 1866.

[S. C. L. R. 2 Eq. 467; 35 L. J. Ch. 847; 14 W. R. 825. See *Whetham v. Davey*, 1885, 30 Ch. D. 579, and Partnership Act, 1890, s. 23.]

As to the rights and remedies of a mortgage of a share in a colliery partnership. The mortgagee of a share in a colliery partnership is entitled to a decree for foreclosure, but he is not entitled to any account of the property paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery, but he is entitled to say that no extra burden shall be thrown on his shares which is not in accordance with some contract or agreement in force at the date of the mortgage.

In 1831 a partnership for sixty-four years was formed to work a colliery; this was remodified in 1838 by a deed, and the term extended to sixty-three years. The concern was divided into sixty-four shares, of which Mr. Rawsthorne was entitled to nine.

The partnership deed contained a clause giving a right of pre-emption between the partners of the shares, in the event of a sale of any of them.

In 1845 Rawsthorne mortgaged five of his shares to Redmayne (since deceased), represented in this suit by the Plaintiff.

As to the subsequent complicated dealings, sufficient will be found stated in the judgment of the Court.

The administratrix of Redmayne instituted this suit in November 1860 to realise the mortgage.

[530] Sir R. Palmer (Attorney-General), Mr. Cole and Mr. Wickens, for the Plaintiff, asked for a foreclosure decree with special declarations.

Sir Hugh Cairns, Mr. Baggallay and Mr. Bedwell, for the four present partners, contested the Plaintiff's right to a foreclosure of a share in a partnership which would force the mortgagee into the concern, as a partner, without the consent of the other partners. They opposed the special declarations, and argued that the Plaintiff had only a right to a sale, giving the Defendants the right of pre-emption. *Pole v. Leask* (28 Beav. 562) was referred to.

Mr. Selwyn and Mr. C. T. Simpson, for the representatives of two deceased partners, argued that they had improperly been made parties. They cited *Clegg v. Fishwick* (1 Mac. & Gor. 294); *Brown v. De Tastet* (Jacob, pp. 284, 289 and 295); *Tuckley v. Thompson* (1 John. & H. 126).

Sir R. Palmer, in reply, adverted to the distinction between a mining concern and a mercantile partnership, and referred to *Parker v. Housefield* (2 Myl. & K. 422); *Slade v. Rigg* (3 Hare, 35); *Bentley v. Bates* (4 Y. & Coll. (Exch.) 183).

June 5. THE MASTER OF THE ROLLS [Lord Romilly]. I think it unnecessary to go through the facts of this case for the purpose of explaining the decree I shall make. Shortly they are these:—A company was formed, or rather an old company was remodified, in January [531] 1838, to work some collieries. It was divided into sixty-four shares, of which Colonel Braddyll held thirty-two, Mr. Rawsthorne nine, Mr. Forster seven, Mr. Green five, Mr. Powell five and Mr. Walker six.

In March 1845 Rawsthorne mortgaged five of his shares to Mr. Redmayne, the testator of the Plaintiff, and the remaining four to Mr. Green.

In 1847 Percival Forster was the manager of the mine, and by deed of 16th September 1847 Rawsthorne assigned his nine shares to Percival Forster on certain trusts therein stated, subject, as to five, to the mortgage to Redmayne, and, as to the four, to the mortgage to Green.

Percival Forster did not execute the deed, but, by letter dated in September 1848, he accepted the trusteeship and undertook to hold the shares on the trusts therein specified. In July 1850 Rawsthorne sold his nine shares, subject to the mortgages thereon as aforesaid, to Forster.

In 1846 Colonel Braddyll became insolvent, and by various deeds, which I am not

going to state in detail, forty-four of the sixty-four shares became vested in Forster, seven in Green, seven in Brunell and six in Walker; this was principally accomplished in May 1850.

A very long argument has been addressed to me as to the proper construction to be placed on the four deeds in question, which bear date respectively 9th September 1846, the 13th August 1847, the 18th February 1849, and the 13th May 1850, and the [532] question arises in this way:—All Colonel Braddyll's shares were to be sold, and were sold, though at different dates, as free shares, *i.e.*, as not liable to contribute towards the moneys due for working the mine previously to the date of such sale; but the holders were to be liable to contribute their rateable proportion of what might be required for the future. The purchase-moneys derived from the shares were to be applied in paying the moneys due from the former holders of these shares, in respect of the previous expenses of the colliery. If they had been sold to strangers, it would probably not have been a matter of much difficulty to distinguish the rights of the owners and to take the account between them; but as they were all bought by former proprietors, *viz.*, twenty-eight by Forster, two by Green and two by Brunell, a confusion has arisen as to what shares in the hands of the same holder are liable and for what contributions.

Nothing has been paid or distributed in the way of profits; the bill is brought for foreclosure of the five shares mortgaged; and the only question is the form of account, which I shall direct, and the declarations, if any, which I shall make for the purpose of taking such an account.

The history of the colliery is this:—Every year the coals sold exceeded the cost of mining them, and thus, in a sense, it is said, that every year the colliery made profits; but, on the other hand, every year it became necessary to make expensive works for the purpose of maintaining and extending the colliery, the expense of which not only absorbed all the profits but required considerable additional outlay, the money for which was produced by calls on the shareholders in proportion to the shares held by them. The result of this has been, [533] that though no profits have been divided for many years, the debts owed by the concern are diminished and the concern itself extended and its value improved.

I do not think that the law on this subject is open to much argument; but the facts are in dispute, and it would be worse than useless to make a declaration as to taking accounts upon a supposed state of facts which is neither proved nor admitted. The law, which I think is clear, is this—that the Plaintiff is entitled to payment of what is due to him or to a foreclosure of the shares mortgaged. In taking the account, he is not, in my opinion, entitled to ask for any account of profits paid or distributed to shareholders or partners before he filed his bill, nor is he entitled to contest or call the shareholders to account for their previous management of the colliery. But in ascertaining what the Plaintiff's shares are, which may either become his by foreclosure or may be sold, he is entitled to say that no extra burthen shall be thrown on his shares or on any class of shares to which his belong, which are not so thrown in accordance with some contract or agreement in force at the time when the shares were mortgaged to him. The Plaintiff says this had been done; the Defendants deny it, and I cannot make any declaration on a speculative suggestion of facts.

I cannot make the declarations which the Plaintiff asks for; but what I can do is, to make a decree to the following effect, which will I believe enable me, on further consideration, to do justice to the two parties:—

Take an account of what is due to the Plaintiff for principal, interest and costs. Then make a foreclosure decree against Mr. Forster, and if the amount be not paid by him, giving the other shareholders an oppor-[534]-tunity of taking the shares, but only one time of payment, not successive foreclosures. If the Plaintiff be not paid, take an account of what debts and liabilities the colliery is now liable to pay, and ascertain what proportion of such debts and liabilities, as between the Plaintiff and the other partners, is properly attributable to the five shares mortgaged by Rawsthorne to Redmayne. If the Plaintiff be paid, there will be no question, but if not, then take this account, and on further consideration I can deal with it. I will allow any Defendant to buy out the Plaintiff on application for that purpose. The other Defendants are, in my opinion, necessary parties, because, in substance, you are

paying off a partner who is asking for partnership accounts; the rule about accounts of a mercantile partnership does not apply to the case of a colliery. The Plaintiff is not entitled to have the colliery sold, but he is entitled to be paid or to have a proper account of all the proceeds of the colliery since the bill was filed, and also to know what debts and liabilities are properly attributable to his shares.

[535] POWELL v. BOGGIS. April 19, 20, May 1, 1866.

[S. C. 14 W. R. 670.]

A share of the produce of real and personal estate directed to be sold was given to a *feme sole* for her life, "and after her decease to her *heirs*, as she shall give it by will, and if she die without leaving a will, to her *right heirs* for ever." Held, that "right heirs" was to be construed "executors and administrators."

The word "*heirs*" was used seven times in a will. It was held to mean "executors and administrators" in three places, "next of kin" in two places, "*heir at law*" in one place, and trustees or executors and administrators in the last.

The testator, by his will dated in 1840, gave and bequeathed to his sister Charlotte Cutfield all his freehold and leasehold lands and tenements not thereafter otherwise disposed of, and his shares in the River Arun Navigation for her life, subject to certain legacies. And he directed them to be sold after her decease by his executor, and he proceeded as follows:—

"And the money arising therefrom, viz., from such sale, I will and direct should be divided by my executors into eight equal parts or shares and paid to my nephews and nieces, children of my sister Frances Wardroper, their *heirs* or assigns, viz., two shares or two-eighth equal parts or shares unto my nephew Richard Wardroper, one share to my nephew William Wardroper, except £600, which I will and direct should be deducted from his share, he having had that sum, which sum of £600 I will and direct should be divided equally between his brothers and sisters or their *heirs* respectively."

And as to the other five shares, he directed payment of them to be made to Charlotte Wardroper and to others, and he proceeded in these words:—

"Except my niece Charlotte Wardroper's eighth part or share, which I will and direct may be put out in Government or real security, and the interest or dividends arising therefrom I will and direct shall be paid, by my executor or executors acting on behalf of this my will, unto my niece Charlotte Wardroper half-yearly for and during the term of her natural life, and after her decease, [536] to her *heirs* as she shall give it by will, and if she die without leaving a will, to her *right heirs* for ever."

He then gave his freehold and copyhold lands at Aldingborne to his sister Charlotte Cutfield for her life, subject to certain legacies, and after her death, he gave the same "unto his nephew Cutfield Wardroper and his *heirs* for ever."

The will then contained the following clause:—

"And I do hereby will and direct, that if any of the legatees or persons hereinbefore named that I have left legacies to shall sell and dispose of the legacies left to them in this my will, before the time of payment that they should receive the same, then and in that case, I do exonerate and discharge my *heirs* and executors from the payment of such legacies, as they or either of them the said legatees shall have sold and disposed of before the time they should have received the same."

He gave all his other property to his sister; and after stating that he and Maurice Smelt had been trustees of his mother's will, he directed that his nephews and nieces should have no claim to their legacies, until they had "given a release to the said Maurice Smelt to indemnify him, his *heirs* and assigns from all claims and liabilities under his mother's will."

The testator died in 1842.

Charlotte Cutfield the tenant for life died in 1863.

Two questions arose; the first under the clause of forfeiture, in consequence of

several of the nephews having sold and mortgaged their shares before the death of the tenant for life.

[537] The second question arose upon the share of Charlotte Wardroper, who married and died without having by will disposed of her share, and leaving her husband surviving her.

Mr. Selwyn and Mr. Osler, for the Plaintiff, the trustee.

Mr. Baggallay and Mr. Peck, for the surviving husband and administrator of Charlotte Wardroper. In the gift to Charlotte Wardroper "heirs" may mean "children;" Roper on Legacies (vol. 1, p. 90 (3d edit.)); *Loveday v. Hopkins* (Amb. 273); *Bull v. Comberbach* (25 Beav. 540). If so, then as there are no children, the prior absolute gift to her is not cut down, and her representative is entitled; *Whittell v. Dudin* (2 Jac. & W. 279); *Mayer v. Townsend* (3 Beav. 443); *Campbell v. Brownrigg* (1 Phill. 301); *Stummvoll v. Hales* (34 Beav. 124).

But it may be a word of limitation, and equivalent to "executors and administrators," in which case she took an absolute interest, which passed to her husband.

Mr. Gardner. The gift of these shares is residuary, and the clause of forfeiture has taken effect as to three of them; *Joel v. Mills* (3 Kay & J. 458); *Rochford v. Hackman* (9 Hare, 475); *Churchill v. Marks* (1 Coll. 441); *Kiallmark v. Kiallmark* (26 L. J. (Chanc.) 1). In cases of forfeiture, a gift over is unnecessary in the case of a life-estate. Being shares of a residue, they are undisposed of; *Wainman v. Field* (1 Kay, 507); and pass to the next of kin.

Mr. Roxburgh also contended for a forfeiture.

[538] Mr. Joshua Williams and Mr. Renshaw, for the co-heirs of Charlotte. This is a residuary gift, and three shares have become forfeited and are undisposed of. The heir is therefore entitled; *Brooke v. Brooke* (2 Vern.); *Townsend v. Early* (34 Beav. 23); *In re Payne* (25 Beav. 556); *In re Cat's Trusts* (2 Hem. & M. 46); *Dommett v. Bedford* (3 Vesey, 149); *In re Dickson's Trusts* (1 Sim. (N. S.) 37). A mortgage is a sale *pro tanto*, and creates a forfeiture; *Bennett v. Wyndham* (23 Beav. 521). Secondly, the heir takes as purchaser; *Mounsey v. Blamire* (4 Russ. 384); *De Beauvoir v. De Beauvoir* (3 H. of L. Cas. 554); *Haslewood v. Green* (28 Beav. 1); *Woolcomb v. Woolcomb* (3 Peere Wms. 112).

THE MASTER OF THE ROLLS [Lord Romilly], before calling on the other side, said—I am of opinion there is no forfeiture. It is important to distinguish between these classes of cases. A person may give a limited interest in real or personal estate; he may limit Whiteacre, as a sum of £1000 to A. for life, and direct that, on the happening of a particular event, it shall go over to another person; as, for instance, upon A.'s becoming bankrupt or insolvent, or on any other event. He may direct that the interest shall determine on the happening of a certain event, and that without giving the estate or the money over to another person.

A testator may also give a sum of money or an estate either absolutely or for a limited interest, and require that the donee or person to take that interest shall fulfil a particular condition previously to or upon taking the legacy; as in one case the testator required that his [539] daughter should not be a nun, and the Court required that condition to be fulfilled. If this had been one of this latter class of cases, I should be of opinion that it would not be a case of forfeiture, but a case in which the legatee was not entitled.

But in this latter class of cases the nature of the condition imposed must be considered. The condition must not be repugnant to the gift itself; for instance, a testator cannot leave £1000 to A. B. and say he shall not dispose of it, for such a condition is repugnant to the gift itself, and the law does not allow such a condition to be added to the gift. So also a testator cannot give an estate or legacy to one for life, and say that she shall not dispose of it. But he may do this in another form; he may say the donee shall have it until he does such an act, and direct that the estate, on that act being done, shall pass over to another person. But he cannot couple with a gift a condition that the donee shall not dispose of what is given; for a person cannot have the enjoyment of a thing if he cannot dispose of it. This does not interfere with the power of a testator to limit a property in a particular way; he may give it to A. B. for life, with power to dispose of it by deed or will in favor of particular persons, with a gift over to other persons, if he fail so to dispose of it. If

a man cannot give £1000 and say the donee shall not dispose of it as he pleases, so neither can he give it in reversion and say the donee shall not dispose of it as he pleases. He cannot give £1000 to A. for life, and afterwards to B., and say that B. shall not afterwards dispose of that property.

The only question here is, whether the manner in which this forfeiture clause is framed amounts to this:—That it is a condition which the legatee is to fulfil in [540] order to entitle him to the property, or whether it is a clause of forfeiture imposed on the legatee by the testator to prevent him from disposing of the legacy given to him. I am of opinion that it is nothing more than a forfeiture imposed upon him to prevent him disposing of the legacy given to him.

There can be no question but that the legatees took vested interests, and that an absolute interest was given to them. Then the testator directs that if any of the legatees should sell and dispose of the legacies before the time of payment, then “he exonerates and discharges his heirs and executors from the payment of such legacies.” There is no condition introduced there; it is merely a statement that, having given to them an absolute interest in the eighth of the produce of certain real estate, they are not to dispose of it, and if they attempt to dispose of it, they shall not have it. I am of opinion that this is repugnant to the nature of the gift, and that the testator had not the power of coupling that condition with his gift. He might just as well say, if they sell it or dispose of it or mortgage it, after they get the property, they will be bound to refund it. It is a limitation and condition which the testator cannot impose, to say that the legatee shall not dispose of the property given to him. I am of opinion that the clause of forfeiture is void.

Mr. Jessel and Mr. Druce then argued that the next of kin took the share of Charlotte Wardroper.

They relied on *Gittings v. M'Dermott* (2 Myl. & K. 69); *De Beauvoir v. De Beauvoir* (3 H. of L. Cas. 524); *Mounsey v. Blamire* (4 Russ. 384); *In re [541] Rootes* (1 Drew. & Smale, 228); *Doody v. Higgins* (2 K. & J. 729); *In re Gamboa's Trusts* (4 *Ibid.* 756); *King v. Cleveland* (26 Beav. 26, 166); *Low v. Smith* (25 Law J. (Chanc.) 503).

Mr. C. Hall, Mr. Southgate, Mr. De Gex, Mr. Horton Smith and Mr. Hardy, for parties interested in the other shares.

May 1. THE MASTER OF THE ROLLS. There are two questions which arise under this will, one is a question of forfeiture, which I disposed of at the hearing, the other is the meaning of the word “heirs” in the following bequest: “and if she die without leaving a will to her *right heirs* for ever.” On consideration, I think the word *heirs* means “executors and administrators.”

It is said that the word “heirs,” in a will of personalty, never is a word of limitation; that is quite true, and it is quite true that the rule in *Shelley's case* is a technical rule and applies only to real estate, and the rule that “heir” is never to be so construed is said to be laid down in *Gittings v. M'Dermott* (2 Myl. & K. 69). But I think that there is a misapprehension as to this. There is no question as to the rule in *Shelley's case*, which in no sort of way applies to this case; but, on the other hand, no technical rule applies to the construction of wills, to the effect that the word “heirs” never can be applied by a testator in disposing of personalty, except to designate heir at law or next of kin as the person designated to take. On the contrary, in my opinion, if a testator chooses to use the word “heirs” as “executors and administrators,” he may do so. For instance, if a testator give £1,000 to A. [542] and his heirs, that is not a gift to him and his next of kin or to him for life and afterwards to his next of kin, but A. would take it absolutely. A testator may apply the word “heirs” to designate “executors and administrators” if he think fit, and the only question on this will, taking the whole together, is, whether he has done so.

I find the word “heirs” employed in seven places in this will, and in one only does it mean “heirs” in the technical sense of the word, that is as *heirs at law*. In two places it means “executors and administrators,” in two others it may mean “executors and administrators” or “next of kin,” and in another place it means “next of kin,” and the question is, what it means here.

I proceed to examine the will. In the first place, he gives freehold and leasehold lands and shares in the River Arun Navigation to Charlotte Cutfield for her life, and then they are to be sold and divided into eighths, and paid to his nephews and

nieces, "their *heirs* or assigns." This is the first occasion on which the word "*heirs*" occurs, and it is quite clear that he uses the words "*heirs* or assigns" as equivalent to executors, administrators and assigns. That is, he gives them absolute interests, and that is what the word simply expresses.

He then gives one share to William Wardroper, after deducting £600 from it, which £600 he directs "shall be divided equally between his brothers and sisters or their *heirs* respectively." This is the second occasion where he uses the word "*heirs*," and I am of opinion that it here means next of kin, and that brothers or sisters alive at the testator's death would take absolutely, but if dead, his share would go to his next of kin.

[543] I now come to the bequest in question, which is the one-eighth share of Charlotte Wardroper, which he directs to be invested and the interest paid to her for life, and "after her decease, to her *heirs* as she shall give it by will." Now there is considerable difficulty as to the meaning of this word *heirs* here, and I am not at all clear that he did not intend to give her an absolute power of disposition to anybody she pleased. But I assume that it here bears a limited construction, in which case the *personae designatae* are the next of kin. He proceeds, "and if she die without leaving a will, to her right heirs for ever." The question is, what the words "right heirs" mean in this case. It is insisted that to construe this executors and administrators would be giving her an absolute interest, and would be inconsistent with the life-estate previously given to her. I am of opinion that this is not so, because the testator might have anticipated her marrying, in which case she would have no power to dispose of it by will, unless he gave a power for that purpose. I think this is clear that, in the gift to Charlotte Wardroper, he did not mean the same thing by the words "her heirs" and "her right heirs for ever." The word "*heirs*" does not appear to me to be used in the same sense in both those places, and I think that in the latter case it means the persons who would take it by law, and that it consequently means "executors and administrators."

The testator then gives freeholds and copyholds at Aldingborne to his sister for life, and after her death, to his nephew "and his *heirs* for ever." This is the fifth place in which he uses the same word "*heirs*," and here and here only, the word "*heirs*" is used in its legal and proper signification as "heir at law."

In the forfeiture clause he provides that the legacies [544] shall be forfeited by a sale before payment, and says "then and in that case I do exonerate and discharge my *heirs* and executors from the payment of such legacies." What the word "*heirs*" means here is not very clear; but this is clear, that it is not "*heirs* at law," because they have nothing to do with the payment of legacies, nor does it mean next of kin. It probably means trustees and executors and the persons whose duty it is to discharge the legacies, but it is quite clear that it means the "heir at law" or "next of kin."

The only other place in which he speaks of heirs is that in which he directs an indemnity to be given by his nephews and nieces to Maurice Smelt, "his *heirs* and assigns." The word *heirs*, in the last place, must mean the persons to be indemnified, and is equivalent to "executors and administrators."

So that having used the word seven times, in two places it means "executors or administrators," and in two others it means "next of kin." In one place only it means "heirs at law." In the sixth it either means or is equivalent to executors or else devisees in trust, and the question is, what does it mean in the seventh.

The case of *Gittings v. M'Dermott* (2 Myl. & K. 69) does not touch this, nor does in fact any one of the other cases. The testator has here, and in other places in this will, used the word as equivalent to "executors and administrators," and I think that so to construe it here makes the whole plain and consistent, and I am of opinion that this is the meaning of the testator, and consequently, as Charlotte Wardroper left no will, she took absolutely, and her husband, having taken out administration, is entitled to her share.

[545] PARTRIDGE v. FOSTER (No. 2). May 4, 5, 1866.

A testator bequeathed his leasehold estate to trustees, in trust, out of the rents, to pay an annuity to his daughter, and he proceeded :—" And I hereby direct that if my son Henry, now absent, shall, within five years, make his claim to my trustees, he shall be entitled to and receive one moiety of my said leasehold estate, subject however, together with the other moiety thereof in favor of my son William, to the annuity and trusts before mentioned." Henry made no claim. Held, that William was entitled to a moiety of the leasehold subject to the annuity, and that the gift to him was not contingent on Henry's claiming.

The testator, by his will, bequeathed his leasehold estate and all his property to trustees, upon trust, out of the rents of the leaseholds, to raise an annuity of £60 for his daughter Mary Ann Largar, to continue till the year 1880, unless the same should previously determine, and to be paid to his daughter Mary Ann during her life, and after her decease, the annuity to be held on trust for her children to the year 1880. He then proceeded as follows :—

" But if no such child, at the decease of my said daughter, shall be then living, the trusts hereinbefore declared to cease and determine and be then held upon trust for my son William Foster. And I hereby direct that if my son Henry J. Foster, now absent, shall, within five years, make his claim to my trustees, he shall be entitled to and receive one moiety of my said leasehold estate, subject, however, together with the other moiety thereof in favor of my son William, to the annuity and trusts before mentioned."

He then gave some legacies and the residue of his estate between his son William and his daughter Mary Ann.

The testator died in 1841.

The testator's son Henry had never been heard of since the testator's death.

The testator's daughter had died leaving children.

[546] This suit was instituted by a judgment creditor of William Foster to obtain payment out of a leasehold in which Mr. Foster was interested under the testator's will. The case is reported *ante* (34 Beav. 1) on a demurrer.

The trustees, before notice of the judgment, had, as they alleged, made payments to William exceeding his share of the income, and they claimed to recoup themselves. The cause now came on for hearing.

Mr. Southgate and Mr. Bevir, for the Plaintiffs, as to the right of the judgment creditor to relief, cited *Partridge v. Foster* (34 Beav. 1); *Yescombe v. Landor* (28 Beav. 80); *Godfrey v. Tucker* (33 Beav. 280); *Smith v. Hurst* (1 Coll. 705, and 10 Hare, 30).

They argued that William was now entitled to the entirety of the leaseholds, subject to the existing annuity.

Mr. Roberts, for William Foster, argued that he took the whole, and as to the relief sought, he commented on *Godfrey v. Tucker* (33 Beav. 280), and *Beavan v. Lord Oxford* (6 De G. M. & G. 492, 507).

Mr. Selwyn and Mr. Chapman Barber, for the trustees of the will, claimed a right to recoup themselves, out of the future rents, the over payments they had made to William prior to their receiving notice of the judgment. They cited *Priddy v. Rose* (3 Mer. 86).

Mr. Swanston, for Edward Largar, the son and representative of the testator's daughter, argued that the [547] gift to the son William was contingent on the son Henry making the claim within five years, and that this contingency had not happened. That there was no implied gift to William, and that the leaseholds passed under the residuary clause.

Mr. Southgate, in reply.

May 5. THE MASTER OF THE ROLLS [Lord Romilly]. The question on which I reserved the expression of my opinion yesterday was, what interest in the leaseholds William Foster took under this will. I am of opinion that he took one-half and no more, and that the other half is to be divided equally between himself and his sister.

The absolute interest of the leaseholds is given to trustees, on trust to raise an annuity for the daughter for her life, and after her death for her children, but to continue only until the year 1880.

The testator then says, if my son Henry "shall within five years make his claim to my trustees, he shall be entitled to receive one moiety of my said leasehold estate, subject (together with the other moiety thereof in favor of my son William) to the annuity on the trusts before mentioned." Now leave out the parenthesis and the bequest will then be as follows:—"If my son Henry shall, within five years, make his claim to my trustees, he shall be entitled to receive one moiety of my said leasehold estate, subject, however, to the annuity and the trusts before mentioned."

That would be very plain and simple; but then the [548] parenthesis says "together with the other moiety thereof in favor of my son William." I do not think that this means that the gift to William is to depend upon the contingency of the other son Henry claiming within five years, but that it means, I give the other moiety to my son William, and the testator has not disposed of the first moiety except in the event of his son Henry claiming within five years, which he has not done.

I am of opinion that this moiety falls into the residue, and the result is that William Foster is entitled to three-fourths of the leaseholds, and the representatives of Mary Ann, who is dead, are entitled to the remaining one-fourth.

I think the Plaintiff is entitled to have William's share sold, unless some other arrangement be come to between the parties. I also think that the trustees are entitled to retain out of his share what they have overpaid him.

[549] GARDENER v. ENNOR. HUMBY v. MOODY. *April* 27, 28, 30, 31,
May 25, 1866.

[See *Watson v. Rodwell*, 1878, 7 Ch. D. 631.]

Transactions between solicitor and client, by which the former obtained gifts, and an undue advantage, set aside and the securities ordered to stand good only to the extent of what might be found justly due to the solicitor.

Though this Court holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they obtain from him present relief, and at the same time indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them.

Plaintiffs, though successful in their suit, held disentitled to costs by reason of unfounded charges made by them against the Defendant.

The first of these suits (*Gardener v. Ennor*) was instituted by Gardener and Burridge against Adolphus Ennor, James Humby and others to foreclose a mortgage; the second suit (*Humby v. Moody*) was instituted by Humby and Adolphus Ennor to set aside an agreement, and to make the mortgage stand only as a security for the amount to be found actually due on taking certain accounts. The facts were complicated; but, so far as the point of law is concerned, they may be stated shortly as follows:—

Nicholas Ennor (the father of Adolphus Ennor) was entitled to a lease of some lead mines in St. Cuthbert Wells in Somersetshire, and, in respect of matters connected with this mine, he was engaged in two law suits.

In 1859-60 Nicholas Ennor sold his interest to Adolphus Ennor and James Humby for £12,000, payable by instalments, and the purchasers were also to pay the costs of the two law suits.

In 1861 a company called the West of England Company was formed for working the mine. It was [550] divided into 400 shares of £100 each, of which Adolphus Ennor and Humby took 345.

Thirty shares were allotted to Mr. Burrige, a solicitor, who had been engaged in all these transactions for Nicholas Ennor, and had also, in the sale of the mine to the Plaintiffs, acted for them. The amount which, at this time, Mr. Burrige claimed to be due to him from Nicholas Ennor was £3709, 16s. 10d. The thirty shares allotted to Mr. Burrige were originally intended to be in part payment of this bill of costs, leaving £709, 16s. 10d. unpaid; but it was ultimately agreed that Mr. Burrige was to have them as a gift. The matter was thus stated by him in his answer:—

“And I say that the Plaintiffs afterwards released me from my agreement to treat the shares as taken in part satisfaction of my costs, and agreed to pay me all my costs in full, in addition to giving me the said shares.”

Afterwards, in September 1861, Nicholas Ennor filed a bill in this Court against Adolphus Ennor and Humby (*Ennor v. Humby*) for the specific performance of the contract of purchase by them, and some of the arrangements, made between the Plaintiffs and Mr. Burrige, were entered into in order to satisfy the orders made by the Court in that suit.

The first arrangement between the Plaintiffs Adolphus Ennor and Humby and Mr. Burrige was effected by an agreement dated the 29th January 1862, whereby, in consideration of Burrige not calling for the immediate payment of the several bills of costs due from Nicholas Ennor, Adolphus Ennor and Humby, the latter “agreed to pay the several bills of costs as the same were then made out and delivered or about to be delivered by [551] Mr. Burrige to Nicholas Ennor” under an order of Court. And in consideration of £2000, stated to be procured for them of Gardener to pay Nicholas Ennor, and likewise in consideration of Burrige having procured loans from his bankers of other sums for them, and in consideration of £2000 procured for them of Stuckey’s Banking Company amounting to £871, 7s. 9d., they agreed to repay him the same sums respectively, with interest at £5 per cent. and for the advances with interest. And for the several considerations aforesaid they also agreed to allot and give to William Burrige *twenty free and paid-up shares* in the West of England Lead Smelting Company (Limited), in addition to the five free shares heretofore agreed by them to be allotted and given to him in the company. And they agreed that all deeds and documents in his custody should be pledged to him for the bills of costs and the moneys advanced or to be advanced.

The Plaintiffs Adolphus Ennor and Humby sought to set aside this agreement *in toto*, on the ground that it was a transaction between a solicitor and his clients for the benefit of the solicitor himself.

After this, and in April 1862, Mr. Elford brought two actions against Adolphus Ennor and Humby to recover money advanced, and on this occasion Mr. Burrige acted as their solicitor and adviser.

In this state of things a second agreement was entered into, on the 27th May 1862. It was in the form of an undertaking, whereby Adolphus Ennor and Humby undertook to execute to Burrige a mortgage of the mines for £4500 which he had provided, as well as for the former sums advanced by and through him and future advances. “And for the considerations aforesaid Adolphus Ennor [552] and Humby agreed to transfer forty-five shares to Burrige of £100 each in the said company, in addition to fifty-five shares previously agreed to be given to him, making his, Burrige’s, interest in the concern, with the thirty shares taken by him on the formation of the company, £10,000; and if at any time the company should cease to exist, Burrige’s interest in the concern should continue the same in proportion to the then present share capital in the concern, *videlicet*, one-fourth interest, but subject to the liabilities of the company.”

The bill asked that this undertaking, so far as it related to the forty-five shares in the company agreed to be transferred might be declared void.

On the 1st of November 1862 the Plaintiff mortgaged the mine to secure to Gardener £3500 and to Burrige £3192, 0s. 5d.

The bill prayed that this mortgage might be ordered to stand as a security for so much as should be found due from the Plaintiffs.

Mr. Southgate and Mr. Cutler, for Gardener and Burrige, the Plaintiffs in the first cause, cited *Bozon v. Bolland* (4 Myl. & Cr. 354); *Harris v. Tremenhoe* (15 Ves.

34); *O'Brien v. Lewis* (9 Jur. (N. S.) 321 and 528); *In re Boyle* (5 De G. M. & G. 540).

Mr. Jessel and Mr. Stook, for Humby and Adolphus Ennor, the Plaintiffs in the second suit, cited *Thomson v. Judge* (3 Drew. 306); *Rhodes v. Bate* (1 Law Rep. (Chanc.) Appeal, 252).

Mr. Baggallay and Mr. Pearson, for St. Cuthbert Company.

[553] Mr. Jessel, in reply. *Hatch v. Hatch* (9 Ves. 292); *Cox v. Wells* (1 Cox, 112); *Walmsley v. Booth* (2 Atk. 25); *Newman v. Payne* (2 Ves. jun. 202); *Montesquien v. Sandyes* (18 Ves. 302).

May 25. THE MASTER OF THE ROLLS [Lord Romilly]. The first head of relief asked by the Plaintiffs is to set aside the agreement of the 29th of January 1862, *in toto*, first, on this ground, that it was a transaction between them and their own solicitor solely for the benefit of the solicitor himself; and, secondly, that the representation of facts, on the face of the agreement itself, was erroneous. The first objection is not easily disposed of; it was, I think, a transaction between the Plaintiffs and their own solicitor, in which I cannot say that all the benefit was derived by Mr. BurrIDGE, but it was one which, in my opinion, was very one-sided, and very materially for his advantage. The advantages he obtained were, first, the payment without taxation of his four bills of costs, one of which he had not then even delivered; secondly, the repayment with interest of the sums advanced by him towards carrying on the mine; thirdly, the allotment of twenty-five paid up shares in the company to be formed; fourthly, a lien on all documents in his possession for bills of costs and money advanced or to be advanced by him. These twenty-five shares were to be in addition to the thirty shares allotted him in part payment of the bills of costs.

The consideration for which the Plaintiffs entered into this agreement was, that they owed Mr. BurrIDGE money, that he had procured loans for them and had advanced [554] and would advance money to carry on the mines. In fact, however, the loans (which were all advanced by Stuckey's Banking Company) were received by Mr. BurrIDGE, in part discharge of what was due to himself, as appears from the account set forth by him in his answer. It is also to be observed that the Plaintiffs were not primarily liable to pay either of these bills of costs to Mr. BurrIDGE or the mortgage on the mines to Messrs. Gardener; these were, in fact, due by Nicholas Ennor, and if the purchase by the Plaintiffs had gone off, they would not have been in any way liable to pay these amounts. At the same time, it is obvious that the Plaintiffs were in great want of money to carry on the mines, and, unless by entering into this agreement, little prospect seems to have existed of their obtaining any, and though such future advances formed no part of the specified consideration for the agreement, still the tacit understanding between the parties to it seems to me to have been, that money should be supplied by Mr. BurrIDGE in future, as in fact it was.

That part of the transaction which consists of the gift of the twenty-five shares is also very objectionable. The mines were a valuable property, though probably worth less than the sum at which they were fixed by the nominal amount attributed to the shares in the company, still they were a property of value, and twenty-five shares represented one-sixteenth part of the whole value of the mines.

This agreement is, however, so mixed up with the subsequent transactions that, in my opinion, it is impossible to deal with it as if it were the sole transaction, in which case, probably, I should, upon the Plaintiffs undertaking to pay what was due to Mr. BurrIDGE on his bill of costs, such amount to be allowed in part pay-[555]-ment of the purchase-money due to Nicholas Ennor, order the same to be delivered up to be cancelled.

But the transaction does not rest here, for a second agreement was shortly afterwards, on the 27th of May 1862, entered into between the Plaintiffs and Mr. BurrIDGE [His Lordship stated this agreement and the other transactions.]

This completes the transaction, so far as relates to the forty-five shares in the West of England Company, which company, it is proper to observe, was only another name for the Plaintiffs. I am of opinion, notwithstanding that the evidence and correspondence shew that the Plaintiffs knew perfectly well what they were about, yet that a transaction of this character, founded on the agreement of January 1862,

which I have already commented upon, cannot be allowed to stand as a valid transaction, so far as it regards any aid or assistance from this Court to enforce it.

Four days after this agreement a mortgage of the mines was, on the 31st May 1862, executed by the Plaintiffs to Messrs. Moody & Smith to secure the sum of £2350, which was advanced by them to enable the Plaintiffs to comply with the order of the Court made in the case of *Ennor v. Humby*, directing the payment into Court of a sum of money due from the Plaintiffs in respect of the purchase-money.

On the 1st of November 1862 the mortgage was executed by the Plaintiffs to Mr. BurrIDGE which forms the subject of the second branch of relief prayed for by the Plaintiffs. This mortgage is to this effect. [His Lordship stated it.]

[556] The bill prays that this mortgage may be ordered to stand as a security for so much only as, upon taking the account between the Plaintiffs and Mr. BurrIDGE, shall be found to be due from them, and the bill alleges a great variety of circumstances to shew the fraudulent character of this deed, and how they were surprised into executing it without a due knowledge of its contents. I regret to say that these allegations in the bill, as well as those of a like nature relating to the two previous agreements, which must have been introduced on the instruction of the Plaintiffs, are destitute of foundation. As regards this ground for impeaching the mortgage deed, the bill wholly fails. It also fails as regards Mr. Gardener.

But as regards the £3192, said to be advanced by the Defendant BurrIDGE, the case appears to me to be very different. The balance is made out by his account, to which I have already referred, set forth in his answer. The items in this account do not appear to have been vouched, and several of them are, in my opinion, such that the Plaintiffs are entitled to have the accuracy of them tested. If the matter had stood here, unconnected with the St. Cuthbert Company, it appears to me that the just and equitable mode of dealing with the transactions between the Plaintiffs and Mr. BurrIDGE would be the following:—

Declare the agreement of the 29th January 1862 to be void, and direct it to be delivered up to be cancelled, on the Plaintiffs undertaking that the mortgage of 1st November 1862 shall stand as a security for all sums justly due and owing by them to Mr. BurrIDGE, including therein the sums due from Nicholas Ennor to BurrIDGE in respect of the four bills of costs referred to in the agreement of 29th July 1862, claimed by BurrIDGE against Nicholas Ennor, the amount due [557] thereon respectively to be ascertained by taxation, and the total amounts due thereon to be allowed to the Plaintiffs as part payment of the purchase-money due from them to Nicholas Ennor in the suit of *Ennor v. Humby*, for which purpose all necessary applications are to be made in that suit. And for the purposes aforesaid, all necessary accounts would have to be taken, but, in taking such accounts, I should give a direction, that where a sum of money is entered as paid to the Plaintiffs in the account in the answer, by which the balance of £3192, 0s. 5d. is arrived at, and for which the mortgage was given by them, that this sum shall be treated as having been admitted by the Plaintiffs to have been paid to them and that it should not require to be vouched.

This, it appears to me, is the only foundation on which the Plaintiffs can ask to settle the accounts and the mortgage security and transaction between them and the Defendant BurrIDGE.

[His Lordship adverted to the difficulty arising from Nicholas Ennor not being a party to these suits and the transaction in respect of the St. Cuthbert Company, who had since purchased the mine, and the modification in the decree which these circumstances require.]

Of course it will appear from this that my declaration as to the invalidity of the agreement of 29th January 1862 makes the gift of the forty-five paid-up shares to Mr. BurrIDGE absolutely void, and that he has, in my opinion, no interest in the said company, except in respect of such shares as he has taken or intends to take and to pay up the amount of the calls thereon. It is also evident from my declaration that Mr. BurrIDGE's claim of a lien in respect of the agreement of 29th [558] January 1862 is gone by the mortgage, or rather that it is merged, by reason of the conditions I impose on the Plaintiffs with respect to the claim against them by the transaction in question as it existed under the mortgage of 1st November 1862.

I have also read and considered the evidence as regards the costs to be given on these transactions, and I am of opinion that, as between the Plaintiffs and Mr. BurrIDGE, I can properly give no costs on either side. As regards Mr. BurrIDGE, the comments I have made on the transactions themselves, and the relation in which he stood to the Plaintiffs, make it impossible for me not only to give him any costs, but, if the transactions had been such as the Plaintiffs represented it, or even if they had plainly narrated the real facts, stating the full extent of their own knowledge, it would have been difficult for me to avoid giving them the costs. But, on the other hand, the Plaintiffs have disentitled themselves to receive any costs, by reason of the unfounded charges they have brought against Mr. BurrIDGE, and of which, under ordinary circumstances, they would have had to pay all the costs. And although, unquestionably, this Court holds that it is highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they obtain from him present relief, and, at the same time, indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them.

I propose to make one decree in both causes. As regards Mr. Gardener I see nothing but what is straight-[559]-forward in his conduct, and he must have his costs of both suits.

The Plaintiff must therefore pay the costs of the Defendants, other than Mr. BurrIDGE, in the suit of *Humby v. Moody*; but in the suit of *Gardener v. Ennor*, the Plaintiffs in that suit must pay the costs of the St. Cuthbert Company and of Moody and Smith, the first mortgagees.

[559] CALCRAFT v. THOMPSON. July 14, 1865; Feb. 9, 13, 1866.

[S. C. affirmed on appeal, 15 W. R. 387. See *Ecclesiastical Commissioners of England v. Kind*, 1880, 14 Ch. D. 224; *Cooper v. Straker*, 1888, 40 Ch. D. 27.]

A suit cannot be sustained in this Court for the purpose of recovering damages for an invasion of ancient lights when the injunction is refused.
Deere v. Guest, 1 Myl. & Cr. 516, observed upon.

This suit was instituted to restrain the invasion of ancient lights by mandatory injunction, the alleged obstruction having been completed before the bill was filed.

Mr. Selwyn, Mr. Cleasby and Mr. Bristowe, for the Plaintiff. *Johnson v. Wyatt* (2 De G. J. & S. 18); *Tapling v. Jones* (13 W. R. 617); *Gale v. Abbot* (10 W. R. 748). Mr. Hobhouse and Mr. Humphrey, in the same interest.

Mr. Leigh and Mr. Southgate, *contra*, were stopped by

THE MASTER OF THE ROLLS, who said that, in his opinion, no case was made for an injunction; and as to the question of damages, that he desired the cause to stand over until the Lords Justices had decided, in *Durrell v. Pritchard*, whether a bill will lie for damages when the Court refuses the injunction.

[560] Feb. 9. The Lords Justices having decided the appeal in *Durrell v. Pritchard* (35 L. J. (Chanc.) 223), the case was brought on again.

Mr. Selwyn, Mr. Cleasby and Mr. Bristowe, for the Plaintiff.

Mr. Hobhouse and Mr. Humphrey, for Defendants in the same interest.

Mr. Southgate and Mr. Cotton, for the other Defendants, were stopped by

THE MASTER OF THE ROLLS, who said he would read the evidence again with reference to the observations of the Lords Justices.

Feb. 13. THE MASTER OF THE ROLLS [Lord Romilly]. I have again gone over the evidence, with a view to consider whether the damage in this case is such as amounts to the "very serious damage which would arise from the interference of this Court being withheld," mentioned by Lord Justice Turner in his judgment in *Durrell v. Pritchard* (*Ibid.*), as justifying the interference by way of mandatory injunc-

tion, and I am of opinion that the damage does not, in that view of the case, in my opinion, justify the interference of this Court.

I may, however, without impropriety, observe that I think that his Lordship did not, in commenting upon *Deere v. Guest* (1 Myl. & Cr. 516) sufficiently take notice that the [561] decision, in that case, was not given on an application for an injunction, but that it was on demurrer, and that the Lord Chancellor decided that, in such a case, no relief at all could be given. Having been counsel in that case, I cannot doubt that the Lord Chancellor intended to lay down the principle that if the injury was completed before the bill was filed, the jurisdiction of this Court did not arise, and that the only remedy was at law; and I remember well that Mr. Jacob urged strongly on Mr. Mylne the necessity of reporting the case, as one that laid down a great and broad principle applicable to all cases of mandatory injunction. In future, no doubt, I shall regard that case in the light in which it is estimated by the Lord Justice Turner; but it is to be observed that it is difficult to consider that the injury was slight in that case, where a railway was made, by collusion with the tenant, across the fields of the Plaintiff, shutting up, as will appear by the bill, though not so stated in the report, a road, which was one of the principal modes of access to his farmhouse.

It is true that, in that case, as I was afterwards informed, the Plaintiff in equity obtained at law full compensation for the damage sustained, including in it the costs of the proceedings in equity, besides also judgment in ejectment, which was not executed, because the parties came to terms of compromise.

The case of *Durrell v. Pritchard* confirms me in my view that suits cannot be instituted in this Court for the purpose of recovering damages when the injunction is refused, and accordingly I am of opinion that, in this case, the bill must be dismissed with costs.

NOTE.—Affirmed by the Lord Chancellor 19th January 1867 (15 W. R. 387).

[562] CROSS v. WILKS. Feb. 15, March 6, 1866.

A testator gave his real and personal estate to trustees in trust, but with the consent of his widow, to sell and invest the produce and pay the income therefrom and of his estate unsold to his widow for life, and after her death, he directed that the money to be produced by his estate, "sold before her death," should be in trust for such persons as she should by deed or will appoint. Held, that the widow's power did not extend over real estate not sold during her life.

"Effects" held to be *ejusdem generis*, and not to apply to real estate.

The testator, by his will, gave his real and personal estate to two trustees (Jacksons and Wilks) and their heirs, upon trust, after paying his debts, funeral and testamentary expenses, that they "should, with the consent and approbation in writing of his wife Elizabeth, at such time or times as she and they might think most advantageous, with such consent as aforesaid, during her life, sell and dispose of his said real estate (if any) and also his personal estate and effects (except such part or parts of his household furniture, plate, linen, china and effects, which his wife Elizabeth might select for her own use) not being then already in money or money securities." And to invest the money arising from such sale or sales, together with what other moneys might come to their hands under his will, upon Government or real securities in England. And to pay the dividends and interest of the moneys arising therefrom, and the interest, dividends or yearly proceeds of all other moneys, and the rents, issues and profits of his real estate (if any) until the same should be sold, unto his wife Elizabeth during her life for her separate use. "And from and after the decease of his wife, then he directed that all and every the moneys to arise or be in any way produced by or out of his estate, effects or property whatsoever sold before her decease, and the furniture and other effects retained by her for her use, when sold after her decease, should be upon trust for all or any person or persons she, his said wife Elizabeth, should, by deed or will, direct or appoint, give, devise or

bequeath the same," and in default of such direction, upon trust to [563] pay and divide the same between his brothers. He authorized his wife to select, for her own use, such articles of his household furniture or any other effects which he might die possessed of. And he further directed that no sale or sales of his said estate or effects should be had, without the consent of his said wife being first obtained, until after her decease.

The testator appointed his wife sole executrix, and he died in 1855, seised of some freehold property in Marston and Stand Street.

The widow entered into possession of the real and personal estate and treated the whole as belonging to her absolutely. The trustees never interfered or took any part in the administration. The widow died in 1864, having, by her will, devised the Marston and Stand Street property to the Defendants. The heir at law of the testator, however, contended that the widow had no power to devise these real estates which remained unsold at her death.

Mr. Swanston, for the Plaintiff.

Mr. Surrage, for Defendants in the same interest as the Plaintiff.

Mr. Baggallay and Mr. Field, for the heir at law.

Mr. Swanston, in reply.

March 6. THE MASTER OF THE ROLLS [Lord Romilly]. In this case, the question, which arises on the will of Joseph Jackson, is, whether his wife has, under the words of his will, power to dispose, by will, of such [564] portion of his property as was not sold or converted into money during her lifetime.

That it was the testator's intention that his widow should have the absolute control over all his property I cannot doubt. I think it would be too capricious an intention to attribute to him to suppose that he intended that his wife should have the power of disposing of his property, if converted into money, but no such power, if it remained unconverted, while the power of converting the whole or any part into personalty depended exclusively on her own will and pleasure.

But even so assuming it, I cannot get over the words of the testator *quod voluit non dixit*.

The words of the will are these: "All and every the money to arise or be in any way produced by or out of my estate, effects or property whatever sold before her decease." So far the words are precise, and the power is confined to the money arising from the sales "before her decease." He goes on: "And the furniture and other effects retained by her for her own use, when sold after her decease." Therefore there are two classes of things given, the money produced by the sale "before her decease," and the furniture and effects "retained by her for her own use when sold after her decease." A good deal of argument was founded on the word "effects," which occurs twice; but I am of opinion that it is impossible to apply the word "effects" to real estate. I think that it must be treated as a word *ejusdem generis* with the "furniture," which was retained by her for her own use, and that it cannot extend to real estate. The proof of it is that when the word "effects" is mentioned a second time, he authorizes his wife "to select for her own use such articles of his household furniture [565] or any other effects which he might die possessed of." There it clearly means "effects" of a like nature.

The testator might possibly have thought that if she intended to dispose of it by will, she might have directed the sale, and that, if she wished the property to go to his heir at law, she might withhold her consent. It is, however, impossible to speculate on his intention; but this is certain: she died intending to dispose of it by will, because she has expressly said so. I think however she had no power to do so, and that to have enabled her it must first have been converted.

I must declare that the heir at law is entitled to this real estate.

[565] DUNBALL v. WALTERS. June 15, 24, 1865.

An Act of Parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and the right to light and air is as much property as the land which enjoys this easement on the land of another.

The Plaintiff's property in Shoreditch was separated from the Defendants' by a wall nineteen feet high, and the windows of the Plaintiff's houses, which were alleged to be ancient lights, overlooked the Defendants' premises.

On the 10th of May 1865, the Defendants pulled down the wall with a view to erect a large warehouse on their premises, and notwithstanding the Plaintiff's remonstrances and threats, they had, at the filing of this bill (29th of May 1865), raised the wall to the height of thirty-five and one-third feet.

The bill prayed an injunction to restrain the Defendants from erecting the building of a greater height than it was originally, and from permitting the wall already erected from remaining a greater height than it lately [566] stood, and from erecting on the Defendants' land any wall, &c., of a greater height than the elevation of the old buildings as they lately stood, so as to darken or obscure or impede the light and air theretofore enjoyed by the Plaintiffs.

A motion was now made for an injunction, the Defendants having previously given an undertaking not further to raise the height of the party wall.

Mr. Southgate and Mr. Ince, for the Plaintiff.

Mr. Selwyn and Mr. Renshawe, for the Defendants.

Mr. Southgate, in reply.

Ranken v. Huskisson (4 Sim. 13); *Attorney-General v. Nichol* (16 Ves. 338); and *Isenberg v. East India House Estate Company* (10 Jur. (N. S.) 221), were cited.

June 24. THE MASTER OF THE ROLLS [Sir John Romilly]. This is an application for an injunction. In truth no such injunction as is here prayed is resisted, because before the motion was made the wall was carried to its present height, and it is not intended by the Defendants to raise it higher. The great object of the present motion however is, to prevent the Defendants hereafter, at the hearing of the cause, from urging as a defence to a mandatory injunction to restore the property to the same state in which it was before the wall was begun to be raised, the hardships and expense which would be entailed on the Defendants by the necessity of pulling down a large and extensive warehouse which they are now in the course of completing.

[567] The Plaintiff alleges that, at the time of the filing of the bill and service of the notice of motion, not only the wall was not completed, but the whole might have been restored to its former state for a few pounds. And that even when the undertaking was given by the Defendants, a comparatively small sum would have restored the property to its former state, but that the subsequent works, although they add nothing to the obstruction of light and air already effected, will add much to the expense of restoring the property to its original state. They stated that, when the undertaking was given, the building was a mere carcass, with four bare walls and an unfinished roof, but that by the time this case will be heard, the whole building with floors, windows, doors, plastering and painting will have been completed, and that it is probable that the Defendants, if the Court should be disposed to decide against them on the merits, will, in resisting any decree for a mandatory injunction, have a strong argument *ad misericordiam* to urge against such a proceeding, and to induce the Court to leave the Plaintiffs to compensation in damages, instead of compelling the Defendants to restore the property *statu quo fuit*.

Certainly many of the observations made in some of the later cases in Chancery seem to point in that direction, but I must state my opinion to be, that an Act of Parliament alone can give any person the right of taking the property of another without his consent, although it be intended to be taken only on payment to him of an adequate pecuniary compensation.

I must also state my opinion that the right of obtaining air and light over the

land of a neighbour, which has, by lapse of time, become indefeasible, is as much property as the land itself which enjoys this easement over the land of another.

[568] I have, therefore, though prematurely, because I am rather trenching upon the province of the judge who will have to dispose of this case at the hearing, examined into the evidence to see how the matter stands in this respect. In my opinion it stands very differently from the case of *Durrell v. Pritchard* (34 L. J. (N. S.) Ch. 598, and 35 L. J. (N. S.) Ch. 223), which I disposed of in the early part of this month. There the matter was begun in July, was carried up to its extreme height on 5th September, was completed shortly afterwards, but no bill was filed until the month of February following.

In this instance, the Defendants raise a case of acquiescence on the part of the Plaintiff, which is founded upon this: that the Plaintiff's husband was invited to inspect the plans and to ascertain what the intended elevation was to be. At the same time that this was done, he was also assured that the intended building would not, to any appreciable extent, diminish the access of light and air to the back windows of his house. I think when such a statement is made, and such an inspection offered, it is the duty of the person to whom the offer is made to examine the plans and ascertain what appears upon them. The Plaintiff (assuming what is not the case, the Plaintiff and her husband to be in the same position) did not do so. I have desired these plans to be shewn to me, and I am bound to say that I am unable, from them, to ascertain the height that the wall in question was intended to be raised, and it is my opinion, that to the Plaintiff or to me the inspection of the plan would have shewn nothing. I think, therefore, that no case of acquiescence can be raised on this head.

Upon the rest of the evidence, I am of opinion that [569] the Plaintiff's husband interfered the moment that it appeared that the wall would be raised to such a height as to interfere with the light and air hitherto enjoyed. I am also of opinion, on the evidence, that the wall was not completed when the bill was filed, and when the Plaintiff had notice of the motion. I am also further of opinion that the erection in question does materially interfere with the access of light and air to the windows at the back of the houses of the Plaintiff. It is true that the light and air they enjoyed previously was but small, but I am satisfied that that little has been seriously diminished, and that the contention of the Defendant, that the slight throwing back of the wall at right angles to the wall complained of, whereby a small additional lateral light is admitted, is no compensation for the additional nine feet that the wall complained of has been raised.

Taking all these things into consideration, it would appear to me by no means improbable that at the hearing of the cause, I should make an order for an injunction in a mandatory form, which would have the effect of causing the demolition of a large portion of the building now in course of completion; unless, indeed, the *dictum* of the Court which I have already referred to, should be settled to be, that in such cases compensation alone can be afforded. I state this view, in order, if possible, to enable the parties, if they think proper, to come to some amicable settlement of this matter. But on the present occasion I shall merely continue the Defendants' undertaking, which will in no respect prevent their going on to complete the building internally; but I think it my duty to warn them, that they will not, before me at the hearing of this case, have obtained any advantage over the Plaintiff [570] by reason of their having so done, and I shall make the costs of this motion costs in the cause.

NOTE.—The following are some of the modern authorities on the subject:—*Cooper v. Hubbuck*, 30 Beav. 160; *Cotching v. Basset*, 32 Beav. 101; *Jacomb v. Knight*, 32 L. J. (Chanc.) 601; *Isenberg v. The India House Company*, 33 L. J. (Chanc.) 392; *Johnson v. Wyatt*, 33 L. J. (Chanc.) 394; *Jackson v. Duke of Newcastle*, 33 L. J. (Chanc.) 698; *Yates v. Jack*, 35 L. J. (Chanc.) 539; *Durrell v. Pritchard*, 34 L. J. (Chanc.) 598, and 35 L. J. (Chanc.) 223; *Lawrence v. Austin*, 34 L. J. (Chanc.) 598; *Weatherley v. Ross*, 1 Hem. & M. 349; *Clarke v. Clark*, 35 L. J. (Chanc.) 151; *The Curriers' Company v. Corbett*, 13 L. T. 154; *Stokes v. The City Offices Company*, 13 L. T. 81; *Smith v. Owen*, 35 L. J. (Chanc.) 317; *Robson v. Whittingham*, 35 L. J. 227; *Lyon v. Dellimore*, 14 L. T. 183; *Dent v. Auction Mart Company*, 2 L. Rep. (Eq.) 338; *Webb v. Hunt*, 12

Jur. (N. S.) 558; *Waterlow v. Bacon*, 12 Jur. (N. S.) 614; *Martin v. Headon*, 12 Jur. 387; *Calcraft v. Thompson*, ante, p. 559; *Taplin v. Jones*, 11 H. of L. Cas. 290; *Lanfranchi v. Mackenzie*, 36 L. J. (Chanc.) 518.

[570] BENYON v. FITCH. June 1, 5, 1866.

[See *Earl of Aylesford v. Morris*, 1872, 42 L. Ch. J. 155.]

A mortgage of a reversionary interest stands in the same position as a sale, and therefore to support the transaction the mortgagee must shew that he gave full value.

A mortgage of a reversionary interest, depending on a gentleman dying without issue male, set aside for inadequacy of consideration, although the risk was such as not to be susceptible of accurate valuation.

Loans were made to a young man on his bills at exorbitant interest, and when they were about to become due, he mortgaged his reversionary interest to secure the amount and a further advance. The mortgage being set aside for inadequacy, held that the mortgagee was entitled to the full amount of the bills and not simply to the money actually advanced on them.

On setting aside the sale of a reversion for inadequacy after four years, the purchaser is not entitled to any allowance for the risk he has ran in the meantime.

On setting aside the purchase of a reversion for inadequacy, the deed stands as a security for the money actually due, and if it be not paid, the bill stands dismissed, which is equivalent to a foreclosure.

This bill prayed a declaration that a mortgage of a reversionary interest, dated the 26th of April 1862, ought to stand only as a security for the money actually advanced and interest, and for a reconveyance upon payment of the amount.

The circumstances were these:—The Plaintiff was [571] entitled for his life, in remainder, expectant on the death of David Pugh, and in default of male issue of David Pugh, to certain real and personal estate producing an income of about £4000 a year.

In October 1861 the Plaintiff, then of the age of twenty-six, had lately quitted Oxford and was in pecuniary difficulties. He applied to an intimate acquaintance to assist him in obtaining money. This friend introduced him to Collett, and Collett introduced him to the Defendants Messrs. Fitch.

In November 1861 the Defendants discounted the Plaintiff's bill for £350 at three months, and they retained £50 for interest and £50 nominally for costs.

This bill became due in February 1862, and the Plaintiff was unable to pay it; the Defendants thereupon renewed it for three months, upon the Plaintiff's giving an additional bill for £150, out of which they retained £100 for discount. So that, as between these parties, the Plaintiff received only £300 in respect of his £500 bills; in addition to this the money passed through the hands of Collett, who retained a large sum nominally for his trouble.

The Plaintiff unable to pay these bills and requiring a further advance, agreed to mortgage his reversionary interest to the Plaintiff, and, by an indenture dated the 26th of April 1862, and made between the Plaintiff of the one part, and the Defendants of the other part, the Plaintiff, in consideration of £1000 expressed to be paid to him by the Defendants, conveyed to them the freehold and personal property to which he was entitled for life expectant on the death of David Pugh without issue male, subject to redemption in three events, viz., if the Plaintiff should pay the Defendants £8500 on the death [572] of David Pugh or should, before the 1st of May 1863, pay the Defendants £2000, or should, on or before the 1st of May 1864, and in the lifetime of David Pugh, pay the Defendants £3000.

The Plaintiff covenanted with the Defendants absolutely, and, with reference to the contingency, that he would, on the death of David Pugh (in case the Plaintiff should not have paid the sum of £2000 or £3000 as thereinbefore provided), pay to the Defendants £8500.

The £1000 expressed to be paid to the Plaintiff was paid as follows:—His bills for

£350 and £150 were handed back, £470 were paid and £30 retained for costs, of which £10 were afterwards returned.

At the execution of the mortgage, the Plaintiff also accepted another bill for the Defendants for £350, because the other bill was in the hands of a third party, but this was simply for the accommodation of the Defendants.

In December 1864 the Plaintiff offered to repay the £1000 with £8 per cent. interest and costs and any sums paid for insurance, but which was refused.

On the 6th of February 1865 the Plaintiff instituted this suit for the purpose above stated.

David Pugh was still living.

Evidence was entered into as to value, but the Court held that the Defendants had failed in proving that they had given full consideration for the mortgage.

Mr. Southgate, Mr. Jessel and Mr. Rawlinson, for the [573] Plaintiff. The mortgagee of a reversionary interest is bound to shew that he has given full value; a mortgage in that respect is a sale *pro tanto* of the reversion; *Bromley v. Smith* (26 Beav. 644). Here, the Defendants have totally failed in proving that they gave full value, and the obligation to pay is not upon the happening of the contingency, but is absolute to pay on the death of David Pugh. The mortgage being set aside, the account must be taken from the beginning, and the exorbitant charges on the bills disallowed, as was done in *Croft v. Graham* (2 De G. J. & S. 155). They also referred to *Tottenham v. Emmet* (11 L. T. (N. S.) 404, and 12 L. T. (N. S.) 838).

Mr. Selwyn and Mr. Cotterell, for the Defendants, argued that, having reference to the nature of the contingency, viz., death without issue male, which, even according to the Plaintiff's witnesses, was not susceptible of valuation, the full value had been given. That the bill transactions were now, since the abolition of the usury laws, perfectly valid, and during the panic the Bank of England had advanced money at £10 per cent. Consequently the full amount of the bills must be allowed, even if the mortgage did not stand, and that an allowance ought to be made for the risk and peril the Defendants had run of losing their money, by the happening of the event which would destroy the Plaintiff's interest. They cited *Perfect v. Lane* (30 Beav. 197, and 3 De G. F. & J. 369); *Headen v. Rosher* (McClelland & Younger, p. 100); *Gowland v. De Faria* (17 Ves. 20); *Earl Aldborough v. Trye* (7 Cl. & Fin. 436); *Tynte v. Hodge* (2 Hem. & M. 287).

[574] Mr. Southgate, in reply, referred to *Talbot v. Staniforth* (1 John. & H. 484); *Chestersfield v. Janssen* (1 Atk. 340); *Baker v. Bent* (1 Russ. & M. 224).

June 5. THE MASTER OF THE ROLLS [Lord Romilly]. This is a suit to set aside a mortgage of a contingent reversionary interest to secure a large sum of money. The law upon the subject is clearly settled. It is clear that a mortgage of a reversionary interest stands in exactly the same position as a sale of a reversionary interest, and that if it is complained of, the burthen lies upon the mortgagee or purchaser to prove that he gave a fair and proper price for it. It is also established, that the modern alteration with respect to the usury laws does not affect this question.

The nature of the case is this:—In April 1862 the Plaintiff owed the Defendants £500 upon bills. They had advanced only £350 upon them, but still that was a perfectly legal transaction, and £500 were due upon those bills. Upon the 26th of April 1862 the transaction in question took place. The bills were not all then due; they did not become due until the 11th of May 1862. The Plaintiff then received, nominally, £1000, and he secured £8500 upon the reversionary life interest to which he would become entitled, if his uncle, who was then fifty-six and had not married, should die without male issue. The income of the property was a little more than £4000 a year. In that state of the case, the Plaintiff comes to set this transaction aside, and there [575] is this peculiarity:—He does not come to set it aside after the reversion has fallen in, and after he has taken the chance of the contrary result (which is what most persons do), but he files his bill on the 6th of February 1865, to set aside the transaction, while the risks are still continuing and going on. The Defendants, instead of acceding to this, insist that they are entitled to retain the bargain. I think it has been well observed in these cases, that there are some instances in which it is impossible to ascertain the real value of the reversionary interest, unless it is sold by auction, and I think that this is one of those cases.

I am of opinion that the Defendants fail in proving that they gave the full consideration, and I doubt whether it would have been possible for them to have proved it for the nature of the transaction itself is such as to throw great difficulties in their way. They have examined three actuaries on the subject, for the purpose of shewing what ought to be the *post obit* sum to be paid for £1000 advanced. One of them says it should be £8357 and another £8264, both of which is below the sum contracted to be given by the Plaintiff, the third (Mr. Jellicoe) states that it ought to be £9666; but his mode of stating it takes away the effect of his evidence: it is this:—He considers it to be of that value, provided the policies of insurance which have been made upon the Plaintiff's life should be given up to him at the end of that period, when, of course, they would be of very considerable value. But it is not incumbent on the person who has advanced the money to effect any policy of insurance, and, as far as I understand, no policy whatever has been effected, and I assume that, if any had been, evidence would have been given to that effect. The policy would be to this effect:—A policy that the Plaintiff would survive his uncle for a sufficient number [576] of years to repay the £8000 together with interest from the death of the uncle, and apparently three years would have been amply sufficient for that purpose.

But there is another circumstance in this case, which tells very strongly against the Defendants, which is this; they insist, and the actuaries appear to proceed upon that fact, that they are entitled to be repaid for the risk they have run, and though the risk has turned out to be nothing, that they are entitled to be paid for it. For instance, the transactions took place on the 26th of April 1862, and the offer to repay them was made in December 1864; therefore there were two years and about nine months during which they have run the risk, and they say they ought to be repaid for the risk during that time, because the Plaintiff might have died during that period, and that they ought to be indemnified. Accordingly that seems to have been the way in which the actuaries have made out a calculation about being redeemed at the end of four years.

But then comes this transaction:—The Plaintiff was to receive back all his bills and to be paid the balance of the £1000. He was paid the balance of the £1000, and he had his bills returned to him, but only upon his renewing one and accepting another bill—a bill of £350—for which he ran the risk up to the 14th of May 1863. He therefore ran the risk for about a year upon this bill, that is, if any misfortune had happened to the Defendants, he would have been liable to pay that bill in the hands of a *bond fide* holder. Now that again makes a very serious alteration in the transaction, because it is not merely the giving up of the bills and the payment of the £1000, but it is the payment of the balance of the £1000 and the giving up of the bills at the end of a year and eighteen days, provided in the meantime the [577] persons who have got the purchase-money meet with no accident, such as death, bankruptcy or the like, which would make them unable to pay the bills.

In addition to this, there is also this circumstance in the present case:—In most of these cases, as far as I can find from those I have examined, the covenant is to pay upon the contingency occurring; but here it is absolute, and that the Plaintiff shall pay the £8500 at all events. I doubt whether you can properly take into consideration the fact of whether it is likely that the Plaintiff would or would not be able to pay that sum, if the contingency did not fall in; but if I am to take that into consideration, I see no reason to shew me why he should not be able to pay it.

In that state of circumstances, after the transaction had taken place two years and eight months, the Plaintiff offered before any accident occurred to repay the £1000, which was more than he had received, and £5 per cent. That offer was refused. A month later, he offers to repay the money with £8 per cent., and also any costs that may reasonably have been incurred for the purpose of setting the matter right, and the insurance if any. That also is refused. I think the Defendants were ill advised not to accept that offer, and, in my opinion, that is more than they were entitled to obtain.

I think, after considering the matter very fully, that I cannot make the same decree as was made in one or two of the cases, that is to say, to take an account simply of what was the amount that was actually paid. I think I must treat the sum advanced as £1000, and the bills for £500 as good and *bond fide* bills, having regard,

it is true, to the very large discount which was [578] upon them ; but the repeal of the usury laws makes that valid.

I am of opinion, therefore, that the Defendants are entitled to have the £1000 with £5 per cent. interest, which is the rate which the Court gives on setting aside transactions of this description ; but as they refused that offer and a much larger one before the bill was filed, and make it necessary to file this bill, and have put the parties to this expense, they must pay the costs of the suit.

If the amount be not paid, then the bill will be dismissed, and the Defendants will get a foreclosure ; it is exactly like a bill to redeem. (NOTE.—See the 31 Vict. c. 4.)

[578] DOWN v. ELLIS. Nov. 22, 23, 1865.

The Court will not act on the unsupported testimony of a person in his own favor. Money, which was standing in the funds in the name of a married woman, was claimed after her decease and that of her husband, by her mother, as having been invested by her while separated from her husband in her daughter's name. The only evidence of the trust was the affidavit of the mother and proof that the dividends had been received by her with the assent of the daughter and her husband. The Court held the claim of the mother established.

The Plaintiff, Mrs. Down, married in 1800. The marriage was an unhappy one, and in 1802, and immediately after the birth of their daughter, she and her husband ceased to live together.

She supported herself and made savings, and in January 1831 she invested a sum of £200 in the funds in the name of her daughter. A second transaction of the same description afterwards took place. In 1832 the daughter married the Rev. Thomas Owen, and the stock was transferred into the name of the married daughter. [579] In 1838 three further sums were invested in the funds in the same name. Mr. Down died in 1839, the daughter, Mrs. Owen, died in 1860, and Mr. Owen died in 1862. At the death of the daughter the fund consisted of £600 New £3 per cent. standing in the daughter's name.

It did not appear, independently of the Plaintiff's affidavit, how the dividends had been dealt with down to 1838, but, in that year, Mr. and Mrs. Owen executed a power of attorney enabling John Baker to receive the dividends, which were paid over to the Plaintiff down to the year 1864.

The Defendant, the executor of Mr. Owen, who was also the administrator of Mrs. Owen, then claimed the £6000 stock as part of Mr. Owen's personal estate. In consequence of this claim, the Plaintiff instituted this suit, praying a declaration that the £600 stock belonged to her and to have it transferred to her. She stated as follows :—

“The Plaintiff, while living apart from her husband, acted as housekeeper in various families of distinction, and by that means not only supported herself but saved money. These savings she from time to time invested in the funds, the stock being purchased in the name of her daughter, Georgiana Frances Down, in order to prevent it from the interference of the Plaintiff's husband. Georgiana Frances Down, from the time of her father's desertion of his family until her marriage, supported herself as a governess and even saved money out of her earnings. These savings she invested in her own name, in the same stocks in which the Plaintiff invested her savings, so that the aggregate of the two classes of savings made one fund. The agreement between the Plaintiff and her daughter was, that the dividends of the [580] whole fund should be paid to the Plaintiff *during the joint lives* of the Plaintiff and her daughter, and that *the survivor should take the whole capital*. This was never reduced into writing, but was distinctly agreed between the Plaintiff and her daughter as the difference in age between the Plaintiff and her daughter was some thirty years, the chances were much against the Plaintiff's being the survivor.”

The only evidence of this trust was the affidavit of the Plaintiff, which however was corroborated by the circumstances of her receipt of the dividends, with the assent of the daughter and her husband.

The Defendant said as follows :—"I find no mention amongst the papers of the said testator, of any such arrangement as that alleged by the said bill to have been made with reference to the said sum of £600 £3 per cent. Bank annuities, nor anything to shew that the Plaintiff has or ever had any interest whatever therein, and I am wholly ignorant of the alleged matters upon which the Plaintiff founds her claim to be entitled to the Bank annuities." He insisted on the Statute of Frauds, there being no trust manifested and proved by any writing signed by the testator and his wife.

Mr. Baggallay and Mr. Wickens, for the Plaintiff.

Mr. Speed, *contrà*, for the executor of the husband. There is nothing but the affidavit of the Plaintiff to support her claim to these funds standing in the name of her daughter. There is no independent proof that the money belonged to the mother, or that there was any such agreement as that stated by her. The Court cannot act on such evidence; *Nunn v. Fabian* (35 Law J. (Chanc.) 140). There is [581] no evidence of any declaration of the daughter, or that she did not receive the dividends from 1831 to 1838.

Secondly, the purchase of the stock by a parent in the name of the child was an advancement, which is not rebutted by her receipt of the dividends; *Sidmouth v. Sidmouth* (2 Beav. 456); *Williams v. Williams* (32 Beav. 370); *Grey v. Grey* (2 Swan. 594).

As regards £200, a portion of this fund, it is admitted that it belonged to the daughter.

THE MASTER OF THE ROLLS [Sir John Romilly]. I think the preponderance of the evidence is in favor of the Plaintiff. I quite assent to the statement :—that the Court cannot act on the unsupported testimony of a person in his own favor. Were it otherwise, in the course of the administration of a testator's estate in the Court, any person might come in and say the testator owed me £1000, and substantiate it by his own unsupported oath. It never is my practice to allow a claim upon the unsupported testimony of a claimant (*Grant v. Grant*, 34 Beav. 623), there must be some attendant circumstances, or some facts established *aliunde*, which corroborate the claim, and these may be rebutted by the other side.

The present claim, therefore, is to be established independently of the testimony of the Plaintiff. The facts are these :—In 1831, when the first transaction took place, the Plaintiff, a married woman, who had been [582] abandoned by her husband and was living with her only daughter, makes an investment of £200 in the name of her daughter. It is obvious that it could not safely be made in the name of the mother, as the husband might, in that case, have taken the money, and it is not too much to assume that they believed that he would have done so. The only protection for the mother was to invest it in the name of the daughter. A second transaction of the same description took place, and the year after the daughter married. Now I must assume that the daughter's husband knew that these sums had been invested in his wife's name. It is certain that he knew it six years after, for he executed a power of attorney to enable the bankers to receive the dividends.

I do not know whether it is proved that the dividends were received by the Plaintiff up to that time, but this is proved :—that the husband of the daughter did not touch any money, and this is certain :—that if it had been his wife's money he might have taken it. All this is in favor of the statement in the Plaintiff's affidavit, and it is not probable that a Welch clergyman, who does not appear to have been wealthy, should not touch the money, if really his wife's, but allow it to remain in his wife's name. Six years afterwards, and in 1838, three other sums were invested in the name of the clergyman's wife, and there is distinct evidence that the dividends were paid to the mother, because the clergyman and his wife executed a power of attorney to receive the dividends, which were received under it from 1838 to 1862, and paid to the mother for twenty-four years. All the investments were made during the life of the Plaintiff's husband who died in 1839, and while there was therefore an obvious motive for investing the money in the name of the daughter. If it belonged to the daughter, why did not her husband have [583] it transferred into his own name? The inference is this :—that he considered it trust money invested in the name of his wife. The daughter died in 1860, and he died in 1862, but he took no proceedings

to take possession of the fund, and he allowed the dividends to be received by the Plaintiff during his life. The conclusion is that he considered it the Plaintiff's money. The Plaintiff is now ninety years of age, and it was reasonable to expect that he would be the survivor.

The Plaintiff's story appears truthful, she does not say that all the £600 was her money, which she might have said, but that this sum arose from the joint savings, and that it was agreed that she should have the dividends for life, and that the survivor should take the principal fund.

I think the evidence is sufficient to establish the case of the Plaintiff, and I will make a declaration accordingly.

[584] BEDFORD v. BEDFORD. Feb. 21, 22, 1865.

[See *Allan v. Gott*, 1872, L. R. 7 Ch. 446.]

A testator gave his real and personal estate to trustees, upon trust, out of the rents and produce, or by a sale or other disposition thereof, to raise an annuity for his wife and certain legacies, and to invest the surplus. He directed a sale of his real estate after the death of his wife, and gave his residue to his children. Held, that the personal estate was not primarily charged with the annuity, but that the real and personal estate formed one common fund for its payment.

A testator gave his real and personal estate to trustees, in trust to raise an annuity for his widow and invest the surplus; and after her death he directed a sale of his real estate, and declared that the produce "should be deemed to be part of his personal estate and should be subject to the disposition" of his personal estate, which he gave to his children. Held, that the realty was converted into personalty only for the purposes of the will, and that the heir of the testator was entitled to so much of the real estate as had lapsed by the death of a child in the testator's lifetime.

The testator, by his will dated in 1867, devised and bequeathed his freehold, copyhold and personal estate to trustees, "upon trust, in the first place, by and out of the rents and annual produce, or by sale or other disposition thereof or of any part thereof, or by such other ways and means, as they should think fit and advisable, to raise" an annuity of £240, and to pay it to his wife during her life; and subject thereto to raise and pay several legacies, and to invest the surplus of the rents, issues, profits and produce of his real and personal estate. And he declared that his trustees should stand seised of his real and personal estate (after answering the purposes aforesaid) upon trust, after his wife's decease, to sell his freehold, copyhold and leasehold estates. And he declared his will to be, "that the moneys which should arise by or from such sale or sales aforesaid *should be deemed to be part of his personal estate*, and should be subject to the dispositions thereafter made concerning his residuary personal estate;" and that his trustees "should stand possessed of and interested in all his said residuary personal estate, and the money to arise from the sale of his real estate, and the surplus rents, issues, profits and produce thereof respectively, after the decease of his wife, in trust for his two sons John James Bedford and William Bedford and his daughter Susan Mary" absolutely, in equal shares as tenants in common.

[585] The testator died in 1858, but his son William Bedford had previously died a bachelor.

Two questions arose; first, whether the widow's annuity was payable rateably out of the real and personal estate; and, secondly, whether the one-third share of the produce of the real estate, which lapsed by the death of William Bedford in his father's lifetime, was to be considered as real or personal estate.

Mr. J. H. Palmer and Mr. De Gex, for the Plaintiff (the heir at law), argued that the personal estate was the primary fund to resort to for payment of the widow's annuity, and they distinguished this case from the others, by the circumstance that

the power of sale did not arise until after the death of the widow. On this point *Boughton v. Boughton* (1 H. of L. Cas. 406); *Tench v. Cheese* (6 De G. M. & G. 453) were referred to.

Secondly, that though the testator had declared that the produce of his real estate should be deemed personal estate, still that this conversion was limited to the purposes and for the persons after mentioned in regard to the real estate, and that, to the extent that those purposes failed, the heir at law was entitled. On this point *Taylor v. Taylor* (3 De G. M. & G. 190); *Phillips v. Phillips* (1 Myl. & K. 649); *Ackroyd v. Smithson* (1 Bro. C. C. 503); *Fitch v. Weber* (6 Hare, 145); *Williams v. Williams* (5 Law J. (Chanc.) 84), were cited.

Mr. Selwyn and Mr. Cottrell, *contra*. First, there is a mixed common fund provided for the payment of the annuity, and it is therefore payable rateably out of the [586] real and personal estate. Secondly, there is not only an absolute power of sale, by which the real estate is converted into personalty, but there is a positive declaration that the produce of the sale of the real estate shall be deemed part of the testator's personal estate. There is therefore an absolute conversion, and the lapsed share of the freeholds is divisible as personalty amongst the next of kin and the representatives of the widow.

Mr. C. Browne, Mr. Rudall and Mr. Babington, for other Defendants.

THE MASTER OF THE ROLLS [Sir John Romilly] was of opinion that the real and personal estate and the rents, issues, profits and produce thereof, respectively, were charged with and formed one common fund for the payment of the annuity of £240 to the testator's widow. Secondly, that William Bedford's one-third share of the real and personal estate lapsed by his death in the testator's lifetime, and, so far as the same consisted of real estate, devolved on the Plaintiff as the testator's heir at law, and, so far as the same consisted of personal estate, devolved on the testator's widow and his two surviving children, his next of kin.

[587] WOOD v. WOOD. Feb. 28, 1866.

Under a gift to parents, with a gift by substitution, to their children in the event of such parents dying leaving issue. Held, that to entitle the children, the event must happen prior to the period of distribution.

A testator directed his real estate to be sold on the death of his widow, and the produce paid to his six "children and the issue of such of them as should die leaving issue," equally, "the issue of any such children being respectively entitled amongst them to such share only as their parents would have been entitled to if living." The will contained a gift over, in case of any of the children dying in the testator's "lifetime or after his decease" without leaving a child. Held, that a child who survived the widow became absolutely entitled, and that her children took nothing.

The testator gave his real and personal estate to trustees, in trust, as to his residuary personal estate, for his daughter Elizabeth and his five sons by name, and he directed the trustees, out of the rents of his real estate, to pay an annuity to his widow during her widowhood, and to pay and divide the residue of the rents to and among his six children. And after the decease or second marriage of his widow, he directed a sale of his real estate; and he directed that his trustees should stand possessed of the moneys to arise therefrom "upon trust to pay and divide the same equally amongst his said children and the issue of such of them as should die leaving issue, in equal shares as tenants in common, the issue of any such children being respectively entitled, amongst them, to such share only as their, his or her parent or parents would have been entitled to if living."

"Provided, nevertheless, and he declared that in case any of his said sons or his said daughter should die, *either in his lifetime or after his decease*, without leaving any child or children him or her surviving who should live to attain the age of twenty-one years, then and in such case the right, share and interest of any such sons or of his daughter should go to and be equally divided between and amongst such of his

children and grandchildren as should be alive at the time of the death of the person last entitled to such share or interest *per stirpes* and not *per capita*."

[588] The testator died in 1855, and his widow died in September 1864.

The testator's daughter, Elizabeth, married after his death; she survived the widow and died in November 1864, leaving three children.

The question was whether the share of Elizabeth was, in equity, personal estate and belonged to her husband, or whether it passed to her three children.

Mr. Bagshawe, for the Plaintiff, a son.

Mr. Nalder, for the other sons and the trustees.

Mr. Broderick, for the husband of Elizabeth, argued that this was an absolute vested gift to the six children, subject to a gift to the issue by way of substitution if any child of the testator died before the period of division, i.e., before the death or second marriage of the widow.

Mr. Dunning, for the three children of Elizabeth. This is not a gift to a class but to persons *nominatim*, and in substance it is a gift to the parents for life, with remainder to their children; *Wild's case* (6 Co. Rep. 17); *Audsley v. Horn* (26 Beav. 195, and 1 De G. F. & J. 226); *Parsons v. Coke* (4 Drew. 296). The word "issue" must be construed "children;" *Sibley v. Perry* (7 Ves. 522); and that this is the meaning of the testator is shewn both by his reference to their "parents," and also by the subsequent use of the word "children" in the proviso.

The children can only take in one of three ways, [589] that is, either concurrently, by substitution, or in succession. They cannot take concurrently with their parents, for they are to take the whole share of their respective parents; neither can they take by way of substitution, for the word used by the testator is "and the issue" and not "or the issue" in the alternative. They therefore take by succession, and this is made more clear by the gift to them if their parents "should die leaving issue," which dying is unlimited and cannot be restricted to a death in the widow's lifetime; and besides, the proviso is express, in case any of the testator's children "should die either in his lifetime or after his decease." The gift in case of death without issue cannot be limited, so neither can the terms of the gift in case of death leaving issue; the children, therefore, are entitled on the deaths of their parents, whenever that might happen.

THE MASTER OF THE ROLLS [Lord Romilly]. I think it clear that the testator's six children took this property on the death of the widow. All the trusts arise on her death or second marriage, upon which event the property is to be sold and the produce divided.

It is not given to a class, but to the testator's six children by name, and to the issue of such of them as shall die leaving issue. This case is therefore distinguishable from all those cited, because there the children take something during their mother's life and have an interest vested in them, but here, I think, the issue take nothing except in the event of the parent dying before the period of distribution. The testator obviously means this:—I direct the produce of my real estate, which is to be sold after my wife's death or [590] second marriage, to be divided into six shares, and such of my six children as shall be living at the death or second marriage of my widow shall take their sixth share; but if any be then dead leaving issue, his issue shall take the share which his parent "would have taken if living." On the words of the gift, taken alone, there can be no question, for the whole thing is to be determined, and the sale and division is to take place on the death or second marriage of the widow. The real estate is to be then sold and the produce divided into six shares and "paid to and equally divided" amongst his six children if then living.

No question arises as to any child of the testator predeceasing the widow, and therefore the fund is divisible in sixths between his six children.

The only question which arises upon the subsequent proviso is this:—whether it has cut down the plain absolute gift to the six children to an estate for life.

Unless you limit the effect of this proviso to a death before the period of distribution, it will be in direct opposition to the previous gift. The Court, to make the whole of this will consistent, says that this proviso applies to the event previously mentioned, namely, to the period of distribution, in which case no conflict will arise, and the whole will have a distinct and consistent meaning.

I think this clause provides for the event of anyone of his six children dying without leaving a child before the period of distribution, which was possible, and in that case, his share is given to "such of his children and grandchildren as should be alive at the time of the [591] death of the person last entitled to such share or interest *per stirpes*, and not *per capita*."

This appears to be a distinct and intelligible meaning, and it makes the whole consistent.

I read the gift to the children as taking effect in case of the death of their parents before the period of distribution, and here, the fact of the mother dying after that period and before payment cannot give to the children a right to that to which their mother was already entitled.

I must declare that all the six children of the testator became entitled upon their surviving their mother.

[591] LLEWELLYN v. ROUS. April 19, 24, 1866.

[S. C. L. R. 2 Eq. 27; 12 Jur. (N. S.), 580. See *Heasman v. Pearse*, 1869, L. R. 8 Eq. 602.]

Royalties payable periodically under leases granted subsequent to the Apportionment Act (1834) by a tenant for life under a power contained in a settlement prior to that Act. Held, apportionable.

The Apportionment Act (1834) applies both to the case where the instrument creating the life interest is subsequent to that Act, and also where the lease is subsequent to it.

By a marriage settlement, dated in 1797, certain hereditaments were settled on Capel Hanbury Leigh for life, with remainders over.

The settlement contained a power authorizing Capel Hanbury Leigh to grant leases.

Capel Hanbury Leigh died on the 22d of November 1860. After his death a question arose between his representatives and the persons entitled in remainder, whether the estate of Capel Hanbury Leigh was entitled to an apportioned part of the royalties payable upon certain mining leases granted by him, in pursuance of the power contained in the settlement of 1797, of certain portions of the estates therein comprised.

[592] One of such leases was dated the 25th of May 1837, and one half-year's payment of royalties accrued due under such lease on the 25th of November 1861. Another of such leases was dated the 5th of May 1838, and a quarterly payment of royalties accrued due thereunder on the 29th of November 1861. The third of such leases was dated the 24th of November 1846, and a quarterly payment of royalties accrued due thereunder on the 29th of September 1861. The fourth of such leases was dated the 18th of March 1861, and a half-yearly payment of royalties accrued due thereunder on the 29th of September 1861.

The bill prayed a declaration that the quarterly or half-yearly payments of the royalties which accrued due in the months of September and November 1861, under these several leases, were not apportionable, and that the estate of Capel Hanbury Leigh was not entitled to any portion of such royalties.

This question depended upon the construction of the Apportionment Act, 4 & 5 Will. 4, c. 22 (see 2 Chitty's Stat. (3d edit.) 1137), which came into operation on the 16th of June 1834.

Mr. Selwyn, Mr. Freeling, Mr. Baggallay and Mr. Upton argued that there was no apportionment. They cited *Re Markby* (4 Myl. & Cr. 484); *Knight v. Boughton* (12 Beav. 312); *Fletcher v. Moore* (26 Law J. (Chanc.) 530); *Plummer v. Whiteley* (John. 585); *Lock v. De Burgh* (4 De G. & S. 470); *Wardroper v. Cutfield* (10 Jur. 194).

Mr. Pemberton, for the executors of Capel Hanbury Leigh, argued that these rents were apportionable. He referred to the cases already cited.

[593] Mr. Jessel, Mr. Druce and Mr. Hanson, for other parties.

Mr. Selwyn, in reply, cited *St. Aubyn v. St. Aubyn* (1 Drew. & Sm. 611).

April 24. THE MASTER OF THE ROLLS [Lord Romilly]. It is impossible to get over the decided cases, for there are four of them which determine that this is a case for apportionment. I should have no difficulty in coming to the same conclusion as Vice-Chancellor Wood, that the Act applies to both cases, that is, both where the instrument creating the interest is dated after the statute, and also where the lease which gives rise to the question bears date subsequent to the statute. The Act bears that construction, and the only thing against it is the case of *St. Aubyn v. St. Aubyn* (*Ibid.*), which determines that, unless the payments are periodical, the Act does not apply; and it is inferred from this that if you hold that the statute applies to both cases, viz., where the instrument creating the interest and where the lease is after the Act, it is very difficult to reconcile that construction with holding that the Act applies to royalties, the payment of which depends on the quantity of ores raised. On that I express no opinion. But my opinion is, that the weight of argument is in favor of the statute applying to both cases rather than to one only. This is a remedial Act, intended to give to the estate of a tenant for life, who might die before the rent became due, a fair proportion of it down to his death. It is, therefore, to be construed liberally, and I adopt the decision of the Vice-Chancellor Wood, and the other decisions which hold that the Act applies to both cases.

[594] IBBOTSON v. ELAM. Dec. 19, 22, 1865.

[S. C. L. R. 1 Eq. 188; 12 Jur. (N. S.) 114; 14 W. R. 241. See *Cooper v. Laroche*, 1869, 38 L. J. Ch. 593; *Broune v. Collins*, 1871, L. R. 12 Eq. 593.]

A testator gave his real and personal estate to trustees, in trust to convert and invest, and he directed them to permit his wife to receive, "from his death, the net annual income actually produced by his trust property, howsoever constituted or invested." The testator was in partnership, the accounts of the profits of which were made up in July in each year, and he was entitled, at the end of each year, to be credited with interest on his capital. The testator having died in March, Held that the widow was entitled to the whole profits of the business from the preceding July, but that she was only entitled to an apportioned share of the interest on the testator's capital as from his death.

In January 1860 the testator, William F. Ibbotson (who died in March 1864), executed partnership articles, whereby he and his mother and brother agreed that the prior partnership should continue in force for five years, even though any of them should die before the expiration of that term. The articles provided that, "before any division of the profits, each partner should, at the end of each year, be duly credited with interest at the rate of 5 per cent. upon the amount of the capital he or she possessed in the business at the beginning of such year." The fifth article provided that "the profits of the business should be annually divided, in equal proportions, between the partners." It was also agreed that, on the death of any partner before the expiration of the term, the time to be given for the payment of his capital should be decided by arbitration, and that the goodwill should belong to the survivors.

During the period of the business being carried on stock was taken, and a statement of account and balance-sheet were made out, in respect of the business of the firm, shewing the interests of the partners respectively therein up to the 1st day of July in each year. The last of such stocktakings prior to the death of William F. Ibbotson was made on the 1st day of July 1863, and a balance-sheet was then drawn out which was approved of by all the partners.

William F. Ibbotson died on the 26th day of March 1864, having made his will, dated 1863, whereby he [595] gave his real and personal estate to his executors on the following trusts:—

Upon trust, as soon as conveniently may be after my decease, to sell my real and

leasehold estates by public auction or private contract, and to sell, convert and get in my residuary personal estate, and invest the produce conformably to the clause for the investment of monies hereinafter contained. "And I direct that my trustees shall (subject to any advance that may be made to my children pursuant to the clause in that behalf hereinafter contained) permit my wife, she continuing my widow, to receive, from my death, *the net annual income actually produced by my trust property howsoever constituted or invested.*"

The testator directed "that subject to the preceding directions, his trustees should hold his trust property for the use of his children." And he also directed that all investments of money thereinbefore authorized or directed to be made by his trustees should be made in their names, in the public stocks or funds or in Government securities of the United Kingdom, or upon mortgage or real or leasehold estates, or on the bonds, debenture stock or preference stock of any railway, canal or other company in England incorporated by Act of Parliament, &c. And he empowered his trustees, from time to time, to vary such investments, at their discretion, for any other or others of the kinds prescribed.

The testator died, as before stated, in March 1864, and he left his widow and four children.

After his death, the partnership was continued by his surviving partners and his executor on the footing of the articles.

[596] Stock was taken in the business and a general annual statement thereof was made by the surviving partners and the executor, after the death of the testator, at the usual yearly time, that is, up to the end of June 1864, and a final stocktaking was made on the 31st of December 1864, up to which time a balance-sheet was prepared, shewing the interests of the surviving partners and of the executor in the capital and profits of the business.

All the accounts between the surviving partners and the executor had been duly adjusted and settled, and from such accounts it appeared that a large amount was due to the testator's estate for his share of the profits of the business, from the stock taken on the 1st of July 1863 to the stocktaking on the 1st of July 1864, and also from the stocktaking on the 1st of July 1864 to the 31st of December 1864, and that there was a large amount of interest due to the testator's estate on his capital in the business.

The widow insisted that she was entitled, as income of the testator's residuary estate, to the whole of such profits as had accrued from the 1st of July 1863 to the death of the testator on the 26th of March 1864, and also to such as had accrued from the 26th of March 1864 to the 1st of July 1864, and also to such as had accrued from the last-mentioned day to the 31st of December 1864.

The widow also insisted that she was entitled to all the interest which had accrued on the capital of the testator in the business during the same periods.

The Defendants, on the contrary, insisted that the whole of the profits of the business due to the estate of the [597] testator during the same periods were to be considered as *corpus* of his estate, and that the whole of the interest due on his capital in the business was to be considered as capital, and that the widow was only entitled, as income, to so much as such profits and interest would have produced if invested, on the death of the testator, in the £3 per cent. consols.

To determine these questions a case was submitted for the opinion of the Court on the following questions: 1st. Whether the widow Mrs. Ibbotson was entitled to receive the whole or any and what part of the profits accrued on account of testator's share from the 1st of July 1863 up to the 26th of March 1864, and from the last-mentioned day up to the 1st of July 1864, and from the last-mentioned day up to the 31st of December 1864, or how the executors ought to apply the same sums when received by them. 2d. Whether the widow Mrs. Ibbotson was entitled to receive the whole or any and what part of the interest accrued due on the share of the testator between the same respective periods, or how the executors of the testator ought to apply the same when received by them.

Mr. Selwyn and Mr. Marten, for the widow. Under the terms of the will, the widow is entitled to "the net annual income produced by the trust property however constituted or invested." This carries the whole profits from the 1st of July 1863 to

the 31st of December 1864, and also the interest on the capital from the same period.

There can be no apportionment of the profits of a trade, they can only be ascertained after taking all the [598] accounts, and after determining how much it is prudent to divide. After the death of the testator, the accounts must be taken and the profits ascertained in the same way and at the same time as had previously been done, namely in July in each year. The state of those accounts must constantly vary during the course of each current year; and the actual profits of the year might all have been made subsequent to the death of testator, or before that event. It is, therefore, impossible to ascertain what were the profits either before or after the 26th of March 1864, without taking the whole of the partnership accounts up to that period, which is precluded by the arrangements between the partners. The income from the partnership could only be ascertained in July; until that time it did not exist, and the whole, therefore, belongs to the widow, as in the case of the public funds, where the tenant for life would take the whole half-yearly dividends if the testator died the day before they became due and if the Apportionment Act (4 & 5 Will. 4, c. 22) did not apply.

Secondly, as to the interest on the capital, it must be admitted that the general rule is, that interest accrues *de die in diem*; but here the rule is controlled by the terms of the articles. They provide that, before the division of the profits, each partner shall, at the end of each year, be credited with interest; therefore it does not accrue from time to time, but at the end of each year when credit is to be given in the accounts.

They cited *Bates v. Mackinley* (31 Beav. 280); *Maclaren v. Stainton* (3 De G. F. & J. 202); *Howe v. Lord Dartmouth* (7 Ves. 137).

[599] Mr. Hobhouse and Mr. T. Terrell, for the Defendants. The widow is only entitled to the income of the testator's "trust property," and every asset became, at his death, trust property and as if the partnership had been wound up on that day. The testator in the first place directs positively that his property shall be converted and invested as soon as conveniently might be after his decease, and this direction governs the subsequent trust in favor of the widow. The testator, in the gift to his widow, is dealing with the converted invested property as his "trust property;" *Howe v. Lord Dartmouth* (7 Ves. 137); *Morgan v. Morgan* (13 Beav. 441). It is argued that there was no ascertainment of the profits at the death of the testator, and that therefore none existed; but the cases cited related to public companies, and there is a marked distinction between public companies and a private partnership. Some profits must have been made in the lifetime of the testator, and which now form part of the *corpus* of his estate. The difficulty in ascertaining them cannot affect the construction of the will, or alter the rights of the parties; the Court in many cases of difficulty strikes the average. If it were the case of an individual who had been accustomed to make up his books at fixed periods, and then to ascertain the yearly profits of his business, there could be no doubt that the profits down to the day of his death would constitute *corpus*, and not income; if so, the existence of a partnership cannot alter the construction of the will.

As to the interest, the rule is admitted, and the mere fact of its being credited or paid at the end of the year cannot alter the rule, for such is usually the case. But this and the other point are governed by the decision of Vice-Chancellor Wood in *Johnston v. Moore* (27 Law J. (Chanc.) 453).

[600] Mr. Selwyn, in reply. The testator must have been cognizant that by the partnership articles the capital was to be retained after his death. The case of *Johnston v. Moore*, though adverse to the widow on the question of interest, is in her favor as to the profits.

Dec. 22. THE MASTER OF THE ROLLS [Sir John Romilly]. The testator, in this case, was engaged in partnership with his mother and brother, and, by the terms of the partnership articles, the profits were to be ascertained and divided in July in each year, and in every event the capital was to remain in the business until December 1864. The testator died on the 26th of March 1864, and the first question is, whether the widow is entitled to all the profits of the business made subsequent to July 1863, or whether something in the nature of an apportionment of the profits is

to be made, or the amount of profits down to the death of the testator in some way ascertained.

The second question is, whether the whole interest of the capital of the testator from the last yearly settlement belongs to the widow, or whether a rest is to be made at the death of the testator, and the interest from that time only given to the widow. These questions depend in some measure on the articles and in some measure on the will taken in connexion with them.

The first argument is that the clause for investment precedes the bequest to the widow; but I am of opinion that cannot be so, because his wife is to receive the net annual income actually produced "from my death," and her right accrues on the moment of his death. That being so, the question arises, whether an apportionment [601] or rest can be made on the death of the testator in order to give her those profits only which accrued after the testator's death and down to July 1864. I am of opinion that no such apportionment can be made, and that she is entitled to all the profits made since the 1st of July in the last preceding year. In the first place, it is to be observed that by the partnership articles all the profits are to be ascertained on the 1st of July, and the business has been carried on upon that principle and the value of the stock taken at that time. But the value of the stock and the amount of the profits might be materially altered if taken at any other time. The testator died in March, and it might occur that various sums due to the concern, and which were then considered good debts, might before July turn out bad, or the opposite might happen and supposed bad debts might, in the interval, become good. Again, they might have a large stock-in-trade, which, from accidental circumstances, either political or domestic, might be seriously depreciated in the value in the interval. But the value was to be fixed in July, and if fixed in March it might be and would probably be very different from that on the 1st of July. If I held the widow entitled to the profits only from the testator's death, I should either decide that the testator's estate was entitled to some share of the profits in March 1864, which, in one event, might be considerably more than one-third of the profits realized prior to July, in which case the testator's estate would be taking more than it was entitled to, or, on the other hand, which might be much less than the actual profits, and the testator's estate would then take less than it was entitled to.

It is obvious that if the matter is to be determined according to the partnership articles, the profits could [602] not be ascertained until July, and, until that time, it cannot be ascertained what profits have accrued.

I think the profits must be treated as at the time when they were ascertained, and that the profits from July 1863 is part of the income to which the widow is entitled under the words of the will.

I have come to an opposite conclusion on the question of interest. The testator's capital was fixed, and the amount ascertained on the 1st of July 1863, and the testator was entitled to interest on that sum at 5 per cent. It is obvious that the interest accrued *de die in diem*, and was an ascertained amount: it did not depend on whether the profits were large or small, or on the debts or stock being ascertained. The amount of interest due at his death belongs to his estate, and the widow is only entitled to the interest which accrued subsequent to the death of the testator.

I concur in *Johnston v. Moore* (27 Law J. (Chanc.) 453) before Vice-Chancellor Wood. The case is a little obscure as to the profits, but it appears to me that the decision depended on the instruments themselves.

I must, therefore, declare that the widow is entitled to the whole of the profits from the 1st of July 1863, but only to interest from the death of the testator.

[603] BOSTOCK v. FLOYER. Nov. 21, 1865.

[S. C. L. R. 1 Eq. 26; 35 L. J. Ch. 23; 13 L. T. 489; 11 Jur. (N. S.) 962; 14 W. R. 120.
See *In re Speight*, 1882-83, 22 Ch. D. 727; 9 App. Cas. 5.]

A trustee employed a solicitor to invest trust money. The solicitor, who was steward of the manor, sent to the trustee some title-deeds and a copy of a surrender of

copyholds to secure the trust money, but misapplying the trust money; the pretended surrender had really no existence. Held, that the trustee is liable to make good the loss.

In 1833 a sum of money was placed by Lord H. in the hands of Mr. Wilmot, in trust for the Plaintiff Mrs. Bostock; but no instrument appears to have been executed defining the trusts, or regulating the investment of the money.

The sum of £400, part of the trust money, was invested by Mr. Wilmot, and it was repaid in 1853. Mr. Wilmot thereupon employed a Mr. Conyers, a solicitor in Yorkshire of large practice and high repute, holding the office of coroner and several other high county offices, to procure another investment for the £400.

Conyers obtained possession of the £400 and represented that he had laid it out on the mortgage of a copyhold property belonging to one John Patrick Stephenson, and he forwarded to Mr. Wilmot a parcel of deeds which were found amongst Mr. Wilmot's documents after his decease. The statement in the answer of his executor, in regard to this, was as follows:—

Amongst the testator's papers was found a parcel of deeds, wrapped up in brown paper, and containing the following endorsement, that is to say:—"Mortgage of copyhold lands at Thearne, in the county of York, belonging to Mr. J. P. Stephenson for securing £400 and interest, dated 7th January 1853." This endorsement was in the handwriting of Conyers. This parcel contained, first, a grant of tithes, dated 10th December 1812, from Sir James Graham and others to Mr. John Stephenson and his trustees; secondly, a deed of covenant, dated the 23d day of August 1813, entered into by one [604] Robert Ramsey with one John Stephenson, on the occasion of the purchase by John Stephenson from Robert Ramsey of Fish Hole Close, containing five acres, and a close of arable land in Thearne, North Carr, containing four acres one rood and sixteen perches (being copyholds of the manor of Beverley Water Towns); thirdly, a copy signed by Conyers, as stewards of the manor of Beverley Water Towns, of the admittance on the 20th May 1840, of John Patrick Stephenson, as only son and heir at law of John Stephenson, to the said closes; and fourthly, a copy of surrender, dated 20th April 1853, duly stamped and signed by Conyers, as such steward, whereby John Patrick Stephenson surrendered to the use of Richard Coke Wilmot, his heirs and assigns, the said two closes, subject to a condition for making void the said surrender on payment by John Patrick Stephenson, his heirs, executors or administrators unto Richard Coke Wilmot, his executors, administrators or assigns of the sum of £400 and interest on the 7th day of July next ensuing the date of the said surrender.

Interest was duly paid by Conyers to Wilmot and by him to the Plaintiff from 1853 down to Wilmot's death in 1856, and the interest continued to be paid by Wilmot's executors or Conyers from 1856 down to July 1863.

In December 1863 Conyers died, and in the following year (1864) it was discovered that the alleged mortgage from J. P. Stephenson to Mr. Wilmot was a mere fiction, that the copy surrender to Wilmot had been signed by Conyers, the steward of the manor, but that no such surrender ever existed. It further appeared that the property had been sold by J. P. Stephenson to Conyers in 1856, and that he had mortgaged it to third parties.

Under these circumstances, Mrs. Bostock instituted [605] this suit in 1864, to make Floyer, the executor of Wilmot, liable for the £400 and interest.

The Defendant, by his answer, said that Conyers was a solicitor in good repute, and, according to his reputation and standing in his own neighbourhood and in every way, fit to be intrusted by Wilmot in the laying out of the sum of £400. The Defendant submitted that no vigilance on the part of Wilmot, short of his employing a second solicitor to investigate the validity of the security effected by Conyers and to check his acts, could have led to the detection of the fraud practised by Conyers; that Wilmot could not be considered as having been guilty of any breach of duty as trustee, and that the loss (if any), which might result from the fraud of Conyers, must fall on the *cestui que trust*.

Mr. Hobhouse and Mr. W. W. Cooper, for the Plaintiff.

Mr. Haynes, for the Defendant. The question raised by this bill really is,

whether a trustee is an insurer of the trust property against every possible loss, and answerable for the fraudulent and criminal acts of every person he necessarily employs in relation to the trust property. Here the loss is like that arising from a *vis major* or by a robbery, and for which, it has always been held, a trustee is not liable; *Jones v. Lewis* (2 Ves. sen. 241). A trustee is only bound to take the same care of the trust property as a prudent man would of his own; *Lewin on Trustees* (p. 224 (4th edit.)). Here the trustee employed, in the ordinary way, a respectable solicitor to invest the money, and he can no more be bound by his fraud than he would in the case of a loss by the insolvency of a [606] banker. A master is liable for the negligence of his servant in the performance of his ordinary duty, but not for his wilful trespass; *M'Manus v. Crickett* (1 East, 106). A trustee indemnity clause is to be assumed under the statute 22 & 23 Vict. c. 35, s. 31. He also referred to *Ellice v. Roupell* (32 Beav. 299, 308, 318).

THE MASTER OF THE ROLLS [Sir John Romilly]. I am of opinion that the liability of this trustee is fixed by the ordinary doctrine of this Court.

Here is a gentleman who accepts the office of trustee and receives £400, he gives it to his solicitor to invest, the solicitor puts the money into his own pocket and never invests it at all. It is the ordinary case of a trustee who is liable for the default of his solicitor. Mr. Haynes thinks that there is some difference, because a surrender of copyholds is forged by a solicitor, who was the steward of the manor, and who writes a regular surrender of copyholds belonging to an existing person and sends it to the trustee as evidence that he had invested the money; but he was acting as solicitor for the trustee and was his agent. There is no receipt for the purchase-money, and, on searching the rolls, it is found that the whole thing is a fiction. *Roupell's case* is distinguishable from the present, for there the forgery was not that of the mortgagee's solicitor. Here a man employs an agent who cheats him; the loss must fall on the trustee and not on the *cestui que trust* who never employed him.

I think the loss must fall on Wilmot, who selected this gentleman, and did not take the precaution he might have taken to see whether the mortgage had been made or not.

[607] KERMODE v. MACDONALD. Feb. 14, 15, 19, 1866.

[S. C. L. R. 1 Eq. 457; affirmed, L. R. 3 Ch. 584; 37 L. J. Ch. 879;
19 L. T. 179; 17 W. R. 4.]

A testatrix, by her will, bequeathed both general and specific legacies, and she willed that, in case of her personal estate proving insufficient for the payment of her legacies, then the deficiency should be made up out of her real estate. By a codicil, she gave "all my personal estate to A. C. M. Held, that A. C. M. took the whole personal estate discharged of the legacies; and secondly, that the general legacies still remained charged on the real estate, but that the specific legacies did not, and therefore failed.

The testatrix, by her will dated in 1832, devised unto her two sisters Maria Macdonald and Sophia Anderson certain real estate in Wales, "subject to the charges and incumbrances thereafter mentioned." She subsequently proceeded as follows:—"I give and bequeath to Mary Ann Judith Griffith the interest, profits or produce of the sum of three hundred pounds, British, or thereabouts, invested by me in the General Steam Navigation Company, London, and also the interest of two hundred pounds, British, for and during her natural life; and upon her decease I will and desire that the said principal sum of five hundred pounds be equally divided amongst the children of Mary Ann Judith Griffith.

The testatrix also gave some legacies and annuities, and in a subsequent part of her will she said:—"Also I will and ordain that, in case of my personal estate proving insufficient for the payment of the several annuities and legacies hereinbefore mentioned, that then such deficiency shall be made up from and out of my said real

estates in Wales, by sale or mortgage, as may be deemed most advantageous to the interests of the parties who may then be entitled to such estates. And she bequeathed all the residue of her personal estate, not thereinbefore given and disposed of, to her two sisters Sage and Ann, whom she appointed executrixes.

Many years afterwards (1858) the testatrix made a codicil to her will in the following terms:—

"This is a codicil to my last will and testament bear-[608]-ing date the 28th day of July 1832, and I direct that it may be taken as part thereof. I give, devise and bequeath unto *Annie Cosnahan Macdonald* all my personal estate; and I hereby appoint *Annie Cosnahan Macdonald* sole executrix of this codicil to my will."

The testatrix died in 1859.

Two questions arose—first, whether the codicil gave the whole personal estate to *Annie Cosnahan Macdonald*, or gave her merely the residue after payment of the annuities and legacies; secondly, whether, in the event of *Annie Cosnahan Macdonald* being held entitled to the whole personal estate, the annuities and legacies given by the will still remained a charge on the real estates in Wales.

Mr. Baggallay and Mr. Atken, for the Plaintiff, argued that the legacies and annuities given by the will had not been revoked by the codicil. That the gift in the will being clear, it required equally clear expressions in the codicil to destroy it; *Doe v. Hicks* (8 Bing. 475); *Robertson v. Powell* (33 Law J. (Exch.) 34); *Cleobury v. Beckett* (14 Beav. 583); and that there were none here. Secondly, that, at all events, the legacies and annuities remained charged on the real estate; *Buckeridge v. Ingram* (2 Ves. jun. 651), where, by a will duly attested, an annuity was bequeathed charged upon the real in aid of the personal estate, and by an unattested codicil, which was therefore inoperative as to the real estate, the realty and personalty was given to A. B., and it was held that the codicil released the personal, but not the real, estate from the annuity.

[609] Mr. Shebbeare, for *Annie Cosnahan Macdonald*, argued that by the gift of "all my personal estate," the whole passed unaffected by the legacies and annuities which were revoked. Secondly, that the legacies and annuities, if not revoked, were not charged on the real estate; they being only so charged in case the testatrix's personal estate should prove insufficient for their payment, an event which had not occurred, the personal estate of the testatrix being amply sufficient for that purpose, though otherwise disposed of.

Mr. Jessel and Mr. Bevir, for the persons entitled to the real estate, argued that the legacies were revoked; that the primary fund having been taken away, the secondary charge, which arose only upon a deficiency of personalty, failed also. They cited *Brudenell v. Boughton* (2 Atk. 268); *Sheddon v. Goodrich* (8 Ves. 481).

Mr. Atken, in reply, referred to *Ashburner v. Macguire* (2 Bro. C. C. 108); *Le Grice v. Finch* (3 Mer. 50).

Feb. 19. THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion that the effect of the codicil is to pass the whole of the testatrix's personal estate. When she says I give "all my personal estate," I cannot say that that is less. If so, it means "all my personal estate whatsoever and wheresoever."

Having come to that conclusion upon the codicil, I refer to the will to see what is the effect of that codicil upon the will. In the first place, I think that the gift of £300 British invested by her in the General Steam [610] Navigation Company is a specific gift, and that it means the £300 or the shares which she had in the General Steam Navigation Company. It is not a legacy of £300 to be paid out of a particular fund, which would make it a demonstrative legacy, but it is the £300 which has been invested in that concern; and therefore, though I have no evidence as to what shares she had in the General Steam Navigation Company, yet I am of opinion that this was a specific legacy of those shares, assuming them to be somewhat about £300. But I am of opinion that the codicil has disposed of those shares by the gift of all the testatrix's personal estate, which carries the subject of that specific gift, and consequently it is adeemed or revoked by the inconsistency of the subsequent disposition.

But the other bequest of £200 British is a general legacy, and that raises a question of much greater difficulty. I have already stated that the codicil gives the

whole of the personal estate; but then there is a direction that, in case of the personal estate proving insufficient for the payment of the several annuities and legacies, such deficiency is to be made up out of her real estate in Wales by sale or mortgage. The rule in cases of this description is this:—You are to disturb the original will as little as possible; and here it is to be observed that the codicil not only republishes the will, but expressly refers to it as being her “last will and testament.” I find it, therefore, extremely difficult to say that the legatee takes no interest at all. It was argued that the personal fund, out of which the legacy was to be paid, being taken away, the legacy itself failed. I adopt that argument where the legacy is specific, because, unquestionably, if a testatrix gives £300 to be paid out of her Steam Navigation Company’s shares, or gives her shares in the Steam Navigation Company, to A., and [611] afterwards, by codicil, gives those very shares to another person directly, or by general words which include them, then the legacy is revoked; and the fact of charging legacies on the real estate cannot apply to a specific legacy or revive a legacy which no longer exists. A gift of plate or anything specific is revoked by reason of the specific chattel being given to another person; but this does not apply to a pecuniary legacy. Here is a legacy of a sum of £200, which the testatrix says, in case her personal estate be insufficient, shall be paid out of her real estate. What do the devisees of the real estate take? They take the real estate subject to the charges and incumbrances after mentioned, that is, subject to such a charge of so much as may be necessary for the payment of this legacy, the personal estate being insufficient. Suppose the personal estate had become insufficient by an act of the testatrix herself in her lifetime, would that have made any difference? Or suppose the whole of her personal estate consisted of certain specific personal chattels, and that she had disposed of all of them by her codicil, would that have destroyed this legacy? I am of opinion that it would not; nor does the fact of her disposing of the whole of her personal estate do more; it makes it quite clear that the personal estate is insufficient to pay the legacy, and then I think that the trust affecting the real estate in favor of the legatee remains. Suppose the testatrix had said, I give £200 to be paid out of my £3 per cent. consols, and in case the £3 per cent. consols shall be deficient, I direct it to be paid out of my Bank stock, and that she afterwards sold out all the consols in her lifetime, would that prevent it being charged on her Bank stock? I apprehend not. So also if she leaves real estate, and says if the personal estate is not sufficient to pay a legacy, [612] then it is to be paid out of the real estate. I see no distinction between those two classes of cases. Supposing she had said, I desire the £200 to be paid out of my consols, and if the consols are insufficient for that purpose, then I desire it to be a charge on my “Welsh estate:” then if she sold out the whole of the consols during her lifetime, or gave the whole of them by a codicil to A. B., does that destroy the legacy she has given? She has increased the charge on the other fund; but that, in my opinion, is the whole of what she has done.

I am prepared, therefore, to make a declaration that the effect of the codicil is, to give the whole of the personal estate; that with respect to all specific legacies, they are all revoked by the inconsistent disposition of the property in the codicil; but that, with respect to the pecuniary legacies, they are all charged upon the real estate and must be paid out of it, the personal estate having proved insufficient.

[613] BRANFORD v. HOWARD. Jan. 26, 27, 1866.

By a rule of a mutual assurance society, the insured was bound to give notice to the directors of any change of the captain of his vessel, and, in case of default, the society was not to be liable for any subsequent loss. By another rule, notices to members sent by post were to be effectual, though not actually received. Held, that the directors of the society were members within the latter rule, and that a notice of a change of captain sent to them by post was valid, though not actually received by them.

In 1860 the Plaintiff became a member of the Knottingley Equitable Marine Assurance Society, which was established for mutually insuring the members of the

society from losses happening to their vessels. This society had been established in 1846, under certain rules, the 57th and 63d of which were as follows:—That in every case in which any notice, by these presents is directed to be given or sent to the members, or any of them, the same shall be given by letter, and that the same shall be either left at the member's place of abode or forwarded through the post office, and shall be considered to have been given on the day it "was left at his usual place of residence or committed to the post office, although the same may not actually reach or be received by the said party. And all notices or letters addressed by members to the president, vice-president, treasurer or secretary relating to the affairs of this society shall be considered as addressed to the directors, unless the subject-matter therein contained shall lead to a contrary conclusion."

The 63d was as follows:—That "when the owner or owners of any vessel assured by this society shall have occasion to change the captain, he or they shall submit the name of the person, so appointed or about to be appointed to the command of the said vessel, to the directors for their approbation; and in the event of the owners' neglect or refusal so to do, or if the newly-appointed captain shall not be approved by the directors, then, in either of these cases, the society shall not, after [614] the first two calendar months from the date of such appointment, be liable to contribute to or make good any loss or damage which the said vessel may sustain during the further time the said captain shall continue to command the said vessel."

The Plaintiff insured his vessel called the "Concord" in the society for £71.

This vessel was lost in February 1864, and the Plaintiff thereupon claimed to be paid the amount of his insurance out of the funds of the society; but this claim being resisted by the officers of the society, the Plaintiff instituted this suit against the president and other officers of the society, to recover payment. The principal defence set up was that, in September 1863, the Plaintiff had changed the captain of his vessel, who had continued to command her down to the time when she was wrecked; but that the name of the new captain had not been submitted by the Plaintiff or any one on his behalf to the directors for their approval, and that the directors had not approved of his appointment. That the change had not been in any way notified by the Plaintiff to them or to the society, and that, until after the "Concord" was wrecked, neither the society nor the directors knew of that change.

The Plaintiff, however, proved that, in September 1863, notice of the appointment of the new captain had been notified to the directors by a letter written by the Plaintiff's wife (he being able to write but imperfectly), on his behalf, addressed to the secretary of the society at Knottingley, which letter had been committed to the post office at Wells, where the Plaintiff resided, by the Plaintiff's wife. The Court, however, considered that it had been proved that this letter had not been received.

[615] The Plaintiff also proved that on the 6th April 1864 the secretary applied to him for payment of a call of £4, 5s. 6d., for losses on other vessels insured in the club. This application stated that unless the amount claimed was paid within two months, the society would not be liable for any loss which the Plaintiff's vessels might sustain.

Mr. Batten, for the Plaintiff.

Mr. Williams, for the Defendants.

Jan. 27. THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion that it is proved that notice was sent of the change of the captain, but that it is also proved that the letter was not received. The question is, whether this was a compliance with the rules of the society.

The meaning of the 63d rule is that it is incumbent on the person who has insured a vessel to give notice to the directors when he changes the captain, and that if he fail to do so, the society is, for two months only, to be liable for any subsequent loss of the vessel. It is not incumbent on the directors to take any steps or to say that they have received information of the change; but if they disapprove of the person appointed captain they must give notice of their disapproval to the owner of the vessel. I am of opinion that the letter was written to the secretary, and the question is, if that is a sufficient notice to the directors, for I am of opinion that the 63d rule means that the owner shall give notice, and submit, either in writing or otherwise, the name of the person appointed to command his vessel. The 57th [616] rule

provides that in every case in which notice is directed by the rules to be given or sent to the members or any of them, it is to be done in a particular mode, and I think this case comes within those words. The 63d rule requires the owner to submit the name of the person appointed captain to the directors for their approbation, and I am of opinion that they are members of the society within the meaning of the 57th rule, and that when a captain is changed, the information which is to be conveyed of the change is a notice to be given to one or more of the members of the society, and that a letter sent to his "usual place of residence" is to be fully effective for all purposes for which such notice is required to be given, if it is so sent. This rule also provides that the notice shall be complete, although the same may not actually reach or be received by the said party, and that notice to the officers shall be considered as addressed to the directors. This proves that the rule applies to the president as well as to the other members. It also provides that all notices to the president, treasurer or secretary shall be considered as addressed to the directors.

I cannot control the words of the 57th clause; they apply to all notices to be given to the members, or any of them, whether they be given to the vice-president, treasurer or secretary or other member of the society. I am, therefore, of opinion that it is established that, under the 57th rule of the society, notice was given to the directors, through the secretary, of the change of the captain.

The other point is that after the notice in September 1863, and after the claim had been made for compensation for the loss of the vessel, the directors, in April 1864, called upon the Plaintiff to contribute for the loss [617] of other ships, to which he was liable to contribute as one of the co-insurers of the company. I cannot make out whether the Plaintiff had any other vessel insured in the society, but if he had not, it was clearly a waiver on the part of the directors of any default committed by the Plaintiff.

I must make a decree for the Plaintiff with costs.

[617] MACKENZIE v. BRADBURY. *June 15, 1865.*

By her will the testatrix gave £1000 amongst the children of her niece. By a codicil she recited that she had, by her will, given £1000 to F. B. (a son of her niece), and she declared that the said legacy should not be payable until twenty-one, with power of maintenance. Held, that the erroneous recital constituted no gift, and that F. B. was only entitled to a share of the £1000.

The testatrix, by will dated the 2d February 1859, gave a legacy of £1000 to John Henry Mackenzie, "in trust for such of the children or child of my niece, Mary Bradbury, who shall attain the age of twenty-one years, and the children of any or either of her children who shall have died under that age."

The will contained a power of maintenance and a power of advancement not exceeding half of a child's expectant or presumptive or vested share.

On the 1st of March 1860 the testatrix made a codicil to her will in these terms:—"Whereas, by my will or a codicil thereto, I have bequeathed to Francis, the son of my late husband's niece, Mary Bradbury, the sum of £1000, payable as therein mentioned: Now I hereby declare that the said legacy shall not be payable until the said Francis Bradbury shall attain the age of twenty-one years, but with power to the trustees or executors of my will to pay or apply the interest or income thereof in or towards his maintenance or education, in such manner as they shall, in their discretion, think best."

[618] The testatrix died in June 1861.

At the date of the will (February 1859) Francis G. Bradbury was the only child of Mary Bradbury; but before the date of the codicil (March 1860) another child was born, who died in April 1860, and two children were born after the testatrix's death.

Francis G. Bradbury claimed, under the codicil, to be entitled, by implication, to an absolute legacy of £1000 in addition to his share in the £1000 given by the will.

Mr. W. P. Dickins, for the Plaintiff, the trustee.

Mr. Selwyn and Mr. Kekewich, for Francis Bradbury. The recital that the

testator had by his will or codicil bequeathed £1000 to Francis amounts to a gift; "for if a testator unequivocally refer to a disposition as made in that his will, which in fact he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated;" Jarman on Wills (1st ed. ch. xvii.). In *Adams v. Adams* (1 Hare, 540), Sir James Wigram says, "Where a testator, in one part of his will, has recited that he has given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and fastening upon it, has given to the erroneous recital the effect of a actual gift."

In addition the testatrix has directed this £1000 to be paid; this of itself constitutes a gift of it.

Mr. Southgate and Mr. Rodwell, for the residuary [619] legatees. This is simply a mistake of the testatrix to which effect cannot be given. The rule as laid down in *Re Arnold's Estate* (33 Beav. 171) is this: "If the testator, in the codicil, recites that by his will he has made a devise or bequest which does not there appear, then the codicil does not, by such recital, create that bequest or devise." This case differs from those referred to by the other side, where the recital was of something in the same instrument. The rule is clearly pointed out by Sir William Grant in *Smith v. Fitzgerald* (3 Ves. & B. 8). He says, "If, in the preceding part, there was nothing that could in any way answer the description of what he here says he had willed to them, there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is whether he did not mean to describe, however inaccurately, that which he had before actually given." He afterwards adds, "Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see, very clearly, that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest; otherwise an inaccurate testator may be held to make a second bequest when he has only made an incorrect reference to the first."

Here there is something to answer the legacy described, but it is described inaccurately, and the description constitutes no gift.

Mr. Wickens, for the other children of Mary Bradbury.

Mr. Selwyn, in reply.

[620] THE MASTER OF THE ROLLS [Sir John Romilly]. I am quite clear, upon general principles, that an erroneous recital by a testator in a codicil that he has, by his will, given a legacy to A. B., when he has not done so, creates no legacy at all. There are some *dicta* in the earlier cases which look like it, and it is discussed in *Dashwood v. Peyton* (18 Ves. 27); but in that case Lord Eldon decided that a mere erroneous recital that there was a gift in a prior will created no gift, and I know of no case which overrules that case. I am satisfied that *Adams v. Adams* (1 Hare, 537) did not do so, and that it was the intention of Vice-Chancellor Wigram, who decided that case, to adhere strictly to the rule. Nothing is more dangerous than to create gifts by implication or by an erroneous recital.

The next question is whether the words in this codicil amount to a gift. I am disposed to think the claimant's case would be very favorable if no will had been found, because then it might be that the words in the codicil amounted to a direction to pay the £1000. It looks very much like another mode of saying the £1000 shall be paid at twenty-one. If the codicil alone had been found and the will had not been forthcoming, I am disposed to think it would amount to a gift.

But here the will is in existence, and you find in it the bequest of a legacy of £1000, in which Francis takes an interest as one of the children of the niece; and I am of opinion that the testatrix merely intended to refer to the legacy previously given by her will, the recital of which was erroneous, and that the testatrix only directs that the trustees shall have a power to [621] maintain and educate Francis Bradbury during his minority, and that she did not intend to make a new gift. When you look at the will, you find that a share in the £1000 is the only legacy she intended to give. I must declare that Francis is only interested in one legacy of £1000 as one of the children of Mary Bradbury, and which is payable at twenty-one, with power for his maintenance and education.

[621] GEE v. LIDDELL (No. 1). Jan. 23, 26, 1866.

Distinction between enforcing the performance of a complete voluntary trust and enforcing the completion of an incomplete one.

A testator bequeathed £2000 on certain trusts, and he empowered his executor, who was also his residuary legatee, to retain the amount in his hands uninvested, he paying interest thereon. After the testator's death, the executor, being satisfied that the testator intended to bequeath £3000, and not £2000, promised to make it up £3000; he made no investment, but continued to pay interest on the £3000 to his death. Held, that there was a complete voluntary trust as to the additional £1000, which this Court would enforce.

A debt held not satisfied *pro tanto* by a legacy of a less amount bequeathed by the debtor to the creditor.

The testator Stephen Gee directed his executor to stand possessed of the sum of £2000, upon trust either to retain the same in his own hands at interest at £4 per cent., or to invest it, and to pay the interest to his daughter Mary Whitaker for her separate use for life, with remainder to her children; and he appointed his son Joseph Gee his sole executor.

The testator died on the 5th of January 1841, and Joseph Gee his son, who was also his executor and residuary legatee, being satisfied that the testator intended to bequeath £3000, and not £2000, to his daughter and her children, acted upon that footing and signed certain documents which will be presently stated. He (Joseph Gee) died in 1860, and the question was whether Thomas Whitaker, the only child of Mary Whitaker deceased, was entitled to be paid this extra £1000 out of Joseph Gee's assets.

[622] From the evidence it appeared that the day after Stephen Gee's death, his son Joseph stated to a witness, "We" (that is, he and Mr. and Mrs. Whitaker) "have been reading my father's will. My father told me Whitaker was to have £1000 more than is mentioned in the will; but I have told Whitaker it shall make no difference, and I will take care he shall have £1000 more than he is entitled to by the will."

The following memorandum was also signed by Joseph Gee and Thomas Whitaker, the husband of Mary Whitaker:—

"By will, &c., of the late Stephen Gee, Esq., the said Joseph Gee pays to the said Thomas Whitaker the annual sum of £120 at two equal payments, viz., the 6th July and 6th January in each year, being interest at £4 per cent. on £3000.

"JOS. GEE."

"THOS. WHITAKER."

Another document in the handwriting of Joseph Gee was also proved:—

"My father having said to me that he had left my sister by will three thousand pounds, and being quite satisfied that he had the impression that there was £3000 named in the will, whereas there are only £2000, I immediately told Mr. Whitaker I should make it up £3000, being quite clear of my father's intention.

"JOS. GEE."

This was dated the 18th of January 1841.

Two other documents were proved, which were signed by Thomas Whitaker. The first was as follows:—

"6 Jan. 1841.—This morning Joseph Gee handed me his father's **[623]** will and desired me to break the seal and read it, which I declined to do. He then opened and read it himself, and putting it to me said there was a mistake in it, as although the will stated the interest of £2000 was to be paid, his father had said (a week previous to his death) it was the interest of £3000, which, upon Joseph again asking him, he repeated £3000. In consequence of which the interest on the latter sum is

to be paid to his sister at the rate of £4 per cent.—in the presence of Mary Whitaker and John Duncan.

“Also that the said Joseph Gee was to pay to Thomas Stephen Whitaker, grandson of the said Stephen Gee, the sum of £1000 on his attaining the age of twenty-one years.

“I put this into writing, in case of any of the parties dying or otherwise forgetting the occurrence, in order that my dear Tom may have his rights.

“THOMAS WHITAKER.”

The second document, which was also signed by Thomas Whitaker, was as follows:—

“Hull, Dec. 9, 1846.—I give all my property to my son the said Thomas Stephen Whitaker. £3000 is due to him under his grandfather's will, although it names only £2000, and another thousand (when he is of age) from his uncle Joseph Gee according to the last wishes of his grandfather, &c., &c.

“THOMAS WHITAKER.”

It appeared also that on the 30th of April 1852 the testator Joseph Gee had paid Thomas Stephen Whitaker £1000, and for which he gave the following receipt:—

“Memorandum.—That I have this day received from my uncle Joseph Gee the sum of £1000 which my [624] late grandfather Stephen Gee desired to be paid to me on my attaining twenty-one years of age.

“THOMAS S. WHITAKER.”

“April 30th, 1852.”

Joseph Gee, the son, by a codicil to his will dated in 1859, bequeathed to Thomas S. Whitaker the sum of £2000, to be paid to him within twelve months after his decease. Joseph Gee died in 1860.

Sir R. Palmer (Attorney-General) and Mr. Waller, for the claimant Thomas S. Whitaker. The executor and residuary legatee of Stephen assented to and retained the legacy of £3000, and acknowledged his obligation to pay it by writing; he acted on it, during his life, by paying the interest, and became a trustee for the Plaintiff; *Ex parte Pye* (18 Ves. 140); *Bentley v. Mackay* (15 Beav. 12). His assets, therefore, are to make it good. It is like a promise made to the testator, which the Court would enforce; *Podmore v. Gunning* (5 Sim. 485); *Stickland v. Aldrich* (9 Ves. 516).

Mr. Baggallay, Mr. Archibald Smith and Mr. Jackson, for the Plaintiffs, argued that the second testator was under no legal obligation to pay the £1000, and had created no trust; *Dipple v. Corles* (11 Hare, 183). Secondly, that the extra £1000 had been discharged by the payment to Thomas Whitaker of that sum in 1852. Thirdly, that the debt, being thus reduced to £2000, was satisfied by the legacy of that amount bequeathed to Thomas Whitaker by the will of his uncle Joseph.

Mr. Selwyn, Mr. Randall and Mr. Hobhouse, for other parties.

Sir R. Palmer, in reply.

[625] Jan. 26. THE MASTER OF THE ROLLS [Lord Romilly]. Notwithstanding a great deal of ingenious argument on the subject, I am in favor of Mr. Whitaker's claim. The argument is that the sum of £3000 spoken of in the memoranda was meant to be merely the £2000 mentioned in Stephen's will, and an additional £1000 to be given to Thomas Whitaker the son, and that this was reduced to £2000 by the payment to him of £1000 in 1852, then by the doctrine of satisfaction that this sum of £2000 has been satisfied by the legacy given by Joseph Gee to Thomas Whitaker, so that instead of getting the £3000 he is to receive nothing at all in respect of it.

I think, however, that this argument is not consistent with the evidence before me. In the first place Stephen Gee by his will gave £2000 to his daughter for her life, and after her death to her children living at her death, to be equally divided, and to be paid to them on attaining twenty-one. That being the case, then this event takes place:—Stephen dies on the 5th of January 1841; and on the 18th of January Joseph his son writes this paper:—“My father having said to me that he had left my sister by will £3000, and being quite satisfied that he had the impression that there was £3000 named in the will, whereas there are only £2000, I immediately told Mr.

Whitaker I should make it up £3000, being quite clear of my father's intention." Now is it possible to say that is more than to change the £2000 into £3000? He does not say it was to be £3000 during my sister's lifetime, and then nothing more, but he expressly says that it was to be "made up to £3000," that is, that the £2000 was to be changed into £3000. It is impossible, I think, to get over those words. Then it is argued that this is consistent with the payment of [626] the £1000 to the son as part of this £3000. But it is to be observed that this is altering the words of the documents. Upon the son attaining twenty-one, Joseph Gee his uncle pays him £1000, and takes a receipt from him for it, as being a sum of £1000 which his grandfather Stephen Gee had desired to be paid to him on attaining twenty-one. Besides this, Thomas Whitaker, who is dead, had written two documents, and in one of them he expressly states that his son Thomas Stephen Whitaker was to have the £3000 under his grandfather's will, although it names only £2000, "and another £1000 when he is of age." Now undoubtedly that document would not be evidence in favor of Thomas Whitaker himself; but he is dead, and it is quite consistent with another statement he has made; and as one of these documents has been made use of against Thomas Stephen Whitaker, I think that, subject to the due weight to be attached to these documents, and subject also to the observation that it is a person giving evidence in favor of himself or his own family, they are all admissible upon this question. The third document is quite consistent with that which is signed both by Joseph Gee and Thomas Whitaker. The only mode in which I can explain these documents is that two sums were to be paid, one of £3000, the other of £1000. This I hold to be quite clear, that if I change the word *two* into *three* in Stephen's will, so as to give £3000 to his daughter for life, with remainder to her children, it can in no degree be satisfied by a payment of £1000 to Thomas Whitaker on his attaining twenty-one, the more especially as it is expressly stated on the receipt that it is "the sum of £1000 which my late grandfather desired to be paid to me on my attaining twenty-one years of age;" while the other £3000 was to be paid, not to one but among all the children on [627] their attaining twenty-one, and after the death of their mother. In my opinion, therefore, the £3000 and the £1000 are two separate and distinct sums.

I will presently consider the question whether there is a debt from the estate of Joseph in respect of the £3000; but assuming that to be the case, then I am of opinion that it cannot be satisfied by a legacy of £2000. According to the cases, a debt is not satisfied by a legacy of a smaller amount, but they are separate and distinct things, and if a person, who owes £3000 to A., leaves him a legacy of £2000, A. takes both, and the legacy is not a satisfaction *pro tanto*. Therefore it is that, by a very singular process, it is attempted to cut this £3000 down to £2000, in order to bring it within the rule that the legacy of £2000 given to Thomas Whitaker by Joseph Gee, would be a satisfaction of the debt of the same amount. The doctrine itself of satisfaction of a debt by a legacy is not a very satisfactory one; because it is clear that in the great majority of cases, a testator never thinks that he is satisfying a debt when he is making a gift by his will. In addition to this, I do not think that the doctrine of satisfaction would apply to a case where a sum being held by A. B. upon certain trusts, he by his will bequeathed a legacy to one of the *cestuis que trust*.

I then come to the question whether there is really a debt which Thomas Whitaker could enforce. I am of opinion that this case comes within the rule of those cases in which a man declares himself to be a trustee of a sum of money, where this Court interferes, not to complete the trust, but to execute it. The distinction between the cases is, that where a trust, though voluntary, is complete, the *cestuis que trust*, although he cannot call on the Court to complete a [628] trust, may call on the Court to execute one that is completed. I have therefore only to consider whether, in this case, the relation of trustee and *cestui que trust* exists. In the first place, Stephen Gee, by his will, leaves £2000, of which the interest is to be paid to his daughter for her life, and after her death to her children equally. The testator also says to his only son and executor, "You may invest this or not, as you please, but if you retain it you must pay interest for it at 4 per cent." Could Joseph Gee, after proving his father's will and taking possession of his assets, amply sufficient for the payment of the legacy, say

that he was not a trustee of that £2000! That would be impossible. The trust is expressly declared by the will. He is told that he need not invest it, but may retain it in his own hands as trustee. I am of opinion that the relation of trustee and *cestui que trust* was completed, and the son was strictly and properly a trustee of that sum of money, although it had not been separated from the estate; because the will of the testator allowed the executor to retain the £2000 in his hands at interest, and to constitute himself a trustee of that sum without separating it from the mass of the property.

Then what takes place is this:—Upon the death of Stephen, the testator, his son Joseph says, in substance, “My father told me that he intended to bequeath the sum of £3000 and not of £2000, and he firmly believed that he had put £3000 in the will, whereas it was only £2000; he told me so a week previous to his death; and that being so, I intend to follow his directions.” Thereupon he signs this statement. How can I distinguish the £3000 from the £2000? Is he not in the same relation with respect to the £3000 as he would have been with regard to the £2000. If he had invested £2000 only, and not £3000, something [629] might have been said; but suppose he had invested the £3000, would it not be clear that there was a declaration of trust in respect of that £3000, though invested in his own name alone? This paper is a distinct and clear declaration of trust in writing of that £3000, and according to the permission contained in his father’s will, he, instead of investing it, holds it in his own hands, and the whole fund stands in the same situation. I am therefore of opinion that the trust is complete, and that this Court will enforce the execution of it in favor of Thomas Whitaker the son.

[629] GEE v. LIDDELL (No. 2). Jan. 23, 26, 1866.

[See *Rawley v. Rawley*, 1876, 1 Q. B. D. 464.]

The testator held £2000 belonging to his nephew, on which for eight years he paid interest, notwithstanding the nephew owed him £1000 on his promissory note. Though the nephew had paid no interest on the note, and had given no acknowledgment of the debt: Held, that, although the remedy for recovering the £1000 was barred by the Statute of Limitations, still the right of the executors to set it off against the £2000 remained.

The testator Joseph Gee, in addition to other benefits gave to his nephew Thomas S. Whitaker a legacy of £2000, to be paid to him within twelve months after his (the testator’s) death.

The testator died in 1860, and amongst his papers the following note of hand was found:—

“£1000.

Hull, 3d May 1852.

On demand I promise to pay to Joseph Gee, Esq., the sum of £1000, value received by my late father.

“THOMAS S. WHITAKER.”

No interest had ever been paid by Thomas S. Whitaker, and it further appeared that the testator, who held in his hand another legacy of £2000 to which Thomas S. Whitaker was entitled, had regularly paid the whole of the interest on that sum to him, without making any deduction in respect of the promissory note.

Under these circumstances Thomas S. Whitaker in-[630]-sisted that the note was barred by the Statute of Limitations.

Sir R. Palmer (Attorney-General) and Mr. Waller, for Thomas S. Whitaker, argued that the debt was due from Thomas S. Whitaker’s father, and the note given for it was barred by the statute. Secondly, that the testator never intended to treat it as a debt, and had abandoned his claim on it; *Flower v. Marten* (2 Myl. & Craig, 459).

Mr. Baggallay, Mr. A. Smith and Mr. Jackson, *contra*, argued that the statute only barred the remedy, and not the debt, and that the executors were entitled to exercise their right of set-off, though they could not maintain an action upon the promissory note.

They cited *Courtenay v. Williams* (3 Hare, 539, affirmed 15 Law J. (Chanc.) 204); *Coates v. Coates* (33 Beav. 249).

Jan. 26. THE MASTER OF THE ROLLS [Lord Romilly]. With respect to the promissory note of £1000 given by Thomas Whitaker, I cannot, in my opinion, treat the acts of Joseph Gee as being a release of that sum of money. If I were asked, whether I thought it probable that he intended ever to enforce payment of the note, I should answer in the negative. I do not believe he ever did, and the non-payment of interest is the strongest evidence in that direction. In addition to which the relationship of the parties also points to that conclusion. But supposing the six years had not elapsed, could it be possible to say that the executors could not enforce payment of this note, or that they ought not to [631] enforce it? The testator had a right to enforce it at law, and if he had intended not to do so, he might have destroyed the note, instead of which he allowed it to remain in existence. The Statute of Limitations does not bar a debt; it only bars the remedy for recovering it. The consequence is that the arguments, which only acquire a little accumulative force by the fact of eight years instead of six having elapsed, are not, in my opinion, sufficient to shew that there was any release of the debt. The testator, if he intended his nephew to be absolutely released from the debt, ought to have done some act for that purpose; but there is a perfect blank on the subject, and nothing more than this:—That he never enforced payment of the interest, and during the whole of the time paid a much larger sum than was necessary to the nephew for interest on the £2000. I cannot hold that to be a release of the debt, and I think that the executors are bound, on the part of the residuary legatee, to set off the amount of the promissory note against anything due to Thomas S. Whitaker.

[631] GEE v. LIDDELL (No. 3). Jan. 23, 26, 1866.

A sole trader, by his will, gave "the annual or other earnings, proceeds and profits to arise from his business," to one for life, with remainders over. Held, that, in ascertaining these proceeds and profits, interest on his capital in his business was not to be first deducted.

The testator, a shipowner and merchant, gave his real and personal estate to trustees, upon trust, as to his real estate, for his wife for life, and as to his personal estate upon trust to convert it into money with all convenient speed. And subject thereto and to certain limitations thereof, which failed, he directed his trustees to stand seised and possessed of his real estate and the moneys to arise from the sale of his personal estate, and of the annual rents, produce and profits thereof, on trust to pay "the whole of the annual rents, profits and produce" of his real estates, and of the moneys to arise [632] from the sale of his personal estate, to his nephew Thomas S. Whitaker for life, with divers remainders over.

And he empowered his trustees to postpone the sale of his steamships, and, until their sale, to employ the same, and, for that purpose, to apply any part of his personal estate as should be necessary. And he declared that "the annual or other earnings, proceeds and profits to arise from the said business, and employment and navigation of the steam or sailing ships or vessels, should be held, paid and applied" by his trustees, upon and to "the same trusts, intents and purposes as were thereinbefore declared" concerning the moneys to arise from his personal estate.

The testator died in October 1860, and the trustees carried on his business until March 1863, when the steamships were sold with the goodwill of the business for £30,400. The net profits during that period amounted to £8161. The capital embarked by the testator at his death, exclusive of the ships, amounted to £25,590; but which had been reduced to £9735 when the ships were sold.

The question was, what part of the profits of this business was payable to the tenant for life under the terms of the will?

It was argued, either that the £8161 or the income of it as produced *de anno in annum* belonged to the tenant for life. Secondly, that interest on the capital employed in the testator's business ought to be deducted from the £8161 before the net profits could be ascertained, and that such interest belonged to the tenant for life as income.

Sir R. Palmer (Attorney-General) and Mr. Waller, for the tenant for life.

[633] Mr. Baggallay, Mr. A. Smith and Mr. Jackson, *contrà*.

The following cases were cited:—*Gibson v. Bott* (7 Ves. 89); *Davies v. Westcombe* (2 Sim. 425); *Morgan v. Morgan* (14 Beav. 72); *Lord Londesborough v. Somerville* (19 Beav. 295); *Wilkinson v. Duncan* (23 Beav. 469); *Scholefield v. Redfern* (32 Law J. (Chanc.) 627).

Jan. 26. THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion that the words of the will are too strong. He declares that "the annual or other earnings, proceeds or profits to arise from the said business and employment and navigation of the said steam or sailing ships or vessels shall be held, paid and applied by my said trustees or trustee for the time being to, for and upon such and the same trusts, intents and purposes as are hereinbefore declared and contained of and concerning the moneys to arise from the sale and collection of my said personal estate and effects, or as near thereto as the deaths of parties and other circumstances will admit."

Now if you take those words literally, there can be no question that the annual profits produced by the concern are to be applied exactly in the same manner as the proceeds of the sale of the personal estate, and which are to be invested, and the interest thereof when invested is to be paid to certain persons for life, with remainders over. The argument of the Attorney-General is, that it is the ordinary practice of merchants, before they ascertain what the profits are, to calculate and [634] deduct interest upon the capital engaged in the trade. But I apprehend that this is only the case where there is a partnership, and where the capitals of the partners in the concern is unequally divided; but where a single person is carrying on trade, I do not apprehend that it is usual for him, in the first place, to deduct so much for interest upon his capital before he ascertains what the profits are. In addition to this, it is also to be observed, that here the expression is not "*net profits*," but "*annual profits*," which would mean all the profits that could be fairly called *annual profits* of the concern. In one sense, of course, it means *net profits*, because it means profits after deducting all expenses; but it is impossible that I can deduct the interest on the testator's capital, which he could have no desire or motive for distinguishing, unless there were some words which pointed precisely to that course.

The consequence is that I am against Thomas Whitaker, and I think there must be an inquiry what were the profits *de anno in annum*, and that he ought to be allowed interest at the rate of £4 per cent. per annum on the profits made annually during that time, as the money was not actually invested.

[635] EARL COWLEY v. WELLESLEY. Feb. 28, 1866.

[S. C. L. R. 1 Eq. 656; 14 L. T. 245; 14 W. R. 528. *Elias v. Snowdon Slate Quarries Company*, 1879, 4 App. Cas. 466.]

The owner of woodlands had been accustomed, every year, to cut about one-twelfth of the underwood and also such of the trees on the same ground as were likely to obstruct and prejudice the growth of the timber. Held, that the tenant for life under his will was entitled to the produce both of the underwood and trees cut according to that custom.

The trustees of a will felled some trees in the woodlands for the purpose of improving the growth of those remaining, but during the testator's lifetime the trees had not been thinned. Held, as between tenant for life and remainder-man, that the produce was capital and not income.

Rents and royalties of brickfields, one of which had been leased by the testator and

the other by the trustees of his will under a power, held to belong to the tenant for life.

The produce of gravel, loam, &c., sold by the trustees according to the course pursued by the testator, held, income and not *corpus*.

Fines for admission received by the trustees of a manor upon grants of parts of the waste, held to belong to the tenant for life.

Preliminary fines received on enfranchising copyholds by reason of the admission having taken place before July 1853, as is mentioned in the Copyhold Act, 1852 (15 & 16 Vict. c. 51), held, to belong to the tenant for life.

Expense of fencing waste lands of a manor granted to a trustee for the benefit of the estate, held, payable out of *corpus*.

Costs of trustees of rendering the necessary accounts for the purpose of paying the succession duty in respect of the life-estate, held, payable by the tenant for life.

Several questions arising under the will of the testator, the late Earl of Mornington, were submitted for the opinion of the Court by this special case.

The testator died in 1863 having, by his will made in the same year, devised his real estate to trustees in fee, in trust, after paying certain annuities, &c., for the Plaintiff, Earl Cowley, for life, with remainder to Viscount Dangan for life, with divers remainders over.

The testator directed that the trustees should manage and superintend the management of the same premises, and that they might cut timber and underwood, from time to time, in the usual course, for sale or repairs; and he empowered them to demise all or any of the mines, minerals, quarries, stones, gravel, brickearth, clay, sand and substances, whether opened or unopened.

The special case stated as follows :—

Part of the real estate of the late Earl of Mornington in Hampshire consists of about 338 acres of woodland, on which there are trees and underwood both of a thriving description, the trees being principally oak. All the said woodland in Hants was, prior to and at the Earl of Mornington's decease, and has since been and is now, in hand. For many years past, the course of management has been, to cut the underwood, of from ten to twelve years' growth, every year, and the underwood growing upon between twenty and thirty acres of the woodland has been cut in every year. In the en-[636]-suing spring, it has been usual, where the underwood has been cleared, to cut down such trees as were likely to obstruct or prejudice the growth of those intended to be preserved, and which, having regard to the general improvement of the woods, should be cut down.

The trustees of the Earl of Mornington's will have followed this course, and have applied the proceeds of the sale of the underwood as income, and the timber, being such thinnings as aforesaid, has been partly used in repairs on the estate, and the larger part has been sold. In the spring of the year 1864, the timber and trees so sold produced the net sum of £565, 3s. 6d., and last spring (March 1865) the timber and trees produced the net sum of £336, 16s. 0d., but this amount is rather above the average of the sums produced in preceding years.

Part of the real estate in the county of Wilts also consists of woodlands, containing oak, ash, elm, Scotch fir, larch and spruce trees and underwood. During the life of the late earl, the underwood was occasionally cut, but the trees in such woods and plantations were not thinned. It has recently been considered desirable, in order to improve the growth of the woods, to fell a number of trees, including trees of all the above-mentioned descriptions. The trees which have been felled were felled for the purpose of improving the growth of those remaining. Part of the trees so felled have been used for repairs upon the estate, and the remainder have been sold standing. The amount produced by the sale of the last-mentioned trees is £500 and upwards.

Upon these circumstances the following question was submitted for the opinion of the Court :—Whether the money produced by the sale of timber in the counties [637] of Hants and Wilts, cut as before stated, should be treated as capital or income.

Mr. Hobhouse and Mr. J. Pearson, for the Plaintiffs, the tenants for life, contended that the money produced by the sale of timber cut in the counties of Hants and Wilts was income and not capital. They referred to *Bagot v. Bagot* (32 Beav. 509); *Bateman*

v. *Hotchkin* (No. 2) (31 Beav. 486); *Burges v. Lamb* (16 Ves. 174); *Knight v. Duplessis* (2 Ves. sen. 360); *Pidgeley v. Rawling* (2 Colly, 275); *Tooker v. Annesley* (5 Sim. 235).

Mr. Joshua Williams and Mr. Nalder, for the first equitable tenant in tail, contended that the produce was *corpus*.

Mr. Williamson, for the trustees.

THE MASTER OF THE ROLLS [Lord Romilly]. With respect to the Hampshire property, I think that the whole produce of the wood belongs to the tenant for life. It appears to have been cut in the usual and regular course as thinnings, and the produce is therefore income.

But with respect to the trees cut on the Wiltshire estates, I do not think that the tenant for life is entitled to the produce as income. The trustees might have properly cut them in order to improve the growth of the others, but they had become trees, and this goes beyond thinnings in the usual course. If they had been cut because they were decaying, the produce would undoubtedly have to be invested as *corpus*.

I think, upon the statement in the case, that the pro-[638]duce of the timber cut on the Hampshire estates is income, but that that on the Wiltshire estates capital, except such part as was cut in the course of regular thinnings.

The next question arose under the following statement:—

"In 1862 the late Earl of Mornington, being owner in fee of fifteen acres of land at Wanstead, granted a lease thereof to William Hill for a brickfield, for a term of twenty-one years, and by the lease, a rent of £37, 10s. was reserved and made payable in the second and every subsequent year of the term. The lease also contained a *reddendum* clause reserving by way of royalty 1s. 6d. for every 1000 bricks, and 2s. for each cubic yard of the clay, brick-earth, loam, sand and other materials to be dug, raised or gotten, and used for other purposes than making bricks, and a minimum rent of £112, 10s."

The amount payable in respect of the royalty had during the past year amounted to a much larger sum than the sum of £112, 10s.

Since the testator's death, his trustees had, in pursuance of an arrangement made by the earl in his lifetime and under the leasing power contained in his will, granted a lease to the said William Hill of an adjoining piece of land also for a brickfield, reserving similar rents and royalties.

Upon these circumstances the question was, whether the royalties payable under the brickfield leases should be applied as capital or income.

THE MASTER OF THE ROLLS. I think that the lease being made by the trustees makes no difference, and that it is clear, from scope of [639] leasing power, that the leases were intended for the benefit of the tenant for life.

The next question arose upon the following statement:—

"The late Earl of Mornington, as lord of the manors of Wanstead was, and since his death his trustees have been, in the habit of selling, in various quantities, gravel, loam, peat and bog-earth, dug and taken from the waste lands of the said manors, and such sales have produced from three to four hundred pounds annually, the profits of the said manors are only such as have usually, for many years past, been gained by working the gravel pits and the loam, peat, and bog-earth in ordinary and usual course of demand for the same every year."

The question submitted on these facts was, whether the money produced by the sale of the gravel, &c., was capital or income.

THE MASTER OF THE ROLLS. I think it belongs to the tenant for life. As to the pits open in the testator's life there can be no question, and as to opening new pits it is like a case before me (*Spencer v. Scurr*, 31 Beav. 334), where a testator worked mines, and after his death it became convenient to sink a new shaft, and I held it was a working of the old mine. I treat this case like that of a mine worked at one place where another shaft is opened in order to work it more conveniently. I do not think that one pit on a large field is to be considered as a separate mine. The minerals being one in the ordinary course, the produce is therefore income.

[640] The next question arose on the following statement:—

"The late Earl of Mornington was, at the time of his decease, seised in fee of manors of Wanstead, &c. And the trustees of his said will have, since his death, as lords of the said manors, with the consent of the homage according to the customs of the said manors, made grants to divers persons of portions of the waste lands of the said manors, and fines have been paid in respect of the admissions on such grants to the trustees or lords of the said manors. The fines paid on admissions on grants exceed considerably in amount the fines paid on admissions on surrenders or admissions on death or under a will; these latter fines have been and are treated as income. In some cases, grants have been made subject to certain restrictive conditions as to building, and the trustees, as lords of the manors, may hereafter be applied to for releases or a waiver of those conditions in consideration of a sum of money to be paid to them by the persons requiring the same."

The question was, whether the fines paid on grants of waste lands of the manors, and the consideration moneys for releasing conditions, as before stated, should be considered capital or income.

Mr. Hobhouse, for the tenants for life.

Mr. Joshua Williams, for the tenants in tail.

Brabant v. Wilson (14 Week. Rep. 28) was cited.

THE MASTER OF THE ROLLS [Lord Romilly]. Where the grants have been made by the trustees, the fines would be income.

[641] As to the conditions, I agree that, if imposed by the testator, he made them for benefit of inheritance, and I doubt whether the trustees could release the condition and the tenant for life get the benefit of it. But if the grants were made by the trustees, then, inasmuch as they might have made them without any condition, they may release them, and the profits would belong to the tenant for life. The grants are the ordinary mode of enjoying a manor.

The next question was this :—

"Since the death of the late Earl of Mornington, several enfranchisements have been affected in the said manors, and, in some cases, preliminary fines have been paid to the trustees, as lords of the manors, by the persons enfranchising, by reason of the admission having taken place before July 1853, as is mentioned and provided for by the Copyhold Act of 1852."

15 & 16 Vict. c. 51 (30 June 1852); 21 & 22 Vict. c. 94 (2 August 1858), were cited.

THE MASTER OF THE ROLLS. I think this must be treated as income.

The next question was this :—

Since the death of the late earl, the trustees, as lords of the manors of Wanstead, &c., "have, with the consent of the homage, according to custom of the said manors, respectively, made grants of waste lands (parts of the said manors) to a trustee for them and for the benefit of the estate of the late earl and the persons interested therein. Upon such grants being made, it has been necessary to [642] fence in the land so granted; and the said trustees have paid the expense thereof out of moneys in their hands.

The question was, whether the expense of fencing the lands so granted to a trustee for the lords of the manors should be paid out of capital or income.

Mr. Hobhouse, for the tenants for life.

Mr. Joshua Williams referred to *Dent v. Dent* (30 Beav. 363).

THE MASTER OF THE ROLLS. This comes under the power to make improvements done by the trustees, which they are entitled to pay out of *corpus*.

The last question arose out of these facts :—

By the will of the late earl, the Plaintiff Earl Cowley was made the first equitable tenant for life of the estates thereby devised, and it became necessary to render to the Inland Revenue Office an account of the estates, for the purpose of paying the succession duty in respect of his life interest. The trustees prepared and rendered such account to the Inland Revenue Office, and had paid the costs, charges and expenses of preparing and rendering the same, which were considerable.

The question was, whether the costs, charges and expenses of preparing and rendering the account of the succession duties ought to be paid out of capital or income.

Mr. Hobhouse. These expenses have been incurred not for the tenant for life alone, but will be for benefit [643] of estate and all those entitled to it under the will. The costs ought to be borne by the *corpus*.

Mr. Joshua Williams. If the legal estate had not been outstanding, the tenant for life would have had to make the return and to pay all the expenses. The only object of the return is to ascertain what the tenant for life ought to pay.

Mr. Hobhouse, in reply.

THE MASTER OF THE ROLLS. I think the tenant for life must pay these costs.

The costs of this special case will be paid out of the residuary personal estate.

[643] BOUCK v. BOUCK. *April 18, 1866.*

[S. C. L. R. 2 Eq. 19.]

A bill by one of the next of kin to administer the estate and to set aside a conveyance by him of part of it is multifarious.

This case came before the Court upon general demurrer to the bill, which, in substance, stated the following case:—

The testator died in 1865, leaving two sons, namely, Edward (the Plaintiff) and John (a Defendant). John obtained letters of administration and possessed himself of the testator's estate, and the Plaintiff sought to have the estate administered and distributed amongst the parties entitled thereto.

But, in addition, the bill stated an indenture dated the 19th of October 1865, whereby the Plaintiff had as [644] signed to two trustees so much of his share of the residuary estate as would raise £8000, upon trust for his wife Hannah Bouck, for her separate use for life, with remainder over. The Plaintiff alleged that this deed had been executed by him without consideration and due professional advice, that it was void as against public policy, and that it ought to be set aside or modified. The administrator and the parties to the deed were made Defendants to the bill, which, in addition to the administration of the estate, asked that the deed of October 1865 might be declared void and be set aside, or that it might be modified by a reduction of the amount to £4000.

To this bill the Defendant John Bouck demurred, on the ground that it was exhibited "for several independent and distinct matters and causes which had no relation to each other, and in some or one of which he was in no way interested or concerned, and ought not to be implicated, and that the bill was multifarious."

Mr. Bagge and Mr. Parke, in support of the demurrer, cited *Salridge v. Hyde* (Jacob, 151); *Mole v. Smith* (Jacob, 494); *Whaley v. Dawson* (2 Sch. & Lef. 367); *Jerdein v. Bright* (2 John. & H. 323).

Mr. Graham Hastings, in support of the bill. The Plaintiff is entitled to have the estate administered and distributed, and this cannot be done without ascertaining the parties interested in it. It therefore becomes necessary, even for the demurring party, that the validity of the deed should be ascertained. The Defendant is interested in every part of the relief prayed, and cannot say he is not concerned therein. Nothing can be gained [645] by allowing this demurrer, for then two suits will become necessary, one to set aside the deed, and the other to administer the estate; *Bent v. Yardley* (2 Hem. & M. 602); *Campbell v. Mackay* (1 Myl. & Cr. 603); *Addison v. Walker* (4 Y. & Coll. (Exch.) 442); *Parr v. The Attorney-General* (8 Clark & Fin. 409); *Chambers v. Crabb* (M. R. (unreported)).

THE MASTER OF THE ROLLS [Lord Romilly]. I am of opinion that the objection to the frame of this bill is one of substance, and that the distinction between this and the cases cited is very obvious. Where an ascertained fund is in the hands of a trustee, and three or four persons claim it, any one of these persons may file a bill to obtain it and make all the other claimants and the trustee parties; or the trustee may get

rid of all responsibility by paying the money into Court, or by filing a bill of interpleader against all the claimants. But if a Plaintiff files a bill for the administration of the estate of a testator or of an intestate, and he mixes it up with a question whether he has conveyed his share to another, or whether the conveyance ought to be set aside, the case is very different, and the trustee cannot dispose of the estate. The accounts are shut up until it is ascertained who is entitled to it, and the costs and all other payments are delayed. You might have questions between six or seven *cestuis que trust* and their incumbancers, and these questions would then have to be determined before the right to have the accounts taken had been made out, for otherwise, after they had been taken, a person might come in and dispute them and raise a question whether any particular item ought or not to be allowed. I think the Plaintiff is not entitled to oblige the legal personal representative to take the evidence as to the validity of the deed or to be mixed up with that question at the hearing. I think that the authorities cited are quite sufficient to compel me to allow this demurrer. I think that the legal personal representative is not a proper party here for the discussion of the question between the Plaintiff and the parties claiming under his deed, and that I must allow the demurrer with liberty to amend.

[646] *Re THE ENGLISH, &C., ROLLING STOCK COMPANY. LYON'S CASE.*
April 24, May 2, 1866.

Alteration of the articles of association of a company between an application for shares and their allotment, held not to invalidate the allotment, such alteration being made under the authority of the "Companies Act, 1862," and the objects of the company not being thereby altered.

The prospectus of a company stated that the capital consisted of 15,000 shares of £10 each; first issue 10,000 shares. A. B. applied for shares, which were allotted to him. Held, that A. B. could not resist being put on the list of contributories, on the ground that less than 900 shares had ever been taken.

Shares were allotted to A. B. at a meeting of three directors, and before the number necessary to form a *quorum* had been determined. Held, that A. B. could not, upon the company being wound up, insist that the allotment to him was invalid.

This was an application, made by Captain Lyons, to strike off his name from the list of contributories.

The company was formed in January 1864, and the provisions of Table A in the first schedule of "The Companies Act, 1862" (25 & 26 Vict. c. 89), were adopted as the articles of the association, but with some variations.

On the 7th of March 1864 Captain Lyons applied for fifty shares in the company; but before they had been allotted, and on the 28th of March, a change was [647] made in the articles of association, the effect of which is stated *post* in the judgment of the Court.

The shares were afterwards allotted to Captain Lyons, three directors being present at the time of the allotment; at that time, no regulation as to the quorum of directors had been made; but it was afterwards fixed at three. In December 1864 Captain Lyons paid a call on his shares.

The grounds on which the applicant relied in support of his application were as follows:—First, that there had been a misrepresentation in the prospectus, in stating that the capital consisted of 15,000 shares of £10 each, "first issue 10,000 shares," whereas no more than 866 had ever been subscribed for, and also in stating that the directors had received promises of a contract. Secondly, that the articles of association had been varied after Captain Lyons's application for the shares. Thirdly, that the shares had been allotted at a meeting of directors at which there was not a sufficient quorum present.

Mr. Selwyn and Mr. Kekewich, in support of the application. Captain Lyons is not a contributory. First, he is released by reason of the false representations contained in the prospectus, that 10,000 shares had been issued, whereas no more than 866 have ever been subscribed for. Captain Lyons agreed to become a shareholder

in a company consisting of 15,000 shares, and the directors were not justified in commencing business until that number or a reasonable number of shares had been subscribed for, and at law the company could not support an action for calls; *The Howbeach Coal Company v. Teague* (5 Hurl. & C. 151, and 6 Jurist, 275). Secondly, Captain Lyons applied [648] for shares in a particular company; but the nature of the company was altered, and he is not bound to take shares in a company different from that he intended and proposed for. The undertaking has been altered, and the allotment is therefore not binding; *Felgate's case* (2 De G. J. & Sm. 456); *Ship's case* (*Id.* 544). Thirdly, at the allotment there were no persons present competent to allot, and no quorum of directors. They also referred to Selwyn's *Nisi Prius* (vol. 2, p. 1153 (12th edit.)).

Mr. Southgate and Mr. Roxburgh, *contrà*. There was no misrepresentation as to the number of shares intended to be issued at first. It could not be necessary that every share should be subscribed for before a right to contribution arises. If it be requisite to have a reasonable number of shares taken, it is for the directors to determine it, and is a matter of internal management and discretion, with which this Court will not interfere. A company may contract with the public the moment it has been registered, and the public cannot know the number of shares allotted until a return of members has been made to the registrar. In the cases cited it was the company that sought to recover calls; here, the proceeding is by the creditors of the company.

Secondly. The cases cited, where the nature of the undertaking was completely altered, do not apply; for here the objects were the same. Under the 50th section of the 25 & 26 Vict. c. 89, there was authority to alter the articles of association, and the applicant must be deemed to have notice of the alterations which were registered, for he might have gone to the registrar's or to the company's office and examined the articles of association as altered. Instead of doing so and re-[649]-pudiating the shares at once, he in December paid the call on them; it is therefore too late now to reject the shares; *The Malt and Hop Company* (35 Beav. 273).

Thirdly. The allotment was duly made by the directors present (Table A, ss. 52, 53), and was valid, though the quorum had not been then settled.

If this application were to succeed, the consequence would be, that every allotment of shares would be invalid, and no one would be liable but the seven persons who signed the memorandum of association for a limited number of shares; and even the Petitioner who obtained the winding-up order will not be a contributory. Shareholders may have rights as against the directors; but here the question does not arise between them, but between these shareholders and the public.

Mr. Selwyn, in reply, cited *Reese River Silver Mining Company* (36 Law. J. (Chanc.) 385, 618).

May 2. THE MASTER OF THE ROLLS [Lord Romilly]. The grounds on which the applicant in the present case asks to be taken off the list of contributories are these:—He says, first, that there was a fraudulent misrepresentation. Secondly, that an alteration was made in the objects of the company between his application for the shares and the allotment of them to him. And, thirdly, that there was not a proper quorum of directors present when the allotment was made.

The prospectus stated that the number of shares was to be 15,000, and that the first issue was to be 10,000 [650] shares and Captain Lyons in his affidavit says that he relied on this statement. He also alleges that, in a passage in the prospectus, it is stated that the directors had received promises of a contract. But I do not find any evidence to shew that that statement was false; and after all a mere promise amounts to very little. If it had asserted that they had entered into a contract, and if, on the faith of that, he had applied for shares, it would be a very different thing. The rest of the prospectus complained of is a mere statement of the benefits which was expected to be derived from the establishment of the company.

The only substantial thing is the statement, that the first issue was to be 10,000 shares, and Captain Lyons says that he relied on it, and that less than 900 shares only were applied for, and therefore he cannot be called on to contribute. In support of this, the case of *Howbeach Coal Company v. Teague* (5 Exch. Rep. 151) was cited, in which Baron Martin, at the trial held, that where something less than one-third of

the whole shares in the company had been subscribed for, the directors were not justified in suing for calls. But when that case was heard in banc, though Baron Martin adhered to that opinion, yet, on that part of the case, the Court gave no decision; on the contrary, some of the other Judges hesitated on the subject. But I have referred to the case of the *Pyrographic Woodwork Company v. Brown* (2 Hurl. & Colt. 63), in which the full Court came to a contrary conclusion. I cannot, therefore, hold that the fact of only 900 shares being taken is such a fraud as to invalidate the application for shares. Directors might reasonably allot shares if they have a reasonable expectation of the success of the undertaking, provided it is not done for any fraudulent purpose. If a person applying for shares desires to make the sub-[651] scription of the whole number of shares a condition, he ought to inquire. I cannot hold that the fact of the directors allotting shares before they have a sufficient number to carry on the concern is a sufficient ground for taking a contributory off the list, especially if they have reasonable expectations of being able to carry on the concern. I think, therefore, I cannot remove this gentleman from the list on the ground of misrepresentation.

The second ground is this:—That there was an alteration in the objects of the company between the application for the shares and their allotment. But really there was no alteration in substance. They cancelled the articles of association and executed new ones, which were quite within the object stated in the prospectus, which do not enable them to carry on a distinct and separate trade from that originally intended.

The third ground is this:—Captain Lyons says that there was no sufficient quorum of directors present when the shares were allotted to him. It appears that three directors were present, but that it had not been then established how many should form a quorum. It was afterwards determined that three should be a quorum, and three were present upon the allotment to Captain Lyons, and the same was done as to the other shareholders.

I am of opinion that a sufficient case is not made out to take Captain Lyons off the list, and that he must remain a contributory.

[652] DENTON v. MACNEIL. May 23, June 1, 1866.

[S. C. L. R. 2 Eq. 352; 14 L. T. 721; 14 W. R. 813. See *Sharpley v. South and East Coast Railway Company*, 1876, 2 Ch. D. 681; *Bellairs v. Tucker*, 1884, 13 Q. B. D. 577.]

Prospectuses of a company are always colored, but if a material fact is stated in them which is untrue, and upon the faith of which a person takes shares, he is entitled as against the company to require allotment of those shares to be cancelled and his deposit repaid.

The remedy for recovering the deposit on shares is by action at law and not by bill in equity.

A bill by one of several projectors of an abortive company against his co-projectors for repayment of moneys expended by him in attempting to carry out the project cannot be maintained; the bill should pray a general account of the expenditure and a due adjustment between all the projectors.

Two patents had been granted in 1852 and 1854, respectively, to Dr. Smith for converting scorise, lava, slag and other refuse obtained from the smelting of iron, lead and copper ores, into a material fit for paving, flagging, tiling and general building purposes.

The Defendant Sir John Macneil and others thereupon attempted to establish a company, called "The British Slag Company," for the purpose of working these patents, and in May 1855 they registered the company, provisionally, under the Companies Act, 1844 (7 & 8 Vict. c. 110), but it was never completely registered.

They issued a prospectus which stated that they had purchased the patents "for

a fixed sum, the payment of which depends on the complete success of *such further testing* as hereinafter referred to."

"The practical working of this invention *has been tested* with a view to ascertain the necessary capital required for the cost of the construction and machinery and for the cost of production of the material."

The cost of the article will not "exceed 10s. a ton, *so far as the testing which has taken place* will permit the directors to judge, but before any large outlay is made they propose erecting limited works at first, which will enable them to say with perfect certainty the exact cost."

On the faith of the statement in the prospectus, the [653] Plaintiff, in October 1855, took 200 shares in the company.

The projectors afterwards became desirous of bringing the company under the Limited Liability Act, and they issued a second prospectus, but this project was not carried into execution.

The company took the Maesteg Works and commenced operations, and the Plaintiff, at his own request, was, in January 1858, employed in superintending the works at a salary, and he continued to do so until March 1859.

The project turned out unsuccessful and was abandoned.

The Plaintiff instituted this suit in December 1863, alleging that the representations made by the promoters, and upon the faith of which he was induced to take the 200 shares, were false and fraudulent, and praying an account, and that the Defendants, the promoters, might pay to him what he had paid in respect of the 200 shares, and also the moneys advanced by him in carrying on the undertaking on the faith of certain agreements entered into by him, and might also pay him for his services from January 1858 to April 1860. And that if the Court should hold the Defendants not liable to recoup to the Plaintiff the whole amount advanced by him for works, then for a declaration that the Defendants were liable to contribute thereto, in such proportions as the Court should deem just.

Mr. Locock Webb and Mr. Horsey, for the Plaintiff, cited *Pulsford v. Richards* (17 Beav. 87); *Colt v. Woollaston* (2 Peere Wms. 154); *Evans* [654] *v. Bicknell* (6 Ves. 183); *Cooper v. Webb* (15 Sim. 454); *Green v. Burrett* (1 Sim. 45).

Mr. Selwyn, Mr. Baggallay, Mr. E. Karslake, Mr. W. R. Ellis, Mr. Macnaughton, Mr. Eddis, Mr. W. W. Mackeson and Mr. J. N. Higgins, for the Defendants, were not cited.

June 1. THE MASTER OF THE ROLLS [Lord Romilly]. In this case I think the Plaintiff fails.

I will state how the matter stands. It appears that two patents were taken out by Dr. Smith in October 1852 and August 1854, for the purpose of converting scorise and slag into materials apparently of the nature of marble. Upon that, several gentlemen, in May 1855, determined to set up what was called "The British Slag Company," and they registered the company under the Act of 1844. They issued a prospectus, under which the Plaintiff applied at the office of the company and obtained, in October 1855, an allotment of 200 shares. After that, the persons who had set up the first company were desirous of having the company formed under the Limited Liability Act, and thereupon they, in June 1856, issued a second prospectus. The Plaintiff's first complaint is that he was taken in and misled by the statement in the prospectus of the company, which was false and fraudulent. He complains that the prospectus states that "the practical working of this invention had been tested, whereas, in fact, the invention had not been properly and sufficiently tested." But the first answer is that [655] the prospectus itself shews that a further and more complete and perfect testing was intended to be made, and everybody was invited to look at their works for the purpose of seeing whether the testing was sufficiently made or not.

In regard to the statements in a prospectus I adopt the observations made by Lord Justice Turner in *Kisch v. The Central Railway of Venezuela* (34 Law J. (Chanc.) 552), that it is "universally known and understood that the prospectus of a company never, in fact, contains a strictly accurate account of its prospects and advantages." Everybody understands that a prospectus is colored in this sense, that everything is put forward in the most favorable view it can be. But this does not justify a material

statement which is totally false, and I am of opinion that if a material fact is stated in the prospectus which is untrue, and upon the faith of which a person takes shares, he is entitled, as against the company, to require the allotment of those shares to be cancelled and to have the amount he has paid for deposit and the like returned to him.

But I do not think that the statement in this prospectus is sufficient for that purpose. It speaks of a testing having been made, but also that it was only to a certain extent, and of an intention to make further testings, and there is no question but that all the persons who established this company *bond fide* intended and believed that they could establish a good and *bond fide* company.

The other answer to this complaint of the Plaintiff is, that, in point of fact, the company has never been established, and that there are no shares to be returned. [656] There were shares in a company which had been *provisionally* registered, but this company does not exist, for they found they could not carry it into effect, and accordingly it has no existence. It also appears that after several letters from the Plaintiff's solicitors to the Plaintiff, in October and November 1857, the Plaintiff proposed to Sir John Macneil, in January 1858, that he should go down and superintend the management of the great oven at a place called Maesteg, and accordingly he did so, with the sanction of the directors at a meeting on the 30th January. He must very soon, in 1858, have seen what was the nature of the undertaking, but he takes no steps whatever in the matter, and this bill is not filed until December 1863, although in the beginning of 1858 he must have been perfectly well aware of the state of circumstances. There were, therefore, very nearly six years from the time that he first went down to superintend these works to the time of the filing of the bill. In my opinion therefore he fails, first, because if there were shares in a company which he required to have cancelled, he must make out that he has been fraudulently deceived, which in my opinion he does not do; secondly, because he must have known exactly in 1858 how the matter stood, and yet he takes no steps for nearly six years afterwards; and thirdly, because there is no company to which the shares can be returned.

If the Plaintiff required the repayment of his deposit, because he has no shares, as in point of fact none exist, the proper mode would have been to bring an action at law for it. He could have maintained an action, supposing that he has merits in the case, and it would not have been necessary to come into equity for that purpose.

The Plaintiff might possibly be entitled to some re-[657]-muneration from Sir John Macneil and the other directors for his superintendence of the affairs of the company and for his services, and the bill makes some claim in that respect. But if that be so, the Plaintiff's proper remedy would be by an action at law upon the agreement between him and the directors, and not by bill in equity.

The only other ground on which, in my opinion, it would have been possible for the Plaintiff to maintain his suit is this:—He might have said, "I was one of several persons who endeavoured to form a company, and for that purpose we paid a great deal of money in endeavouring to bring out a joint concern for our common benefit, and in which undertaking we were partners. But I have paid more than my share, and you are bound, upon a due account being taken, to repay what I have overpaid. We endeavoured to produce a certain work, we were, so to say, tenants in common or jointly interested in the affair, and we ought to bear the liabilities jointly between us." But I find that no such case is made by the bill. It asks that the Defendants may pay the Plaintiff what he has advanced, and not that all the expenses of every sort and description of this concern should be ascertained and borne *pari passu* by everybody concerned. It appears that considerable expenses have been incurred, that the directors have been compelled to repay some of the deposits paid upon applications for shares, and there must have also been office and other expenses incurred. But all that the Plaintiff proposes is, that the whole of what he has spent shall be repaid him, or else that the Defendants may contribute to what he has spent, but not that all the expenses shall be ascertained, he undertaking to pay what, if anything, should be found due from him on taking the account, which very possibly might turn out against him. It is [658] obvious that it is not the scope and object of the suit to have a mutual contribution to all the expenses.

That being my view of the case, I think the Plaintiff fails. He knew what he was about, and if he has any remedy, it is at law, and he cannot come into equity on a bill framed as this is. I am of opinion, therefore, that the bill must be dismissed with costs.

[658] GEE v. LIDDELL (No. 4). May 31, June 4, 11, 1866.

[S. C. L. R. 2 Eq. 341 ; 35 L. J. Ch. 640 ; 12 Jur. (N. S.), 541 ; 14 W. R. 853.]

The meaning of the word "survive," in a limitation of property, is that the person to survive shall be living at the time of the event which he is to survive ; it does not mean living at any time whatever after the event referred to. Consequently, a gift over, if there should be no child or remoter issue of A. B. who should survive the testator and A. B., and should live to attain twenty-one, is not void for remoteness.

The testator, by his will, dated in 1855, demised and bequeathed his real and personal estate to trustees and (subject to certain trusts which it is unnecessary to state) upon trust for his nephew, Thomas Stephen Whitaker, for life, with remainder to the children of Thomas Stephen Whitaker who should attain twenty-one.

And he provided that if any of such children should die before attaining twenty-one leaving issue at his decease, such issue should take his parent's share. But, in case any such child of his nephew should die under twenty-one without leaving issue, or leaving such they should all die before attaining twenty-one, then his share should be equally divided amongst the other children then living and the lawful issue of such of them as should be then dead, such issue taking their parent's share.

Then followed the clause on which the question turned, which was as follows :—

[659] "Provided always and I do hereby declare and direct, that if there shall be no child or children or remoter issue of my said nephew who shall survive me and my said nephew and shall live to attain the age of twenty-one years, then and in such case, the whole of my said real and residuary personal estate and effects, moneys and premises hereinbefore devised and bequeathed, shall, after the decease of my said nephew and such failure of issue as aforesaid, go over and be in trust for and to be conveyed, surrendered, assigned, paid and applied unto and for my three cousins, George William Moore Liddell and the said William Liddell and Charles Liddell, their heirs, executors, administrators and assigns for ever, according to the nature and quality thereof respectively, in equal shares as tenants in common."

Charles Liddell having died a bachelor, the testator, in 1857, made a codicil to his will, and he thereby revoked the gift to the three Liddells and after making certain devises in favor of the Plaintiffs William Gee, John Gee and Walter Gee, he made an ultimate and residuary gift, the validity of which was contested, to George W. M. Liddell and William Liddell, their heirs, &c.

The testator made a second codicil in 1859, whereby he revoked the ultimate gift of his residue to the two Liddells, and he gave it to the three Plaintiffs, William R. Gee, John Gee and Walter M. Gee, their heirs, &c.

The testator died in 1860, leaving his nephew Thomas Stephen Whitaker his heir at law, who had never had a child.

[660] This suit was instituted by the three Gees against George W. M. Liddell, Wm. Liddell and Mr. Hickman (the three trustees and executors), and against Thomas Stephen Whitaker, for execution of the trusts of the will and the administration of the estate.

The question was whether the gift over to the Plaintiffs was not too remote, for if so, they would then have no sufficient interest in the residue to enable them to continue the suit. This depended (as was held) on the validity of the gift to the three cousins set forth in the above proviso.

Mr. Baggallay, Mr. A. Smith and Mr. Jackson, for the three Plaintiffs W., J. and W. Gee, argued that "issue" was to be construed "children," that the limitation was not too remote, there being a double contingency, and the ultimate gift being so

worded as to take effect in the event of the three nephews surviving living persons. They cited *Festing v. Allen* (12 Mee. & Wil. 279, and 5 Hare, 576); *Evers v. Challis* (7 H. of L. Cas. 531, and 18 Q. B. 224).

Sir R. Palmer (Attorney-General) and Mr. Waller, for Thomas S. Whitaker, the heir at law and next of kin, argued that the gift over, in the event of their being no children or remoter issue of the nephew who should attain twenty-one, was clearly too remote, as it would not necessarily take effect within the period of a life in being and twenty-one years after; that surviving the testator and his nephew meant living at any time after their deaths, and must have reference to the previous gifts.

[661] They cited *Dungannon v. Smith* (12 Cl. & Fin. 546); *Deerhurst v. Duke of St. Albans* (5 Madd. 232, and 2 Cl. & Fin. 611); *Ware v. Polhill* (11 Ves. 283).

Mr. Rendall, for William Liddell, argued that the substituted gifts by the codicil were void for remoteness; that the object of the revocation was merely to give effect to the substituted gift in favor of other persons, and that if those substituted gifts failed, the revocation, introduced only for the purpose of such substitution, became ineffectual, and that the original gift to the Liddells remained intact. He distinguished the case of a simple revocation from a revocation accompanied by a substitution. Secondly, he insisted that that gift to the Liddells was not too remote, as the survivorship was limited to the period of the death of the testator and his nephew. He cited *Onions v. Tyrer* (1 Peere Wms. 343, and Pr. Ch. 459); *Lewis on Perpetuities* (p. 506); *Re Thatcher* (26 Beav. 365); *Ex parte Earl of Ilchester* (7 Ves. 348); *Robertson v. Powell* (10 Jurist, 442); *Barclay v. Maskelyne* (Johns. 125); *Jarman on Wills* (vol. 1, p. 156 (3d edit.)).

Mr. Baggallay, in reply.

June 11. THE MASTER OF THE ROLLS [Lord Romilly]. The question on this will and the two codicils is, whether the gifts contained in them upon the failure of the children or remoter issue of the nephew is or is not too remote, and if not, then who is entitled under the gift over.

[His Lordship stated the limitation of the residue in the will to the nephew and his children.]

[662] The gift over is "if there shall be no child or children or remoter issue of my said nephew who shall survive me and my said nephew and shall live to attain the age of twenty-one years."

Now this gift over is clearly too remote, unless the effect of the word "*survive*" is to confine the happening of the event on which it is to take effect to the day of the death of the survivor of the testator and his nephew.

It is argued that the word "*survive*" imports that the person to survive must be living at the death of the person whom he is to survive, and that it cannot, according to the ordinary import of the words (to give an instance) be said that Geo. III. survived William III. That it is true that Geo. III. survived his father and his grandfather, but that he did not survive Geo. I. or any of the other monarchs who preceded him on the throne of this realm.

In answer to this, it is argued that the meaning of the word "*survive*" is more extensive, because if it were so restricted it would defeat the previous gift to the remoter issue of the nephew, which I have read and which clearly is not confined to the children living at the death of the nephew. It is true that this criticism is correct to this extent:—that the gift over would, if so construed, have that effect; but I think that this result ought not to induce the Court to give any other than the ordinary meaning to the words used by the testator.

My opinion is that the meaning of the word "*survive*" or "*survivor*" imports that a person who is to survive must be living at the time when the event which he is to survive happens. I have consulted several [663] dictionaries on this subject, such as Johnson and Richardson and the authorities cited by them, and it appears to me in all instances to mean *to outlive*, that is, to be alive at the time of a particular event or the death of a particular person, which event or person the other is to survive. It is true that Dr. Johnson puts, as one of the meanings, "to live after the death of another," which, if taken in its full sense, would bear out the meaning contended for by the Defendants. But all the passages cited from the English writers tend to the conclusion, that the person who survives an event must be living at the time when

that event takes place. The expression *to live after* is somewhat ambiguous in itself, and it is not the ordinary meaning as contended for by the Defendants. I also think that, in construing wills, words ought to have such meaning given to them (to use the expression used in the celebrated case of *Forth v. Chapman* (1 Peere Wms. 663)), that *res magis valeat quam pereat*.

I think, therefore, that the word "*survive*," properly speaking, imports that to prevent this gift from taking effect the remoter issue of the nephew must be alive at the death of the survivor of the testator and his nephew, and consequently that the gift over is confined to the contingency which gives effect to it taking place at the death of the survivor of the testator and his nephew; that consequently the gift over is not too remote, and that on the will alone, if unaffected by the codicils, the gift over to the three cousins George William Moore Liddell, William Liddell and Charles Liddell would take effect.

[His Lordship next considered the effect of the two codicils, which it is unnecessary to state further than he came to the following conclusion:—]

I am, therefore, of opinion that the Plaintiffs have a [664] sufficient *locus standi* to enable them to maintain and continue this suit, as, in some possible events, they may become interested in the property; but I shall make no declaration of rights until the event arises which makes this necessary.

The Authorized Reports of CASES in CHANCERY
ARGUED and DETERMINED in the ROLLS
COURT during the time of the Right Honorable
LORD ROMILLY, Master of the Rolls. 1865,
1866. By CHARLES BEAVAN, Esqr., M.A.,
Barrister-at-Law and Examiner of the Court of
Chancery. Vol. XXXVI. 1869.

[1] *In re* THE GENERAL INTERNATIONAL AGENCY COMPANY (LIMITED).
Jan. 21, 23, 1865.

Upon two petitions of shareholders of a company, one praying for a voluntary winding up under the supervision of the Court, and the other for a compulsory winding up, the Court, being unable to ascertain the wishes of the shareholders, ordered a voluntary winding up under the supervision of the Court, but directed that any shareholder should be at liberty to inspect the books and accounts, and have liberty to apply to the Court touching the matter.

Upon a petition to wind up a company, a provisional liquidator was appointed prior to its being heard. Held, that the provisional liquidator was not entitled to appear at the hearing (though served), and his costs were refused.

In this case, two petitions were presented, one by the chairman and secretary of the company, praying that the company might be wound up voluntarily, but under the supervision of the Court. The other by a contributory, who prayed for the usual order for the compulsory winding up of the company. A provisional liquidator had been appointed prior to the hearing on the first petition.

There was no question but that the company must be wound up, and the only question was, as to the mode of doing it.

[2] Mr. Southgate and Mr. Brooksbank, argued that there ought to be a voluntary winding up.

Mr. Selwyn and Mr. G. Hastings insisted on a compulsory order.

Mr. Baggallay and Mr. C. A. Turner, for the company.

Mr. Edmund James, for the provisional liquidator.

Jan. 23. THE MASTER OF THE ROLLS [Sir John Romilly]. Although the Court is usually in the habit of deferring much to the wishes of the shareholders, in accordance with the recommendation to that effect contained in the statute, still it is in the discretion of the Court to adopt or reject this course. In the present case, it is extremely difficult to ascertain the wishes of the shareholders, notwithstanding the vote in favor of the voluntary winding up. On the evidence I am by no means clear that the majority are not in favor of a compulsory winding up; but their wishes are so coupled with an expression in favor of the appointment of one or other of two gentlemen as official liquidator, that it is very difficult to satisfy myself as to their wishes on the subject.

Upon the whole, I think that the voluntary winding up under the supervision of the Court is the order which I ought to make on the present occasion. By these means, if it should appear not to be conducted well, it will be easy for any one of the shareholders to apply to the Court for a compulsory order; I think it will be less expensive and equally effective. I shall direct that [3] any shareholder shall have liberty to inspect the books and accounts at all reasonable times, on giving reasonable notice, and that every shareholder shall have liberty to apply to this Court touching the matter. This, of course, will be at his own peril, if he make any improper or ill-judged application.

Mr. E. James asked for the costs of the provisional liquidator of the petition which had been served upon him. He referred to two unreported cases of *Re Snobbook, &c., Company*; *Re East Dyliffe, &c., Company*, decided in July 1864; but

THE MASTER OF THE ROLLS held that the provisional liquidator stood in the same position as a receiver, who was not entitled to appear, and refused his costs.

[3] LAING v. CAMPBELL. Dec. 4, 5, 6, 8, 1865.

Upon the dissolution of a partnership, and the settlement of all accounts between the partners, A. B. (the continuing partner) took some of the debts as good debts. One turned out to be bad, the securities for it having been fraudulently abstracted by a clerk. Held, that A. B. could not sustain a bill to rectify or set aside the settlement of accounts.

The account of a customer of a firm consisted of debits and credits arising from the purchase and sale of goods. The partnership was dissolved, the customer being then greatly indebted to it, but the account was continued in the same mode by the succeeding firm. Held, that the doctrine of appropriation of payments applied to the debtors' account.

The Plaintiff Laing and the Defendant Campbell carried on the business of brokers in partnership, from 1852 to the 31st of December 1859, when the partnership was dissolved and Campbell retired. The dissolution took place on the basis of Laing retaining the business, of his paying and receiving all the debts, and paying Campbell his share of the capital and profits down to the dissolution.

[4] To ascertain this, the accounts were gone over by the partners, and they agreed on such of the debts as they deemed good and on the losses to be written off against those accounts which were considered bad or doubtful. The amount thus found due to the Defendant, being ascertained, was paid to him, and mutual releases were executed.

Amongst the customers of the firm was a Mr. Barber, a saltpetre refiner, and the usual course of business between them was this:—Barber received from the firm warrants for raw saltpetre, and he was debited with the purchase value, and this saltpetre, when refined by him, was sold by the firm, and his account was credited with the produce. On taking the accounts on the dissolution of the partnership, a large sum appeared to be due to the firm from Barber on the deposit of warrants and other securities, and it appeared from the books that the debt was amply covered by the securities. In consequence, upon the settlement of the partnership accounts, Barber's debt was placed in the list of good debts, and it was taken as such by the Plaintiff.

After the dissolution, Laing entered into partnership with Mr. Merridew, and Barber's account was continued by the new firm in the same manner as before, by debiting his account with the purchase-money of the raw saltpetre, and crediting it with the amount for which the refined articles were sold. But in 1862 it was discovered that during the partnership between the Plaintiff and Defendant, the warrants and securities deposited by Barber had, in many instances, either immediately or shortly after their deposit, been fraudulently delivered up to Barber by two of the clerks of the firm (Goodburn and Crowther), without repayment of the

advances and without debiting Barber in the [5] books of the firm with the values of the warrants and securities so delivered up. It was then discovered that Barber was greatly indebted to the new firm, and that he was hopelessly insolvent. The consequence was that his debt, though taken by the Plaintiff as good, was really bad, and the amount was lost.

The Plaintiff, by this suit, insisted that, by mutual mistake, Barber's debt had been taken as good, and that, consequently, the Defendant had been overpaid to the extent of £1750, and he sought either to recover this from the Plaintiff, or to set aside the transaction.

Mr. Jessel and Mr. Waller, for the Plaintiff, argued that the debt had been accepted as good under a mutual mistake, both the parties supposing that the debt was fully secured by warrants and securities deposited with the firm, whereas they had been fraudulently abstracted by the two clerks. That the Plaintiff was therefore entitled to open the accounts and have the error corrected.

They cited *Pritt v. Clay* (6 Beav. 503); *Millar v. Craig* (6 Beav. 433).

Mr. Selwyn and Kekewich, for Campbell. There was no mutual mistake, the Plaintiff obtained, as a consideration for the final settlement, the goodwill of the concern, and it was important that the debts due to the concern should not be pressed for or got in, as they would have been if the concern had been wound up. It was necessary that the usual credit to the customers should be continued, in order to preserve the business, and for that purpose an estimate only was made as to the value of the debts outstanding. The Plaintiff can [6] no more ask for indemnity against a bad debt, than the Defendant would be entitled to an extra payment from the Plaintiff, if a debt represented as bad had turned out good. The Plaintiff has had the benefit of his bargain and has since continued the business, and it would be impossible for the Court to restore the parties to their former position.

Barber's debt was discharged by the subsequent dealings between him and the new firm, for, by the doctrine of appropriation of payments, all the subsequent credits must be applied in the discharge of the oldest debts; *Devaynes v. Noble (Clayton's case)* (1 Mer. 568); *Merriman v. Ward* (1 John & Hem. 371); *Pennell v. Deffell* (4 De G. M. & G. 372).

Mr. Jessel, in reply, argued that the doctrine of *Clayton's case* could not apply to the present; that it had reference only to cash accounts and not to purchases and sales of goods, and that it would be impossible to set off saltpetre against cash. Again payments made by Barber to Laing & Merridew could not be set off against a debt of Laing & Campbell, and that Barber never agreed to accept Laing & Merridew for creditors, in the place of Laing & Campbell.

THE MASTER OF THE ROLLS [Sir John Romilly]. I will read the evidence; but at present there appear to me to be two fatal objections to this bill. In the first place, it is very difficult to hold that if two persons meet together for the purpose of dissolving a partnership, and they take the accounts and examine the books, and, having all the necessary materials before them, they agree to set down and divide some of the debts as [7] good and others as bad, one partner can afterwards come and say, "If I had looked more closely into the matter, I should have found an error, and I would not have taken this debt as a good one."

It would be a very different thing if there had been an error in casting, or if the account had not been entered in the books. Both these parties were able to judge for themselves, and it appears to me that they must be bound by what they have agreed on at the time.

As to the other point depending on *Clayton's case*, I cannot see any difference between this and that case. Here the ordinary account between Barber and the firm of Laing & Campbell is afterwards carried on with the firm of Campbell & Merridew, and it is treated in the same way, and although some of the payments are made in cash and others in the sales of refined saltpetre, still it is treated as one running account and no difference is made. If payments had been made in cash and bills, and carried to the general account, no express agreement by Barber would be necessary for applying the doctrine of appropriation of payments. At present I am unable to appreciate any difference between this and *Clayton's case*.

Dec. 8. THE MASTER OF THE ROLLS. In this case, I am of opinion that the Plaintiff fails in his contention. The state of the case is this:—After a partnership between the Plaintiff and Defendant, which had lasted six or seven years, it was put an end to, and they ascertained what was due to each partner. This bill is filed on the assumption that, in the settlement of the accounts and when the release was executed, there [8] was a common mistake, which this Court will remedy. The facts, as proved, shew that there was no common mistake, but that, if any, it was the mistake of the Plaintiff, and not of the Defendant. The mistake alleged is this:—They took Barber's as a good account: on it a balance of £6892 was due from him, to meet which it turns out that there were only securities for about £2886.

Close by them, at the time of the settlement, there was not only a book of warrants, but a chest, which contained all the securities, which might have been ascertained and examined. If anyone ought to have examined them, it was Laing, for Campbell, of course, wished to treat all as good debts. Laing had the means in his possession of ascertaining the truth, but he never inquired, and after subsequently dealing with Barber for several years, he has found that Barber was insolvent at the time of the settlement, and he now contends that there was a mistake, and that the arrangement ought now to be set aside.

If Laing had a book containing an account of all the securities of Barber, can he justify not examining them? No account would ever be settled, if, by not examining the accounts and securities, a party to a settlement, several years afterwards, could insist that there was a common mistake. Campbell supposed the debts taken as such were all good, and he now admits that Barber could not pay his debt. But that does not make it a common mistake, or enable the Court to set aside or alter the transaction.

Another important consideration is this:—That I cannot put the parties in the same position as they were before this settlement. If Barber's account had been [9] examined, and it had been found that he owed £7000, but that the securities for it were only £3000, means might have been taken to make him pay; but at last, when the crisis arrives, the new firm gets only £1700. How can I tell that more might not have been obtained.

The new firm go on dealing with Barber as before, and that is another unanswerable objection; for the consequence of this is, that all the payments made by Barber, and all the sums put to his credit, ought to be applied in payment of the balance due at the date of the settlement, according to *Clayton's case* (1 Mer. 568). I still retain the opinion that there is no possibility of separating one from the other. Even if you could separate cash payments from the other credits, I do not think, upon looking at the accounts, that it would be very beneficial to the Plaintiff.

The arrangement was this:—Saltpetre was given to Barber to refine, it was then sold, and credit was given to him for the produce of the refined saltpetre. The argument is, that these must not be set off against one another. If they had been kept separate in the books, something might have been said; but nothing of the sort was done, and they are all treated as sums received from Barber.

It is one regular running account, in which one item must be set off against the previous one. The Plaintiff continued these books for two years, and he knew or must be taken to have known the state of them.

The bill fails, and must be dismissed with costs.

[10] LYDE, on behalf, &c., v. THE EASTERN BENGAL RAILWAY COMPANY.

March 15, April, 1866.

A company established for one purpose cannot, against the will of any dissentient minority (however small) undertake a business foreign to its original object. Thus a railway company cannot become a steam-boat company or carry on a brewery. No portion of the funds of a company can be applied in procuring the means of carrying on a different undertaking, such as soliciting a bill in Parliament to confer powers necessary for that purpose.

The Court will take the interests of the public into consideration when asked to interfere with a railway.

This was a motion for an injunction.

An Act of Parliament passed in the twentieth and twenty-first years of the reign of Her Majesty, cap. 159, intituled, "An Act for Incorporating the Eastern Bengal Railway Company and for Other Purposes," and which received the Royal assent on the 25th August 1857. It recited the several persons lately associated themselves together for promoting the establishment of a company (to be called "The Eastern Bengal Railway Company") for making and maintaining a railway, to be called "The Eastern Bengal Railway," from Calcutta, on the left bank of the Hoogly, through the districts of Kishnaghur, Jessore and Pubna, to the right bank of the Ganges to Kooshtee, and ultimately to the City of Dacca.

The fifth section incorporated the company, with power to purchase, take, hold and dispose of lands in India, for the purposes of this Act, and to make, maintain, regulate, work and use the Eastern Bengal Railway as now proposed, or any railway in India, wholly or partly in lieu thereof, and any extensions of and branches from the same, and any works and conveniences connected therewith, including *all requisite ferries and connections by means of floating bridges or otherwise, across rivers and waters*, and other means of communications by water.

[11] Subsequently to the passing of this Act, a deed of settlement was executed, dated the 1st of February 1858, the second article of which was as follows:—

"The directors shall have the fullest power, from time to time, at their discretion, to apply to Parliament for an Act or Acts for conferring on the company all such powers for extending the undertaking, increasing the capital and borrowing money, and all such other powers, for any other purposes incident or necessary to any of the purposes of the undertaking, as the directors from time to time think fit, and may take all such measures in that behalf as they think fit, and may procure the introduction into any such Act of all such provisions for any purposes whatsoever in any way relating to the undertaking as they think fit, and may assent to the introduction into any such Act of any provisions required by Parliament, and may, in all other respects, act in and about any and every such application to Parliament as if the directors were absolutely and exclusively interested in the undertaking."

What the company had done was this:—They had constructed and opened the railway from Calcutta to Kooshtee, a distance of about 100 miles, and they had contracted with the Indian Government for an extension of the railway from Kooshtee to Goalundo, which was apparently about half way from Kooshtee to Dacca; but they seemed to have no present purpose of extending the railway from Goalundo to Dacca. Instead of doing so, they had entered into arrangements and contracts for conveying passengers from Kooshtee to Dacca by means of steam-boats, which either ferried across the water, or occasionally, when the waters were raised in the rainy seasons, by traversing the country, then under water, by steam-boats drawing a small depth of water [12] and towing after them flat-bottomed boats containing the goods, the passengers and luggage which required to be transported from Kooshtee to Dacca.

The Plaintiff objected to this, and remonstrated with the Defendants, whereupon the company introduced a bill into Parliament, which proposed to give to the company powers to acquire and employ ships and vessels to carry passengers, &c., to and from any part of their undertaking, and to acquire coal and other mines, and lands on which there was timber, and to provide footways, &c., in connexion with the undertaking, wherever approved of by the Government of India. In addition, it sought a general power for the enlargement of the objects and the purposes of the company, and proposed that the costs of the Act should be paid by the company.

This bill was filed by a shareholder on behalf, &c., against the company and the directors, insisting that it was *ultra vires* for the Defendants to employ steam-boats, &c., and that it would be a misapplication of the company to pay thereout the costs of the Act of Parliament. The bill prayed an injunction to restrain the Defendants from so using steam vessels, &c., and from applying the funds of the company to that purpose. It also asked a declaration that the powers sought were not authorized by the second article of the deed of settlement, and for an injunction to restrain the Defendants applying the funds of the company in support of the application to Parliament.

A motion was now made for an injunction.

Mr. Southgate and Mr. Swanston, for the Plaintiff.

[13] Sir Hugh Cairns, Mr. Baggallay and Mr. Macnaghten, for the Defendants.

The following cases were cited :—*Colman v. Eastern Counties Railway Company* (10 Beav. 1); *Simpson v. Denison* (7 Railw. Cas. 403); *Attorney-General v. Great Northern Railway Company* (1 Drew. & Sm. 154); *Lancaster, &c., Railway Company v. North-Western Railway* (2 K. & J. 293); *Great Western Railway Company v. Rushout* (5 De G. & Sm. 290); *Simpson v. The Westminster Palace Hotel Company* (8 H. of L. Cas. 712).

April. THE MASTER OF THE ROLLS [Lord Romilly]. This is a motion for an injunction to prevent the Defendants from employing the funds of the company in obtaining powers from Parliament foreign to the objects and purposes of the company as originally established.

This is the principal object of the motion, but besides this, the Plaintiff, on the same grounds, seeks to restrain the company from employing steamboats for the conveyance of goods and passengers beyond the limits of the railway. The first object mentioned is the most important, because, if the bill which the company is now soliciting in Parliament should pass into an Act, it will enable the company to perform all the Acts at present complained of, which the Plaintiff seeks to restrain, and the injunction for the latter object, if granted, could only operate for a few months.

[14] The general principles of law which apply to this subject are well and unmistakeably laid down in the various decisions, and which were cited and commented upon in the argument. It is quite settled now that a company established for one purpose cannot, against the will of a dissentient minority, however small, undertake a business foreign to the objects of the original company. That a railway company cannot become a steamboat company, cannot carry on a brewery or the like. It is also settled that no portion of the funds subscribed for the original purpose can be applied in procuring or in endeavouring to procure the means of carrying on another and different undertaking, such as soliciting a bill in Parliament to confer on them the powers necessary for that purpose. This unquestionably cannot be disputed, and indeed is not disputed by the Defendants, but they rely on the special words of the Act by which they were constituted, and of the deed, the articles of which govern the duties and functions of the company.

The question I have to determine resolves itself into a question of construction of the words of the Act of 20 & 21 Vict. cap. clix., intitled "An Act for Incorporating the Eastern Bengal Railway, and for Other Purposes," passed in August 1857, and also of the words of a deed of settlement of the company, made on the 1st February 1858, which has been executed by the Plaintiff and the other shareholders of the company. The former, viz., the statute, applies to the question as to whether the present proceedings of the company, in the employment of steamboats, exceed the limits of the powers given to them by the Act which incorporated the company. The latter, viz., the deed of settlement, applies to the question whether the application to Parliament for the bill they are now soliciting is beyond the powers conferred upon the directors by the shareholders [15] at the time when they advanced their money and became members of the company.

The 5th section enacts that the shareholders of the company shall be united into one body corporate, by the name of "The Eastern Bengal Railway Company," and with power to purchase, &c. [see *ante*, p. 10]. What the company have done is as follows :—They have constructed and opened the railway from Calcutta to Kooshtee, a distance of about 100 miles, and they have contracted with the Indian Government for an extension of the railway from Kooshtee to Goalundo, which apparently is about half-way from Kooshtee to Dacca; but they seem to have no present purpose of extending the railway from Goalundo to Dacca. Instead of doing so, they have entered into arrangements and contracts for conveying passengers from Kooshtee to Dacca by means of steamboats, which either ferry across the water, or occasionally, when the waters are raised in the rainy seasons, by traversing the country, which is then under water, by steamboats not drawing much depth of water and towing after them flat-bottomed boats containing the goods and the passengers and luggage which are required to be transported from Kooshtee to Dacca. At least, from the evidence as far as I can judge, this seems to be the nature and character of the employment of the steamboats used by the company. The evidence, however, is not very distinct on the subject, and I think it probable that, if this cause should come to a hearing,

more clear and distinct evidence might be produced, for the purpose of accurately describing what it is they do, and at what times of the year, it being I think evident that the same sort of water communication, or at all events the same direction of water communication, is not suited for all periods of the year; that, during the dry season, the communication must be confined to the [16] rivers, while, in the wet season, it may probably be that a more direct route may be accomplished. But even as described at present I should feel very doubtful whether this species of employment and use of steamboats could properly be brought within the words "maintain, regulate, work and use the Eastern Bengal Railway, or any extensions of and branches from the same, and any works and conveniences connected therewith, including all requisite ferries and connexion by means of floating bridges or otherwise across rivers and waters and other means of communication by water." It certainly does not come within the words "ferries and connexion by means of floating bridges or otherwise across rivers and waters," and the words "other means of communication by water" must, I think, signify means, *ejusdem generis*, with ferries and floating bridges. Were it not so, these words must include any species of water communication, including sea-going vessels, which, even if useful for some extension of the Eastern Bengal Railway, were not, I think, within the scope and purpose of this Act.

This was contested by the counsel for the Defendants, and as an illustration of the manner by which a railway company might legitimately embark in projects apparently inconsistent with its means and objects, it was suggested that coals might be necessary for the purpose of the railway, and that thereupon the company might work a coal mine for that purpose, if, by so doing, it could obtain coals cheaper than by the purchase of them, and that by so doing it would be fair and proper and not really inconsistent with the objects of the company, and that if it did work a colliery for this purpose, it would be foolish to prevent the company from obtaining a profit by the sale of such coals as were raised and not required for the company.

[17] The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coals to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the Court drew from the evidence. The same observations apply here; if the use of the boat is really to assist the traffic on the existing railway, it is lawful and proper; but if the object be to extend the traffic to places beyond the railway, which the railway is never intended to reach, then it is illegal and beyond the powers of the company.

I am also of opinion that the circumstances that the railway company is under the special control of the Indian Government, that its funds are held by the Government, its expenditure regulated by it, cannot alter the construction to be put on the words of the Act, although this Government control may afford an admirable reason why the company should be invested with much larger powers than are entrusted to an ordinary English company, who are unfettered by any such restriction.

If this had been an English company, and the matter had depended on this first point, I think I should not have hesitated in granting the injunction applied for; but two circumstances peculiar to this case induce me not to adopt that course on the present occasion. In the first place, it is the duty of the Court, in all these cases, to take into consideration the interests of the [18] public, as was laid down by Lord Cottenham in the case of *Rigby v. Great Western Railway* (2 Phill. 44; 14 Mee. & W. 811, and 19 L. J. (Chanc.) 470). In this case, the distance of the place, where the Acts complained of are being carried on, and the uncertainty of the evidence on this subject, consequent on such distance, would, unaccompanied by any other circumstances, make me hesitate before I could, on an interlocutory application, stop the Acts complained of, and thus possibly produce a suspension of an important traffic, and occasion great public inconvenience, a matter which would be easily judged of, if the place where all this was going on was in England, but very difficult to be ascertained satisfactorily with regard to India. In the second place, there is, coupled with

this circumstance, the fact, that the railway company are themselves applying to Parliament for powers, which, if granted, will manifestly include the power of doing the very things which the Plaintiff now seeks to restrain, in consequence of which, the determination of the second point I have to decide seems to me an essential preliminary to the determination of the steps to be taken in consequence of the decision on the first point against the company; for if the company are justified in employing the funds of the company in soliciting the bill in question before Parliament, it would be idle to restrain, for a month or two, Acts which Parliament might think fit to legalize permanently, and it would, in that case, be proper to suspend any active enforcement of the decision on the first point, until the determination of Parliament as to the second point had been ascertained.

If, however, on examining the second question, I should come to the conclusion that the company is not justified in employing the funds entrusted to it by the [19] shareholders, for the purpose of applying to Parliament, then it would be proper to stay the employment of the steam-boats, at the same time that it stays the application of the funds of the company for the solicitation of further powers.

The second question depends on this point, whether the application to Parliament is included in the powers conferred on the directors by the deed of 1st February 1858. I am of opinion that the words of the second article fully justify the directors in their present application to Parliament. In my opinion it is impossible to frame words more large, or giving a more complete and entire power to apply for any additional powers of any possible description, than the words here set forth. It may be that the powers, as given, would be unprecedented, and indeed dangerous, as far as the shareholders are concerned, were it not for the circumstances to which I have already referred, viz., that the Indian Government always keeps a control over the affairs of the company, regulates its proceedings and moderates the application of its funds. But this is not the question I have to consider; whether dangerous or not, this is the contract by which the shareholders have thought fit to bind themselves, and by which they have agreed to act; they have chosen to embark in an undertaking, and advance their money for the purpose of it, in which it was contemplated that new and extraordinary powers might be required, which it would be difficult or impossible to define beforehand; and this being so, they have consented to give these large powers to the directors, to apply to Parliament for any such addition as they may think fit. The Plaintiff and the other shareholders cannot now complain that the directors act accordingly; and if the Plaintiff and the other shareholders think the powers applied for are [20] injurious, their only mode of resisting them, in my opinion, is, by obtaining the sense of the shareholders at public meetings of the company, duly convened for that purpose, or by inducing Parliament to come to the conclusion that the powers ought not to be conceded.

This being my view, it follows, from what I have already stated, that it would not be proper for this Court to interfere with the present proceedings of the company; but that this Court should wait till the hearing of this cause, and see what, if any, additional powers and authority Parliament may have thought fit to confer on this company. My decision therefore on this matter is, that of which I expressed the result before the vacation, viz., that the motion should be refused, but that the costs of it should be costs in the cause.

[21] MACKINTOSH v. STUART. May 2, 3, 6, 7, 30, 1864.

A., in India, on his own responsibility, invested money belonging to his brother B. in England in indigo, which he consigned to B., and he recommended him, in consideration of his (A.) not charging commission, to settle £1000 on each of his two sisters, which he suggested should be invested in spelter and consigned to him for sale. B. acceded to this, and A. sold the spelter and remitted the proceeds (nearly £4000) to B. on account of his sisters. B. retained the money and gave his promissory notes to his sisters for the amount. Held, that the £4000 belonged to the sisters, and that the gift of it could not be recalled.

In 1841 sisters voluntarily surrendered to their brother his promissory notes for money owing to them, but under such circumstances, the transaction could not be sustained if complained of in due time. One sister died in 1852 and the other in 1857, and the brother died in 1860. In the following year a bill was filed by the representative of the sisters to set aside the transaction. Held, that the Plaintiff wholly failed, this being an attempt to rip up a transaction nineteen years old, when all the actors in it were dead, and which transaction they all understood at the time.

Hastie, the father, died in 1808, leaving a widow and a large family of children in reduced circumstances.

In 1821 six of these children were living, namely, four sons, Robert, John, James and Archibald, and two daughters, Anne and Margaret. Three of the sons, viz., Robert, John and James, were carrying on a considerable business as coach makers at Calcutta, under the style or firm of Stuart & Co., and they were occasionally engaged in commercial speculations. Archibald Hastie was carrying on business as a saddler in London, and acting as agent to Stuart & Co., his brother's firm at Calcutta. The two sisters were residing with their mother, and during this time were supported by the united contributions of the four brothers. The money obtained for the goods, which Archibald, in the course of his trade, consigned to his brothers in Calcutta, and which were taken or sold by them, was remitted to him in England, in the shape of goods likely to realize the most profitable return in the English market. Accordingly it appeared from a series of letters of James to Archibald, written in June, July and October 1822, [22] that James had invested the moneys then due to Archibald in the purchase of large quantities of indigo, which he consigned to his brother, and which he anticipated, from the rise in prices and the rate of exchange, would realize a net profit of from £16,000 to £20,000 to Archibald. James said that he had done this on his own responsibility, and that he had not, as he might have done, charged any commission on the transaction; but that, in consideration of this profit to Archibald, and the forbearance on his part, James hoped and requested that Archibald, on his part, would settle £1000 on each of their two sisters, Anne and Margaret, and in that case, in one of the letters written in April 1823, James suggested that the £2000 should be invested in spelter and sent out to Stuart & Co. to be sold, and the produce employed for the benefit of the two sisters. This was accordingly done; Archibald acceded to the suggestion, invested the £2000 in spelter and consigned it to his brother, under the style of Stuart & Co., by whom it was sold at a considerable profit, and by this means and the high rate of interest obtained in India, the £2000 were greatly augmented, and (after it had been still further increased by a contribution of £260 by the three brothers in India) it amounted in the whole to £4001, 6s. 5d. This sum was remitted by Stuart & Co. to Archibald Hastie in the month of September 1832, and duly received by him on account of his sisters. This money was retained by Archibald Hastie, but he gave a promissory note for £2000 to each of the sisters, to bear interest at £5 per cent. per annum, which he continued to pay regularly to them down to the time of the transaction complained of. The promissory notes both bore date the 18th February 1833.

In July 1834 Robert Hastie, one of the brothers, died; he made a will by which he left all the residue [23] of his property equally between his three surviving brothers and his two sisters, and he made the three brothers his executors.

Six years afterwards, in July 1840, John, another of the brothers, died, and he made a similar disposition of his property, dividing his estate between his two surviving brothers and his two sisters.

The result of these testamentary dispositions was, that the fortunes of the two sisters were greatly increased, and that, instead of having only £2000 apiece, they had, on the death of John, a fortune, independently of the promissory notes, of from £9000 to £10,000 each.

Thereupon, in October 1841, Archibald Hastie applied to each of his sisters to return to him the promissory note of £2000. This was accordingly done by each of the sisters, by Margaret in a letter dated the 3d November 1841, and by Anne in a letter on the following day. Archibald acknowledged the receipt of them in a letter dated 7th November 1841.

In 1850 Margaret married the Plaintiff. Anne died in 1852, the Plaintiff's wife (Margaret) died in 1856, and Archibald Hastie died in November 1857.

This suit was instituted in 1861, and, in addition to other things, it prayed a declaration that Archibald Hastie fraudulently obtained from his sisters Anne and Margaret (the wife the Plaintiff) the sum of £4000, and it asked that this amount might be made good out of his estate to the estate of each.

The answer set up to this was, first, that the trans-[24]-action specially complained of was *bona fide*. Secondly, that it was not, after the time which had elapsed, to be now disturbed; and, thirdly, that it was included in and covered by settled amounts between the parties concerned.

This case was argued by

Mr. Hobhouse, Mr. G. L. Russell and Mr. Leith, for the Plaintiff.

Mr. Selwyn and Mr. Roberts, for Stuart.

Mr. Wood and Mr. Boys, for other parties.

The following cases were cited: *Cooke v. Lamotte* (15 Beav. 239); *Randall v. Errington* (10 Ves. 423); *Aylward v. Kearney* (2 Ball & Beattie, 463).

May 30. THE MASTER OF THE ROLLS [Sir John Romilly]. In substance, this suit is instituted for the purpose of setting aside the transaction respecting the £4000. The history of the £4000 involves the narrative, not I believe an uncommon one in this country, of the rise to affluence and prosperity of a young family, left in indigent circumstances on the death of their father, mutually assisting each other, and supporting the mother and sisters, who were unable to co-operate in the business of their brother.

[THE MASTER OF THE ROLLS stated the circumstances of the case, as detailed above, and the letters of Margaret, Anne and Archibald of November 1841.]

[25] Certainly, as stated in the letters, the transaction does not look quite straightforward. If the transaction had been as must have been inferred from these letters it would bear the aspect of a brother recalling a voluntary gift made to his sisters to support them during indigence, but liable to be recalled when, from any cause, that indigence should have ceased. But this was not the transaction, the money was unquestionably the property of the sisters, which they could have kept or invested as they pleased, and although it had sprung originally from the bounty of Archibald, it had done so at the instigation of James, by whose exertions the amount has been doubled.

Judging also from these letters alone, the surrender of the notes has not the appearance of a voluntary *bona fide* gift by the sisters to their brother, and if they had instituted this suit against their brother, and had done so recently after the transaction had occurred, and assuming also that there were no more evidence respecting it than I now have, it would, I think, have been very difficult for Archibald Hastie to have successfully sustained the transaction.

But the event occurred in November 1841; one sister survived the transaction eleven years, and the other fifteen years, and neither of them ever complained of it. Archibald Hastie himself died in November 1857; and, upwards of three years after his death, when all the actors in the transaction are dead, and not very far short of twenty years after the transaction itself, this bill is filed to set it aside and to obtain restitution of the £4000.

On behalf of the Plaintiff, this lapse of time is attempted to be got over by reference to the principle of [26] equity that, in cases of fraud, time only begins to run from the time when the fraud is discovered, and that, in this case, the return of the notes was obtained by the fraudulent representations of Archibald, and that this was only first discovered by the Plaintiff in searching amongst his wife's papers after his brother-in-law's death, and in the year 1859. But I think that this attempt to get over the lapse of time cannot be allowed to prevail. In the first place, the representations of Archibald, contained in his letter, though not strictly accurate, are not devoid of truth; he had given the £2000 from whence the money arose. Whether he could have avoided giving it, and whether James might not have charged commission and settled the amount of such commission on his sister, it would be idle to inquire and impossible now to ascertain, but that Archibald did give the money from whence the £4000 arose is certain. I am also convinced that both the sisters

were perfectly well aware of what the transaction was, and that they cheerfully acceded to it. They probably felt grateful for all the support they had received from him and their other brothers, when it was unquestionably pure bounty on their part, and they probably wished to keep up the harmony and affection which seems to have pervaded the whole family, and, as they had an ample independence from other sources, that they might well give to Archibald what, though now their own, had originally sprung from his bounty and affection towards them. It was, in fact, as it appears to me, an act of bounty and a gift by the two sisters, and this is confirmed by the indorsement made by Archibald Hastie on the notes themselves, which are still in existence.

That Margaret understood what the transaction really was is proved by the letter of the 9th July 1850, written before her marriage with the Plaintiff. Nothing [27] can give a more accurate account of the whole transaction than her letter. She had nothing to enlighten her since November 1841, what she knew in 1850 I am convinced she knew in 1841, and indeed throughout the whole affair. I am also convinced that whatever Margaret knew relative to the transaction with Archibald was also known to Anne; and it is too much to allow her legal personal representatives ten years afterwards to claim against the estate of her brother that which she obviously abstained from claiming against her brother when she was alive. With respect therefore to the £4000, I am of opinion that it is an attempt to rip up a transaction nineteen years old when all the actors in it are dead, and which transaction they all understood at the time. In this respect, therefore, the bill wholly fails.

The bill, so far as it seeks to undo the transaction relative to the two promissory notes of £2000, must be dismissed with costs.

[27] WARDLE v. OAKLEY. Nov. 18, 20, Dec. 1864.

A. by deed mortgaged freeholds to B. At the same time, the title-deeds not only of the freeholds but of leaseholds belonging to A. were delivered to B. Held, in the absence of proof to the contrary, that B. had no lien on the leaseholds for the money advanced.

This summons was argued by

Mr. Higgins, in support of the summons.

Mr. Hobhouse and Mr. Jervis, for the Plaintiff.

Mr. Cole, Mr. Locock Webb and Mr. Pearson, in the same interest.

The following cases were cited: *Roberts v. Croft* (24 Beav. 223; 2 De G. & J. 1); *Hunt v. Elmes* (2 De G. F. & J. 578); *Colyer v. Finch* (5 H. of L. Cas. 928); *Vaughan v. Vanderstegen* (2 Drew. 289).

[28] Dec. THE MASTER OF THE ROLLS [Sir John Romilly]. The question raised on this summons is whether the representatives of the testator Phillips can claim an equitable mortgage on certain leaseholds at Ampleforth in Yorkshire. The suit is instituted for the administration of the estate of William Phillips, who died in October 1863.

In December 1857 Messrs. Stevenson & Salt, who were the bankers of the Defendant Richard Banner Oakley, by his desire delivered to Messrs. Blair & Co., who were the solicitors of the testator William Phillips and of Mr. Oakley, a bundle of deeds relating to a freehold property at Oswald Kirk in Yorkshire, and also to two leasehold pieces of land at Ampleforth in the same county, for the purpose of enabling the Defendant Oakley to raise £2000 on the security of them.

In January 1858 £200, part of the money required, was obtained from Mr. Goodwin, and the whole of the deeds relating both to the freehold and to the leasehold were deposited to secure that amount; on the 1st of March 1858 this sum was repaid by Mr. Oakley, and on the 4th of March 1858 a mortgage was duly executed of the freehold hereditaments at Oswald Kirk by the Defendant Mr. Oakley to William Phillips to secure the sum of £2000, but which deed does not include the leaseholds. Mr. Gould, of the firm of Blair & Co., says he prepared the indenture from instructions received from Mr. Blair. After the execution of the mortgage all

the deeds, including those which related exclusively to the leaseholds, were handed by Mr. Blair to the testator, Mr. Phillips.

Afterwards, on the 24th of January 1862, a further [29] charge, by way of indorsement, was executed on the first deed of 4th March 1858 for £4350, and this deed does not include the leaseholds.

In October 1863 the testator, Phillips, died.

Messrs. Roy & Cartwright, in December 1863, were the solicitors of the Defendant Mr. Oakley, and they had full notice, at that time, that the deeds relating to the leaseholds were in the possession of the testator at his death, and that they continued to be and were then in the possession of his legal personal representatives.

I cannot, on the evidence, ascertain whether the claim of lien on the leaseholds was communicated to Messrs. Roy & Cartwright before the mortgage to Mr. Wheldon. Gould's affidavit says nothing about the lien claimed on the leaseholds. The paper sent on 16th November 1863 is lost by Messrs. Roy & Cartwright; they ask for a copy, and the answer is given by sending particulars of property real and personal on mortgage to the testator, in which paper the claim of lien on the leaseholds is expressly set forth; but they do not say that this paper is a copy of that which was sent in November 1863, and they decline to give any other. Upon this I cannot come to the conclusion that it is proved, as a fact, that communication was made to Messrs. Roy & Cartwright that a lien was claimed on the leaseholds on behalf of the testator's estate before the mortgage to Wheldon. The communication of the fact that the deeds relating to the leaseholds were in the possession of the testator at his death is proved, as I have already stated. But this does not involve the fact that a claim was made for a lien on the leaseholds, and I think that the burthen of proof lies on the representatives of the testator to [30] establish that such notice was given or knowledge obtained by Roy & Cartwright. On the 17th November 1864 Mr. Oakley mortgaged the freeholds and the leaseholds in question to Mr. Wheldon to secure £5000.

In this state of things, I have come to the conclusion that the estate of the testator is not entitled to any lien on the leaseholds for the amount of the mortgage. I think that the extent of the contract between the testator and Mr. Oakley is shewn by the contents of the deeds of the 1st of March 1858, and the 24th of June 1862. There is no evidence of any deposit with the testator independently of these deeds and of what I have mentioned. When I say "no evidence of a deposit," I mean of a deposit with the intention thereby to secure repayment of an advance of money. It is true that they were deposited with Goodwin for that purpose, but Goodwin was paid off by the Defendant Oakley, and Messrs. Blair & Co. were the solicitors of both Phillips and Oakley. It is true also that the deeds were sent to the testator by Messrs. Blair & Co. immediately after the execution of the mortgage of 4th March 1858, but if the leaseholds were intended to be included in the mortgage security, why were they omitted from the deeds, and why, if meant to be an additional security by way of deposit, was no memorandum made of it, and why is there a total blank of any evidence of such an intention on either side?

If I accidentally deliver a box of deeds to a creditor of mine, that would not constitute him an equitable mortgagee. It might well be that the delivery of the deeds would be *prima facie* evidence of such intention which would throw the burthen of proving the negative on the owner; but if that is so, I think that, in the present case, this burthen is fully discharged by the pro-[31]duction and examination of the contents, purport and effect of the two mortgage deeds executed by Mr. Oakley to the testator, which shew the extent of the contract between the parties—what one intended to include in the mortgage and what the other accepted as a sufficient security.

I am of opinion that the deeds in question were sent by mistake with the deeds relating to the freeholds to Mr. Phillips, and that he neither contracted for nor intended to contract for any additional security on the leaseholds by way of equitable mortgage, and that the possession of the deeds, in such circumstances, confers no lien. Order accordingly.

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